

Enhanced Remedies with Copyright Registration for Building Design

Amundsen Davis Intellectual Property Alert
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Copyright protection for building designs is available under the 1990 Architectural Works Protection Act contained in Title 17 of the U.S. Code.

Although copyright ownership begins at creation of the work, only U.S. copyright registration of a work will afford the owner full protection and all available remedies in the event of infringement. Registration may be crucial to obtaining adequate compensation for damages suffered in this situation.

The benefits of copyright registration are:

1. **Jurisdictional** - No civil action for infringement may be instituted without registration of the copyright claim. Without registration, the owner has no protection under federal law. 17 USC 411(a)
2. **Evidentiary** - If the registration is obtained within five years after publication, the copyright is presumed to be valid, which may reduce the likelihood of or even avoid litigation. 17 USC 410(c)
3. **Remedy** - Valuable remedies of statutory damages and attorney fees provided under the Act are not available for any infringement of copyright unless the published work is registered before infringement or within 3 months of publication. These remedies are: (a) Actual damages plus the infringer's profits or an optional statutory remedy of a specified dollar amount and (b) attorney fees. 17 USC 412

Statutory remedies under the Act can be especially vital for infringement of building design copyrights because it is difficult to establish damages at a satisfactory level. Without the benefits provided with registration, an owner is limited to actual damages which have often been found speculative and unrecoverable unless damage to the marketability of the copyright itself can be shown.

Without the benefit of the statutory damages provided under the Act, a plaintiff must factually show with reasonable probability that, but for the defendant's infringement, it would not have suffered the loss. *Cohen v. United States*, 100 Fed. Cl. 461, 478 (2011). Where infringement of design plan copyrights involve construction by unauthorized use of a builder's plans, without statutory damages

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under the Act, the builder owning the copyright would have to show that but for the infringement, it would have profited from that construction.

Actual damages may also be proved by reduced market value of the plans themselves resulting from the infringement. *Davis v. The Gap, Inc.*, 246 F.3d 152, 159 (2d Cir.2001). Because the plans may continue to be used by the author, the amount of actual loss in market value is often minimal. This is evident in *Pfanenstiel v. Chouteau*, where the Court declined to award actual damages for design plans infringement because there was no evidence that the infringement deprived the author of any other business. *Pfanenstiel Architects, Inc. v. Chouteau Petroleum Co.*, 978 F.2d 430, 432 (8th Cir. 1992).

For these reasons, the remedy of statutory damages for timely registration is valuable. The registration process is fairly simple and inexpensive and given the benefits, should be seriously considered by an author of building plans.

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