

# Unauthorized Use Of Architectural Plans Can Be Costly

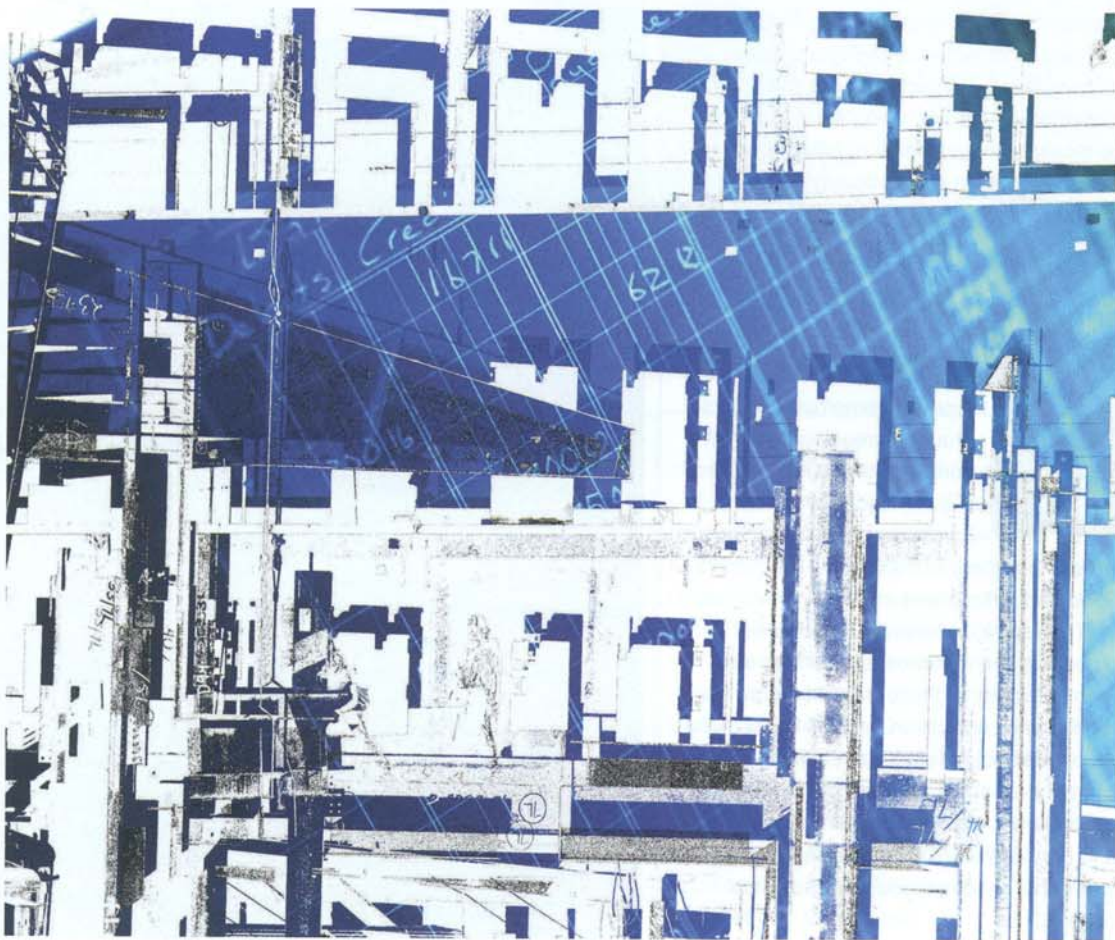
**T**he consequences of using an architectural design without the copyright holder's permission may come as a surprise to many contractors, owners and developers. Under the Copyright Act, the copyright holder is entitled to damages for the unauthorized use of its designs, and one element of those damages is the profits the infringers earn as a result of the illegal copying.

Does this mean the copyright plaintiff is entitled to all the profits a contractor or owner enjoys from the construction or development of a "knockoff" structure? It could, and under many scenarios the damages can be substantial.

The plaintiff is entitled to "actual damages" plus "infringer's profits" under the Copyright Act.

While actual damages may be relatively simple to calculate and comparatively modest, infringer's profits are less predictable and can be sizable.

Generally speaking, actual damages consist of what the plaintiff would have received had the defendants properly paid for the architectural plans in the first place. The courts describe this compensatory element as the fair market value of the plans, or what a willing buyer would have paid to a willing seller.



However, the prospect of paying actual damages does little to discourage infringement. A copyright plaintiff's additional right to recover the infringer's profits may change the damages picture dramatically and more powerfully deter unauthorized copying.

For example, if a homebuilder uses copyrighted plans without the permission of the architect who created them, infringer's profits may consist of the builder's profits from the sale or potential sale of the home and the contractors' profits from its work on

the project. These profits can be substantial compared to the architectural fee.

Imagine if a developer that had success with a design from one of its prior projects uses the same design, without permission, for one of its 10 plan types on a 300-home project. The plaintiff will be entitled to the profits made by the parties that participated in the infringement.

In the case of wrongfully copied plans for a condominium project, or commercial construction project, the infringer's profits

likewise can far exceed the architectural fee.

Under the Copyright Act, the plaintiff must show a reasonable relationship between the improper use of its plans and the gross revenues of the defendants. Several courts state once the plaintiff does so, a legal presumption is created that all the defendants' gross revenues are recoverable.

**INFRINGER'S DEFENSES**

The act also gives infringers the opportunity to rebut that presumption by proving that some or all of their profits are attributable to factors other than the improperly copied architectural work. Infringer's profits is defined by the Copyright Act as "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." The defendant then "is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."

This legal framework presents unique factual and analytical disputes about the extent to which the defendants' profits are attributable to factors other than

the plaintiff's architectural design. For example, the defendant may contend that only a portion of the plans were copied, and therefore none of its profits or only a correlative portion of its profits should be recoverable.

Or, the defendant may contend its profits primarily are due to the non-design amenities, the infringing structure's location, the defendant's own efficient handling of the construction process or its choice of interior finishes—not the copied architectural design. The extent to which these contentions may be successful in limiting recoverable profits remains in question.

In one case involving the purported copying of a Beverly Hills residence design, the plaintiff asserted "the mere fact that the residence was constructed from its copied plans" established a sufficient connection between the infringement and the profits "for the simple reason that without the infringing plans, the residence would be altogether different, if it existed at all." The jury initially awarded \$5 million to the plaintiff in infringer's profits alone. However, a re-trial was ordered and a

subsequent jury only awarded \$666,000 in profits to the plaintiff for a total award, including actual damages, of \$1.1 million.

In another case involving the copied façade of a commercial building, the defendant presented evidence that the buyer wanted the building regardless of the type of façade used and primarily was concerned about the need for additional space and the interior design and setup of the building. The jury concluded no profits were recoverable and the decision was upheld on appeal.

Under the current rules and case law, assessing the potential damages flowing from participation in the unauthorized use of copyrighted architectural plans is not an exact science. It is clear significant factors include the extent to which the infringing structure utilizes the copyrighted design and the extent to which the copyrighted design is important to the value of the infringing structure.

**Mark Hellenkamp is a partner in the San Diego office of Morris Polich & Purdy LLP. For more information, call (619) 557-0404 or email mhellenkamp@mpplaw.com.**

## Start Building Your Future with a Bachelor's Degree in Construction Management



**Courses include:**

- Construction Law
- Building Construction Drawing
- Construction Contracts
- Construction Cost Estimating
- Managing a Construction Project
- Construction Layout Planning
- Managing a Construction Business

[www.EvergladesUniversity.edu](http://www.EvergladesUniversity.edu)

- All degree programs are offered 100% online through the Boca Raton main campus
- Students take one class at a time for more focused learning
- Financial aid is available for those who qualify



**Boca Raton Campus** (Main Campus) **888.235.8418**

5002 T-REX Avenue, Suite #100, Boca Raton, FL 33431

**Sarasota Campus** (Branch Campus) **888.785.8689**

6001 Lake Osprey Drive, Suite #110, Sarasota, FL 34240

**Orlando Campus** (Branch Campus) **866.314.4540**

887 East Altamonte Drive, Altamonte Springs, FL 32701