

## **Infringement of Buildings and Plans Risks Huge Damages**

By: Jim Astrachan

Real estate developers, builders and architects who copy buildings or plans can wind up paying a fortune for their infringement. This is because the United States copyright law protects building plans, and in some cases buildings. Under this law, the measure of damages can be the infringer's profits. For commercial real estate and large residential projects, the profits can be enormous.

### Plans

Building plans, or technical drawings, are protected and can be infringed if copied. In an architectural plans copyright case, like any other copyright case, the plaintiff must prove that the infringer had access to, and copied, the plans. If access is shown, and the new work is substantially similar to the copied work, copying is presumed. When it comes to architectural plans, access is almost always easy to establish, as plans must be filed with the local government to obtain a building permit.

### Buildings

A building intended for human occupancy constructed after December 1, 1990 is also eligible for copyright protection. To infringe the copyright of a building constructed prior to that date an infringer had to actually copy plans. Infringement was avoided by measuring and

photographing a building to create plans that would exactly duplicate a building. Since December 1, 1990, the original design of a building, including its overall form and the arrangement and composition of space and elements is protected by copyright law. Excluded from protection are individual standard features or functionally required design elements such as doors and windows. Only buildings designed for human occupancy are protected. The buildings don't have to be residences - office buildings, churches and schools qualify. Chicken coops do not qualify.

### Damages

In a copyright infringement action the owner of the copyright is entitled to recover from the defendant its actual damages which are the profits it would have made from the plans absent the infringement. In addition to actual damages, the copyright owner can recover any profits of the infringer that are attributable to the infringement which have not been taken into account in computing actual damages. It would be double dipping for a copyright owner to recover both its damages and the infringer's profits.

Assume that Jones and Associates, a residential real estate developer, owns the copyright to architectural plans and that Smith Development copied those plans without permission and built from those plans a development of single family homes, each of which sold. Smith's business methods are not as honed as Jones, and Smith sells its houses at a smaller profit margin than Jones.

In this example, Jones can recover all of Smith's profits attributable to the infringement. Once a finding of infringement occurs, courts generally award to the copyright owner all of the

infringer's profits attributable to the infringement. Likely, Jones will also recover that portion of the profits it would have made, had it built the houses, which exceed Smith's profits already awarded to Jones. So if Smith made a profit of \$25,000 per house, and if Jones, instead of Smith, had built the houses and made a profit of \$30,000 per house, Jones will receive the full measure of his lost profits: \$30,000 per house.

On the other hand, if Smith made a profit of \$30,000 per house and Jones would have earned a profit of only \$25,000 per house, Jones is still entitled to recover from Smith damages of \$30,000 per house - being all of Smith's profits.

A savvy expert witness is needed to establish, and testify, regarding the defendant's and the plaintiff's profits. The Copyright Act provides that "in establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenues, and then the infringer is required to prove...deductible expenses." Because there are so many ways to calculate profits, some acceptable, and some not, in copyright cases the expert witness should be carefully guided by someone very familiar with copyright law. For example, one court has recently ruled that if a defendant's infringement is willful it is improper to permit a defendant to deduct all overhead expenses in the same proportion as the sale of infringing goods bears to the defendant's total sales.

### Leased Real Estate

What if a rental office park is built using infringed plans? What then is the measure of damages? Arguably, these damages can be vast as there is likely profit in each rental payment, although the defendant's expert witness is likely to disagree. Additionally, the developer may

have a history of eventually selling its projects which will allow the expert witness to calculate profits on the eventual sale through modeling. While not exact, this testimony will likely not be speculative, allowing the expert witness to testify as to this aspect of the developer's prospective profit. These damages can be huge.

In addition to recovery of damage, the plaintiff under certain circumstances may recover all of its attorney's fees, making it whole against the cost of trial. To enjoy this benefit, the copyright owner must register the copyright within the statutory period or be barred from recovery of attorney's fees; and the plans or the building must be "published" through sale or distribution of the plans or construction of multiple buildings. The court cannot waive these requirements.

In order to preserve rights to the fullest, it is strongly recommended that architectural plans prominently display the copyright notice of the owner. In addition, buildings constructed after December 1, 1990 should display, in the lobby, a copyright notice. Whenever practical, the plans or photos of architectural models, should also be registered.

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