

Owners, builders need to heed Copyright Act

Oct 02 2017

Posted By: Frank W. Kowalkowski

Practice Area: Construction Law and Litigation

This article originally appeared in *The Business News*, October 2, 2017.

Homeowners and builders alike should be cautious when using plans for custom built homes. A recent copyright infringement case decided by the Seventh Circuit Court of Appeals brings this topic to the forefront.

At issue was the allegedly wrongful copying of home plans, and the subsequent construction of 50 homes using those plans. The defendant was one of approximately 100 such defendants sued by the plaintiff/home plan designer in separate lawsuits across the country.

What is at stake?

The Copyright Act entitles a successful plaintiff to claim all of a defendant's profits from each home built with copied plans. Statutory damages, which can total tens of thousands of dollars for each infringement, may also be sought.

In both instances, a successful plaintiff may also be entitled to reimbursement for all costs and attorney's fees incurred in asserting the claim.

The Court's decision.

In affirming the lower court's dismissal of all of the plaintiff's claims, the Court noted that there are only so many ways to arrange a few bedrooms, a kitchen, some common areas, and an attached garage.

The Court also noted that the opportunity for originality, justifying copyright protection, in the design of home plans, is constrained by functional requirements, consumer demands, and the vast body of similar designs already available.

The Court's final conclusion was that in this field "the substantial similarity requirement, necessary to be successful with a copyright infringement claim, is particularly hard to satisfy."

It concluded that to whatever extent the parties' plans resembled one another, they likewise resembled countless other home designs in a crowded market.

In order to be found liable for copying someone else's work, there must be evidence that the defendant had access to the plans, because without ever seeing the plans, the defendant could not have copied them.

The Court then noted that it had not previously considered whether an internet presence, without more, could satisfy the access element of a copyright infringement claim.

After considering this point, the Court held the existence of a plaintiff's materials on the internet, even on a public and "user friendly" site, cannot by itself justify an inference that the defendant accessed the protected materials.

What should you do?

Builders who are asked to construct a home using plans provided by someone else should confirm that the proper license is in place to use those plans.

Further, obtaining an indemnification and hold harmless agreement from the supplier of the plans relative to any potential copyright infringement claims asserted by a third party is imperative.

Homeowners must also make sure that they have proper written permission to use any plans. If they switch designers or builders during the course of the project, they should obtain a release from the previous company.
