landscape architecture

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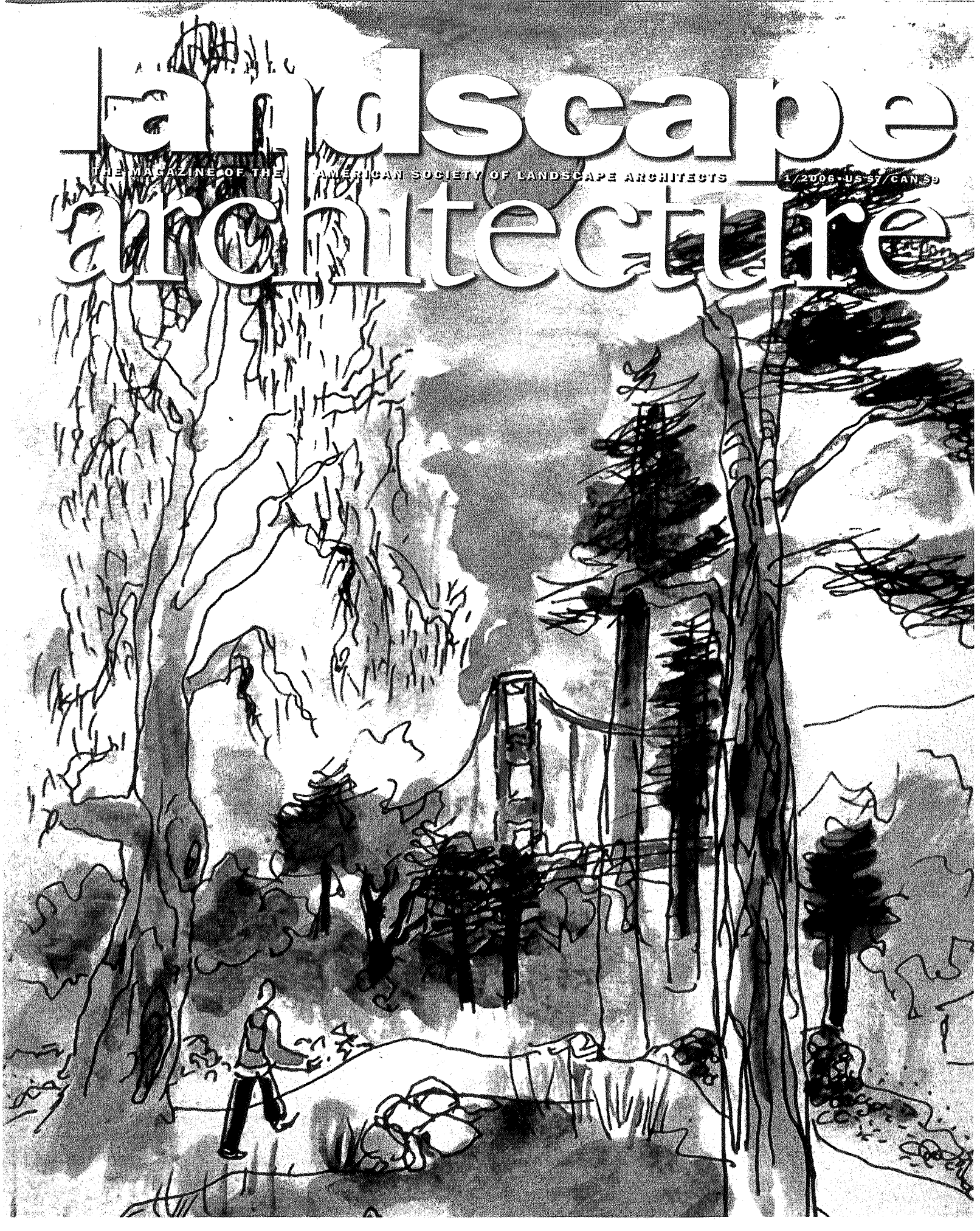


LA LAW

Copyrighting the work of landscape architects.

By Andres F. Quintana

IN MAKING PLANS and designs, landscape architects demonstrate creative and technical skills that differentiate them from competitors. Copyright laws reward their creativity by providing financial incentives. Specifically, these laws grant copyright owners a limited monopoly to exploit their creations. Copyrights are intended to motivate the creative activity of authors and artists, including landscape architects, by granting owners exclusive rights over reproduction, preparation of derivative works, distribution of copies, performance, and display of the copyrighted works. The laws also promote public access to designs after the limited period of exclusive control expires.

Landscape architects should protect and maintain their copyrights through contracts, copyright registrations, and legal enforcement. Yet, as an attorney who speaks with dozens of design professionals from coast to coast, I have found that landscape professionals (1) are not aware of copyright protection, (2) don't appreciate the financial incentives and benefits it bestows, (3) don't realize how simple it is to secure a copyright, and (4) don't appreciate how easy it is to infringe on someone's else copyright.

As landscape architects begin to understand the scope of their intellectual property rights, and if the real-estate development boom continues, intellectual property experts expect to see more copyright cases filed. This has been true for architects, particularly in cases against real-estate developers and contractors for tract-housing communities, where there are higher potential damages awards; the same principles apply for landscape architects.

Suppose, for example, that a landscape architect is hired by a developer to prepare plans for a tract development and that, according to the contract with the developer, the landscape architect maintains copyright ownership of all her landscape plans and specifications. In tract developments, one of the attractions for designers is that a prospective home owner may have a choice of only a few house and landscape designs. Even though the development may contain 50 homes, the architect and landscape architect may each need to create only a handful of different plans. Suppose the landscape architect completes the plans but is fired from the project. The developer then uses the plans to build the 50 homes and landscapes. The fired landscape architect sues for copyright infringement and wins. Under the current copyright law, the landscape architect would be entitled not only to the market value of her plans but also to a portion of the profits made on each of the 50 homes built from her plans, even if not all of the homes are sold. The landscape architect would need to establish the profits attributable to her plan, which would be demonstrated through expert testimony, typically from real estate appraisers and brokers. In this case, the landscape architect has financial incentive to protect and maintain her copyrights.

What Can Be Copyrighted?

Congress enacted the copyright laws and amendments to protect works of authorship, including "pictorial, graphic, and sculptural works." More specifically, this category encompasses "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans"—and, of course, landscape architectural plans. Even a preliminary site plan or sketch may be protected if the document contains enough protectible elements defined under the law, even though technically it may not be a "plan." Copyright laws apply to both published and unpublished creative works.

To qualify for copyright protection, a landscape plan or design must be an original creation. Originality means that the work was independently created by the author (as opposed to copied from other works) and that it possesses some minimal degree of creativity. It doesn't necessarily mean novelty. A landscape design that resembles another but also includes differences is entitled to copyright protection as long as the similarities are not the result of illicit—that is, intentional—copying. While this can seem murky in print, the threshold for copyright protection is so low that this issue is rarely at the center of an infringement case. When copyright cases go to trial, the litigation usually centers on the degree of similarity between the infringing plan and the original. Ultimately, the judge's ruling or the jury verdict is based on the look and feel of the disputed work.

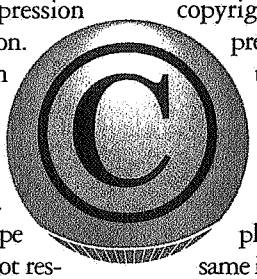
Copyright protection also extends to "compilations" and "derivative works." A compilation is a work formed by assembling preexisting materials or data that is selected, coordinated, or arranged in an original manner. Copyright protection does not extend to the preexisting work in a compilation. The arrangement of preexisting materials, not the preexisting materials themselves, is considered the original work of authorship.

To put it in landscape terms, a landscape plan may specify trees and shrubs. There's nothing copyrightable—original—about the plantings alone. Their arrangement (or compilation), however, may connote an original expression and merit copyright protection.

A "derivative work" is an adaptation of a preexisting work that contains enough original elements to be distinct from the original work. For example, let's say a landscape design for a 20,000-square-foot residential lot is a copyrighted compilation. Suppose the landscape architect who created it wants to use the same landscape design for a 40,000-square-foot lot. Since he is working with a larger area, the spacing of the design elements will obviously change, and trees, shrubs, and other components may be added. But because he used the original plan to come up with the larger one, the two plans will likely have the same look and feel. The latter would be a derivative of the original. A derivative work may be copyrighted, but only if the use of the preexisting work was authorized by the copyright owner or if the original work was in the public domain. As with compilations, the protection covers only the material contributed by the author of the derivative work, not the preexisting material.

The copyright law also imposes reasonable limits on the rights it confers to the owner of a creative work, including the copyright's time frame. A copyright doesn't last forever. A copyright in a landscape plan lasts for the life of the author plus 70 years—for work created by individuals (not as a work made for hire) on or after 1978. For landscape architecture firms, a copyright in a landscape plan done on or after 1978 lasts for 95 years after publication. (The term is 120 years after creation if a work is not published.) A landscape plan published before 1978 and after 1923 is protected for 95 years.

Also, the Fair Use doctrine permits limited copying of copyrighted works for educational and research purposes. And a "limited publication" clause allows limited copying and distribution of plans for permit or bid purposes.



Who Owns Commissioned Landscape Plans and Designs?

Generally, the person who creates landscape plans and designs is considered the author and owner of them and holds the copyrights. However, if the work is prepared by an employee within the scope of his or her employment, unless there is a written agreement to the contrary, it is deemed a "work made for hire," and the employer owns the copyright. The same is generally true for a work specially ordered or commissioned. Because landscape architects routinely perform commissioned work, it is crucial to establish in the contract for services that the landscape architect, not the client, owns the copyright to the plans and designs.

Under the sample contract available in the members-only section of the ASLA web site *(www.asla.org)*, for instance, drawings produced for a project are "instruments of service," and the landscape architect expressly retains the copyright in them.

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Because the client also plays an important role in the creative process, and because he or she is the property owner, the client may assume that he or she is entitled to some ownership of copyright. In one case involving an architectural plan, the contract said that "drawings and specifications are and shall be the property of the [home] owner," in this case, a

developer. The architectural firm and its two partners (the plaintiffs), brought a copyright infringement action against the developer. As a defense to the copyright claim, the defendant developer contended that the plaintiffs had transferred all ownership interests, including the copyright, in the drawings when the agreement between the plaintiffs and defendant developer was executed. The court found that interpreting the agreement as having transferred all ownership interests, including the copyright, to the defendants would be contrary to federal copyright policy. To transfer ownership interests in a copyright, the Copyright Act requires that the author sign a written agreement that memorializes the transfer of copyright ownership. The court held that where an ambiguity exists about whether the copyright interest itself was transferred, such contractual provisions must be construed in favor of the author to prevent inadvertent loss of copyright.

In general, copyright law ensures that the creator of a work will not give away his or her copyright inadvertently and forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price. That's why it's so important to include clear and specific language in a contract clause.

Registering a Copyright

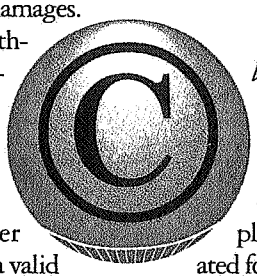
Copyright registration is mostly a legal formality intended to make a public record of the basic facts of a particular copyright—the owner, the date of creation and/or publication, the kind of copyright, and so on. Registration is simple and inexpensive. The landscape architect simply fills out a form available from the U.S. Copyright Office *(www.copyright.gov)* and mails a copy of the plan to the copyright office with a fee payment of $30. After the copyright office receives a copyright application, it will issue either a certificate of registration indicating that the work has been registered or a letter explaining why it has been rejected. Registration may be made at any time within the life of the copyright.

Registration isn't even technically necessary. Copyright protection occurs when expression is fixed—that is, when pencil hits paper. If a landscape architect wants to initiate a lawsuit for copyright infringement

of a plan, however, he or she must register the plan first. Copyright law provides several inducements to encourage copyright owners to make registration, two of which are essential to pursue a copyright case: (1) If registration is made before or within five years of publication, it will establish prima facie evidence of the validity of the copyright in court and of the facts stated in the certificate of registration; (2) if registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages (up to $150,000) and attorney's fees will be available to the copyright owner in court actions.

Infringement of Landscape Plans and Designs

If landscape plans or designs are misappropriated or copied, the landscape architect may have a claim for copyright infringement—and monetary damages. Infringement occurs when another party exercises, without authorization or other legal defense, any of the exclusive rights granted to the copyright owner by law. For an infringement claim, the owner must prove that he or she has a valid copyright and that his or her exclusive rights in the work have been violated.



A valid copyright is established if (1) the landscape plan or design is original, sufficiently creative, and within the subject matter of copyright; and (2) the landscape architect is the registered owner. Violation of the owner's exclusive rights in the work is normally established when someone copies the copyrightable work (regardless of whether it has been registered) or elements of it.

Copying can be demonstrated in several ways: (1) through direct evidence such as a paper trail (documents or e-mails), where the infringer admits to the copying in correspondence (this is very rare); (2) through circumstantial evidence of access and substantial similarity to the copyrighted work, as when a landscape architect leaves firm A, joins firm B, and produces a design for a new client that resembles a plan created by a former colleague in firm A; or (3) through circumstantial evidence of striking similarity to the copyrighted work, as when the landscape architect's plan is so similar to the original that access to the original will be presumed. The most common cases involve the second scenario.

In one compelling example *(Ocean Atlantic Woodland Corporation v. DRH Cambridge Homes, Inc.)* a real-estate developer acquired copyright ownership in two development plans—a site plan and a landscape plan—created for a specific parcel of land. The plans were part of an annexation agreement governing an adjacent development's incorporation of that parcel and were based on the contours of the land to be developed. The copyright owner failed to close on the sale of the land on time and didn't develop the parcel. Another real-estate developer purchased the land, hiring its own landscape architect, who referenced the original plans included in the annexation agreement. The copyright owner of the plans sued the new developer and landscape architect for, among other things, copyright infringement of the plans. (The case settled in January 2005, and the terms were undisclosed.)

If landscape plans or designs are misappropriated or copied, the landscape architect may have a claim for copyright infringement—and monetary damages.

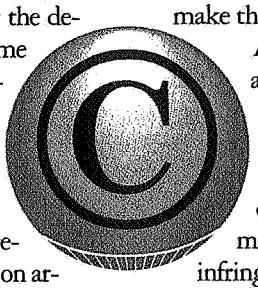
The copyright law protects landscape architects not only from direct infringers but also from other parties not directly involved in the copying—for example, "contributory infringers," people who

knowingly contribute to another's infringing activities, generally in an intermediary capacity. Suppose a home owner likes the landscape design of house A in her neighborhood. She hires landscape architect B and tells him to copy the landscape plan from house A. The plan would need to be accessible, as the law does not at this time protect against copying a design by observing the finished landscape. [This point marks an important distinction between copyright protection of landscape plans and architectural plans. For architects, Congress amended the copyright law in 1990 to give architects an additional copyright in the design embedded in the building, architectural plan, or drawing itself. In a nutshell, this additional copyright prevents copying by observation. Thus, architects get two copyrights (one for the plan and one for the embedded design), while landscape architects get one (for the plan only). For landscape architecture, the infringer must copy or otherwise use the plan without authorization to be liable for infringement.]

Landscape architect B then copies those plans. The landscape architect of house A, the design's copyright owner, sues both home owner and landscape architect B for infringement. The latter is the direct infringer because he was the one who actually copied the plans. Although the home owner didn't copy anything, she knowingly contributed to the infringement and is liable as a contributory infringer.

The law also permits claims against or extends liability to "vicarious infringers" such as home owners and real estate developers who have a financial interest and the right to supervise or control the infringing activity without even knowing about it. Let's say a home owner hires a landscape architect to design a landscape plan. Unbeknownst to the home owner, the landscape architect copies the landscape plans for house X. The copyright owner sues both the landscape architect who copied the work and the home owner who hired her. The direct infringer is clear. But what about the home owner? Under vicarious liability infringement, the copyright owner has to prove that (1) there was a direct infringer (which is clear in this case); (2) that the home owner obtains some financial benefit from the infringement (which he does, as the pleasing landscape plan will increase the value of his property);

and (3) the home owner has or had the opportunity to supervise or control the landscape architect (which, as the client, he arguably did). If a jury finds all three elements in the affirmative, even though the home owner didn't know that the designer was infringing, the home owner is liable. Moreover, his legal exposure to the landscape architect's infringement could be significant.



Sound fair? Nonetheless, this model of vicarious infringement theory is being imposed on architectural copyright cases. Its application to architectural copyright cases is expected to be challenged in the near future because it doesn't make sense, given the service-oriented nature of the business.

Remedies for Landscape Professionals Under Copyright Law

For the landscape architect, copyright law provides a variety of equitable and monetary remedies for infringement. First, a landscape architect may elect to recover from an infringer either his actual damages or the "value of use" of the plans, which might also be thought of as the lost fair-market value of the plans. (Fair-market value is determined by what a willing buyer would have paid a willing seller for the services—that is, what you would have made had the infringer hired you instead of infringing your plan.) In addition to actual damages, the plaintiff may seek the profits made by the infringer due to the infringing activity. Actual damages compensate for the landscape architect's losses caused by the infringement, while the "disgorged" profits prevent the infringer's unjust enrichment and deter future infringements.

For example, a builder needs a landscape plan for his 20,000-square-foot lot. For the kind of project he wants, a landscape architect would charge $250,000. Instead, the builder copies a plan by a landscape architect, sells the home, and consequently makes $100,000 profit directly attributable to the infringement of the landscape architect's design. The landscape architect sues for copyright infringement and wins actual damages of $250,000 (what would have been charged for the service), plus $100,000 (the profit directly attributable to the infringement, even if it is unlikely that the landscape architect would be able to make the $100,000).

As an alternative to recovery of actual damages, a landscape architect may elect recovery of statutory damages if he or she complies with time-sensitive copyright registration requirements. These damages punish an infringer in cases where, for example, actual damages are nominal or difficult to prove or there is strong evidence of willful infringement. Statutory damages can go up to $30,000 per infringement and up to $150,000 for willful infringement.

In any case, the copyright owner doesn't have to elect which damages to pursue until trial. Regardless of whether the copyright owner obtains statutory or actual damages, he or she can seek lost profits as well. The trial court also has discretion to award the successful claimant costs of court, including a reasonable attorney's fee. Finally, there are a number of equitable remedies, including injunctive relief—permanently preventing an infringer from using a plan—and destruction of the infringing materials.

For landscape architecture, the infringer must copy or otherwise use the plan without authorization to be liable for infringement.

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