



By Andrea Lee

COPYRIGHT IN ARCHITECTURAL WORKS

COPYRIGHT IS DEFINED BY CANADA'S COPYRIGHT ACT AS THE SOLE RIGHT TO PRODUCE OR REPRODUCE A WORK OR ANY SUBSTANTIAL PART THEREOF IN ANY MATERIAL FORM.

An architect's copyright in his or her work protects the work for the life of the architect plus 50 years. In *Lifestyle Homes v. Randall Homes (1991)*, 34 C.P.R. (3d) 505 (Man. C.A.), the Court found that the work must possess at least some individualistic style and have "something apart from the common stock of ideas" to be copyrighted.

Copyright differs from the moral right of an architect in his or her work, which is defined as the right to protect the integrity of the work and to be associated with the work as its author. The moral right in an architectural work exists for the architect's life plus 50 years, and can be transferred upon death.

Generally, standard form contracts between architects and their clients provide that the copyright in the architects' plans, sketches, drawings and materials belongs to the architects and remains their property regardless of whether the projects are executed or not. See, for example, the Canadian Standard Form of Contract for Architectural Services, Document Six (2006), G.C. 5. However, where the architect produced the work under a service contract or an apprenticeship, the employer of the architect will own the copyright in the work.

Standard form contracts such as the Ontario Association of Architects Standard Form of Contract for Architectural Services Document 600, 2005, permit the client to retain copies of the architect's drawings for purposes of maintenance and records related to the work. The drawings may be copied only for a one-time use in respect of the same site and for the same project, and shall not be used for the purpose of renovation, addition or alteration to the project unless written consent is obtained from the architect.

An architect may assign copyright and grant any interest in copyright by license. In *Katz (c.o.b. Michael Katz Associates) v. Cytrynbaum*, [1983] B.C.J. No. 2421 (C.A.), the British Columbia Court of Appeal held that an architect may revoke his or her consent to the transfer of copyright if it was given without consideration.

In the event a dispute arises between the client and the architect, the client must pay the architect before using or modifying the design. The Supreme Court of Canada decided in *Netupsky v. Dominion Bridge Co.*, [1972] S.C.R. 368, that payment for the architect's services implies the transferral of the right to use the plans for the purposes contemplated at the time the client-architect agreement was made.

Where the client ends its relationship with one architect and retains another architect to continue the work, the new architect should obtain the written permission of the original consultant to use the design (see R.R.O. 1990, Reg. 27, s. 49.2). In addition, the new architect should obtain from the client written acknowledgement that the previous

architect has been paid and that the right to use the drawings has been transferred. The original consultant should be credited for the work done prior to the retainer of the new architect.

The Copyright Act provides that upon infringement of copyright, an architect is entitled to such remedies as injunctions, damages, accounts, and delivery up. If the construction of a project which infringes an architect's copyright is already underway, the architect will not be able to obtain an injunction halting construction or an order for destruction of the project.

Canadian courts consider various factors in the assessment of damages for copyright infringement [see *Hay and Hay Construction Co. Ltd. v. Sloan (1957)*, 12 D.L.R. (2d) 397 (Ont. H.C.); *Bemben and Kuzych*

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Architects v. Greenhaven-Carnagy Developments Ltd., [1992] B.C.J. No. 2489 (S.C.); *Kaffka v. Mountain Side Developments Ltd. (1982)*, 62 C.P.R. (2d) 157 (B.C. S.C.)). These factors include:

- the fee the architect would have earned for the granting of a license;
- the profit gained by the infringing party;
- the loss of opportunity to enhance the architect's reputation;
- the architect's risk and exposure to liability;
- the amount of labour and expenditure involved in the project; and
- the conduct and knowledge of the individual infringing the copyright.

Punitive damages will be awarded in rare cases where there has been an intentional disregard for the architect's rights and the direct unauthorized reproduction of the original design [*Randall Homes Ltd. v. Harwood Homes Ltd.*, [1987] M.J. No. 258 (Q.B.)]. **B**

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