2009 South Atlantic Region ARCHITECT

Volume I, Issue I

September 2009

2009 DESIGN AWARDS

What Does "Publication" of Your Work Mean Under Present Copyright Law?

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An architect's ability to adequately protect his or her drawings and architectural works through federal copyright registration is crucial. Dispelling misconceived notions of when an architect's work is "published" under copyright law is a vital part of that exercise and worth explaining.

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By way of background, the copyright law generally allows architects to obtain separate copyrights for (1) "technical drawings" (or architectural plans) and (2) "architectural works" (or the design embedded in the physical building). Early copyright registration is important since it entitles the copyright holder to claim "statutory damages" if infringement occurs. "Statutory damages" is a predetermined range of $750 to $30,000 per infringement and potentially more for willful infringement. "Statutory damages" also alleviate the architect's burden of proving actual harm suffered.

An architect can claim statutory damages if (1) the work is registered with the Copyright Office before someone else infringes, or (2) if the registration is made within three months of "publication." The former scenario is the more straightforward copyright case. For instance, Architect X registers her technical drawings with the Copyright Office on January 1st and someone else infringes on the drawings on January 2nd or thereafter. The lesser understood scenario is whether the architect may bring a statutory damages claim after the infringement has occurred but before the copyright registration date. The answer generally lies in the way federal courts interpret the word "publication" and whether "publication" of the work is made within three months of registration. Preliminarily, it is worth noting that "publication" under the Copyright Act is a special legal term and has a different meaning from the common everyday usage of the word. For instance, architects believe that merely showing a work to someone else or submitting the work to a city building department constitutes "publication" for copyright purposes. That is not necessarily accurate. Rather, the Copyright Act defines "publication" as: "the distribution of copies…of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies…to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication."

As to "technical drawings", federal courts have not reached a consensus regarding what specific types of activities constitute "publication" to commence the "three month" statutory period. For instance, does "publication" occur if (1) plans are submitted to municipal authorities for approval, or (2) plans are circulated to contractors for bidding purposes, or (3) plans are deposited in public files? Unfortunately, there is no one answer applicable to all cases and to all parts of the country. While some courts have found "publication" in these circumstances (and thus triggering the three month period for statutory damages claims), others have not or have found so-called "limited publication" – that is, distribution of plans to a limited class of persons and for a limited purpose which does not trigger the crucial three month period.

While the law on "publication" of technical drawings appears open, "publication" with regards to "architectural works" is, fortunately, more uniform. "Publication" as to architectural works occurs when underlying plans or drawings or other copies of the building design are distributed or made available to the general public by sale or other transfer of ownership, or by rental, lease, or lending. These transactions or usages are easier to track and document.

The best way for an architect to protect his or her drawings or works is to register the work as soon as practicable. The importance of early registration of copyrights for "technical drawings" and "architectural works" cannot be stressed enough. The lack of uniformity in the law with regards to "publication" for "technical drawings" only supports this recommendation. ❖