Wyse Kadish LLP | Attorneys at Law

Should Architects Ever Agree That Their Drawings Will Belong to the Owner?

By

Charles J. Pruitt
Partner, Wyse Kadish LLP

The AIA standard and abbreviated forms of Agreement Between Owner and Architect provide that the architect shall retain all common law, statutory and other reserved rights, including copyrights, in the drawings, specifications and other documents ("Instruments of Service") prepared by the architect and its consultants.[1] It is not unusual during the negotiating stage for the project owner to insist that this provision be changed, contending that, since the project owner will pay for them, the project owner should own the Instruments of Service. Architects routinely concede the issue to the project owner, perhaps without fully appreciating what they are giving up.

Many architects are unaware that their architectural designs are a form of intellectual property that is protected by federal copyright laws.[2] Under these laws, a copyright is automatically created when the Instruments of Service are created by the architect.[3] The individual or joint authors of the work initially own the copyright. Each author is granted a bundle of exclusive rights. Any transfer of those exclusive rights must be in writing. So, while a project owner may feel entitled to use the Instruments of Service, it may not do so under federal law unless it has first received written permission or license from their author and owner – the architect who created them. Accordingly, an architect should approach this negotiating issue with the project owner recognizing that the architect's copyright in the Instruments of Service is a valuable property right that, like any other valuable property right, should not be given away carelessly.

If an architect concedes ownership of the Instruments of Service to the project owner, then the project owner might be able to preclude the architect from employing the same original design style on another project. If an architect has developed a signature style, transferring the copyright to Instruments

[1] See e.g., AIA Document B151 – 1997 §6.1; AIA Document B141 – 1997 §1.3.2.1.

[2] Architectural drawings and specifications were first included in the definition of valid copyrightable subject matter by the Copyright Act of 1976. The Architectural Works Copyright Protection Act of 1990 extended the scope of copyright protection to the overall form of the building. The law protects only the original constituent elements of the completed architectural work and the Instruments of Service, not standard design details and functional elements whose design or placement is dictated by utilitarian concerns.

[3] Even though the copyright comes into existence when the Instruments of Service are created, a copyright registration is a prerequisite to suing an infringer and recovering statutory damages or attorney fees for infringement. The architectural work and the technical drawings (i.e., the Instruments of Service) from which the work was built must be registered separately. To register the work and the Instruments of Service, the architect must file completed copyright application forms with the United States Copyright Office together with the prescribed application fees.

of Service on a project could potentially have surprising consequences on the architect's subsequent career.

Relinquishing ownership rights to the Instruments of Service might also create an unacceptable additional risk of liability for the architect. As the owner of the Instruments of Service, the project owner will be able to modify and use the Instruments of Service to build subsequent projects. Those subsequent projects may differ significantly from the project for which they were prepared. Plans prepared for dry conditions may not be appropriate for wet conditions. And plans that were prepared for an apartment complex may not be appropriate for a condominium project. When and if the condominium owners on that later project sue the developers for alleged construction defects as the statute of repose is close to expiring, it is possible that the architect who authored the Instruments of Service for the earlier apartment project will be dragged into the dispute.

For these reasons, the AIA forms of Agreement Between Owner and Architect provide that the architect is the author and owner of the Instruments of Service and that the owner of the project has a nonexclusive license to use the Instruments of Service for the limited purposes of constructing, using and maintaining the specific project that is the subject of the agreement. If the agreement is terminated prior to completion of that project for any reason other than the architect's fault, the AIA forms provide that the owner's license to use the Instruments of Service is terminated as well.

If an architect elects to concede ownership of the Instruments of Service to the project owner, the architect should seek a comparable concession in return, such as limiting the architect's potential liability on the project to the architect's insurance coverage. At a minimum, an architect making that concession should insist that the agreement with the project owner (i) allow the architect to use constituent elements of the Instruments of Service on other projects and (ii) allow the architect to include photographic or artistic representations of the design among the architect's promotional and professional materials.

BIG FIRM EXPERTISE
SMALL FIRM ATTENTION

Business, Real Estate and Construction
Litigation / Dispute Resolution

Wyse Kadish LLP
Attorneys at Law
621 SW Morrison, Suite 1300
Portland, OR 97205-3816
www.meyerwyse.com

Charles J. Pruitt (503) 517-8117

cjp@wysekadish.com