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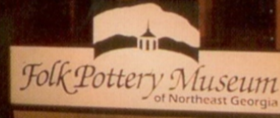

2008 DESIGN AWARDS

Misconstruing The Architectural Works Copyright

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For the past several years, I have had the occasion to appear before architectural groups to discuss copyright protection of plans and drawings. At these gatherings, I am repeatedly struck by the number of architects that still do not comprehend the notion and gravity of the "architectural work" copyright. "Architectural work", in copyright parlance, amounts to a consequential legal term routinely applied by judges, lawyers and juries to decide the fate of architects unlucky enough to be embroiled in copyright infringement litigation. More unfortunate, an architect's misunderstanding of the term's legal import may lead to the substantive loss of copyright protection (as what happened to an architect in a recent federal appellate court case). Let me touch upon the very basic concepts.

1.

Architects Get Two Copyrights. Since the 1990 enactment of the Architectural Works Copyright Protection Act, architectural plans can obtain copyright protection under two provisions of the Copyright Act. Architectural plans had been protected as "pictorial, graphic, and sculptural works" under the Copyright Act, and continue to fall within that provision. Additionally, architectural plans fall within a new category of copyrightable works called "architectural works." An architect can (and often should) secure registrations for both copyrights.

2.

What Exactly Is An "Architectural Work"? The legal definition is a bit daedal: An "architectural work" is "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings." The Copyright Act now makes it an infringement to construct a building that copies from another's protectable two- or three-dimensional design. Stated very colloquially, an architect gets to copyright the physical building—the overall shape of two- or three-dimensional works of architecture. While the "pictorial, graphic, and sculptural works" copyright protects the actual plans and drawings, the "architectural work" protects the architect's design in the building itself.

3.

Why Two Copyrights? Congress added "architectural work" protection for a number of reasons. Most important, Congress wanted to close a potential loophole in copyright infringement cases. Take the simple case: if an architect copies the plans or drawings of someone else, that's copyright infringement. What if an architect does not copy the plans but instead visits the physical building constructed from those plans, makes some observations, takes pictures, etc., then prepares plans based on that visit. Is that copyright infringement? Before 1990, the answer was no. After the 1990 copyright amendment, the answer is yes since the design embedded in the building itself is now protected.

4.

The Architectural Work Copyright Really Matters. First, "architectural works" are generally subject to a standard of copyrightability more generous than that accorded "pictorial, graphic or sculptural works." Second, it closes the liability gap mentioned above. Third, since buildings are generally worth more than the plans themselves, copyright infringement of architectural work means more potential damages for the architect to recover. Based on federal cases from around the country, the recovery related to architectural works can be remarkable.

5.

Architectural Work Copyrights Are Easy To Obtain. If an architect seeks registration for an "architectural work," he or she need only submit a separate application indicating the title of the building as well as the month and year when construction was completed. If the building has not yet been constructed, the architect can simply follow the title with the notation "not yet constructed."

Architects should continue to educate themselves on "architectural works" given the complexity of this area of copyright law. ❖