



Copyright Basics for Builders and Developers

by Scott A. Johnson

You have seen the warnings at the beginning of movie rentals advising about the potential criminal punishment you will be subject to if you illegally copy the movie. You may also have heard about the music recording industry suing college students for illegally “sharing” music through peer to peer networks like Napster. In both situations, the basis for the criminal sanctions and civil liability is the law of copyright.

Motion pictures and music, however, are not the only types of materials subject to copyright protection. While builders and developers do not typically deal with music or motion pictures in the ordinary course of their business, many materials used in the real estate industry on a regular basis are covered by copyright. It is impossible to create an exhaustive list of materials that are subject to copyright protection, but the Federal Copyright Act has characterized all of these materials with a single phrase. Specifically, the Copyright Act provides that copyright protection extends to all “original works of authorship fixed in any tangible medium of expression.”

Offices

Toledo Office:

One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Columbus Office:

100 E. Broad Street, Suite 600
Columbus, Ohio 43215
Telephone: 614-280-1770
Fax: 614-280-1777


Findlay Office:

725 S. Main Street
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Novi Office:

28175 Haggerty Road
Novi, Michigan 48377
Telephone: 248-994-7757
Fax: 248-994-7758

www.eastmansmith.com



The Copyright Act goes on to identify several specific categories of works entitled to copyright protection. This list includes “literary works,” which could include real estate contract documents, written construction warranties and written construction details and specifications. Another identified category is “pictorial, graphic and sculptural works,” which could include artistic renderings of buildings. Finally, the listed category that is most clearly related to the real estate industry is “architectural works.”


As you can see, many of the materials used by builders and developers on a daily basis are subject to copyright protection. Therefore, in order to avoid an accusation of unlawful infringement, or to prevent others from unlawfully infringing upon your rights, it is important to have a general understanding of copyright law.

What are the rights of a copyright owner and when are they acquired?

Copyright ownership gives the owner of a work exclusive rights to reproduce, copy, perform, display or broadcast the work. It also gives the owner the exclusive right to make derivative works based upon the original. These exclusive rights are extended to the copyright owner as soon as an original idea is “fixed in any tangible

Practical Copyright Tips for Real Estate Professionals

- Surveys, engineering plans, architectural drawings and other materials subject to copyright cannot be copied without the copyright owner’s permission. Generally, the surveyors, engineers or architects will make additional copies of materials prepared for you available upon request for a nominal charge.
- Licenses for architectural home plans typically only allow the license holder to construct a single home. An additional license must be purchased for each additional home to be built.
- If you make changes to a material that is subject to copyright protection, the resulting material is called a derivative work. The creation of derivative works can be copyright infringement, so it is best to consult with the architect or engineer who originally prepared the material before making alterations.
- It is not always abundantly clear whether someone is an employee or independent contractor for purposes of determining copyright ownership. Contract terms that make reference to copyright ownership in materials with respect to the parties always will prevail. Otherwise, when in doubt, it is best to contact your legal professional for assistance.
- Just because a survey, architectural drawing, engineering plan or contract document (e.g. form purchase and sale agreements like those approved by the Toledo Bar Association and Toledo Board of REALTORS® or warranty programs like those prepared by the Home Builders Association of Greater Toledo) does not contain a copyright notice, does not mean there is no copyright protection.



medium of expression.” In other words, you cannot get copyright protection of your original ideas until these ideas are expressed by you in a concrete or physical manner. For example, when an author comes up with a brilliant idea for an original novel, he or she does not get copyright protection in the brilliant idea until pen is put to paper. Similarly, when an architect comes up with an exciting new building design, the design is not protected by copyright until it is drawn or drafted.

How are copyrights protected?

The Federal Copyright Act provides both civil and criminal remedies to help copyright owners protect their exclusive rights in copyright materials. Infringers who willfully and knowingly commit infringement are subject to fines and the confiscation and destruction of any infringing goods. Moreover, an individual convicted criminally of copyright infringement can be sentenced to as much as ten years in prison.

As a civil remedy, copyright owners are entitled to injunctive relief, which is a court order requiring an infringer to cease and desist from their unauthorized use of the copyrighted material. Additionally, a copyright owner is entitled to recover monetary damages from the infringer. The Federal Copyright Act gives courts discretion to award statutory damages ranging from \$750 to \$150,000. Alternatively, the copyright owner can recover the amount of their actual damages, plus any profits the infringer realized as a result of their infringing actions.

Is an “innocent” infringer still subject to civil penalties?

It is important to note that even people who accidentally infringe upon a copyright can be subject to civil injunctions and damage awards in favor of the copyright owner. Until several years ago, a copyright owner could not protect his or her copyrighted materials unless the work contained a copyright notice. A copyright notice is a statement contained on the copyrighted material to give the world notice that the material is subject to copyright protection. This notice is sometimes as simple as the word “copyright” followed by the year of the work’s creation.

With a copyright notice affixed to an original work, it is difficult for infringers to argue they had no knowledge the work was protected by copyright. That being said, a copyright notice is no longer required to be placed on copyrighted materials. Furthermore, it is not required that a copyright owner show an infringer had knowledge he or she committed copyright infringement in order to recover in a civil cause of action. Simply put, you do not need to know that you are committing copyright infringement in order to be held civilly liable for copyright infringement. The willfulness and knowledge of an infringer is considered when the court determines the amount of monetary damages to be awarded the copyright owner, but an infringer still will have to pay some amount of damages to the copyright owner, even if his or her infringement was unintentional or “innocent.”

Who is the owner of a copyright?

As a general rule, the author or creator of an original work is the owner of the copyright of that work. These ownership rights can be altered by contract. For example, it can be contractually agreed that the copyright owner will be the individual a work is prepared for instead of the author of the work. Copyright ownership also can be transferred and sold.

This issue of ownership can be confusing, because owning material that is subject to copyright protection does not always mean you own the copyright. For example, when you purchase a novel at a bookstore you are

buying a copy of the novel, but you generally do not acquire an interest in the copyright to the novel. You can make personal use of the book, but the book's author retains the exclusive right to make copies of the book and to sell or distribute them.

Who owns the copyright in works made for hire?

The main exception to the general rule of copyright ownership stated above is referred to as the work-for-hire doctrine. This doctrine applies when an original work is created by an employee in the course of his or her employment. Under these circumstances, the copyright owner is the employer of the author.

The work-for-hire doctrine only applies where there is a true employee-employer relationship. It does not apply when an independent contractor is hired to prepare an original work. For real estate professionals, this issue is easily exemplified by situations where an architect is hired to prepare a design for a building. The architect (or architecture firm employing the architect) owns the copyright in the building design, not the party who hired the architect to design the building in the first place. This is true, of course, unless other contractual arrangements are made.

The issue of copyright ownership becomes more confusing when licensing is involved. With a copyright license the license holder can use the copyrighted materials in a manner that would otherwise infringe upon the copyright owner's exclusive rights; however, a license is not a transfer in ownership of the copyright. As a result, it is important for a licensee to pay careful attention to the limits of the rights granted by the license.



For questions regarding real estate and copyright laws, please contact Mr. Johnson at our Toledo office (419-241-6000). Mr. Johnson is an associate concentrating his practice in the area of real estate law. He works with Firm member James L. Rogers in copyright matters.

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