

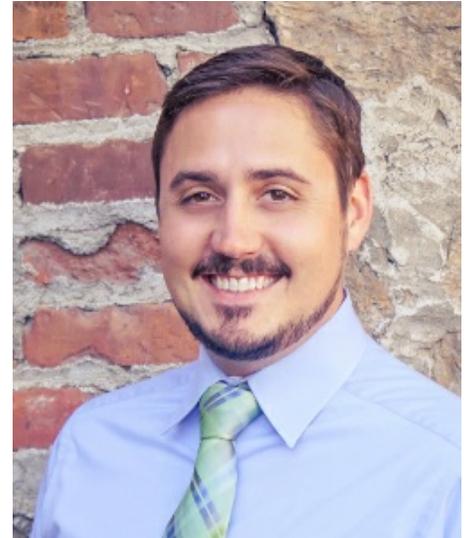
## Intellectual Property

### Letter from the editor

By Seth Anderson, AIA

It is with great honor that I assume the responsibilities of Digest editor from the capable David Richards. I have served on the PMKC leadership group for about a year, and in that time I've been enthusiastic about the work done by AIA staff, the PMKC and our members in practice management. As Digest editor, I look forward to gathering and sharing articles that get to the core of practice management topics and help our readers become better business leaders.

This month's digest topic is intellectual property. The first article, "Does Copyright Law Protect Your Architectural Design Concepts?" by architect and attorney Charles R. Heuer, covers architectural copyright law basics, which will help the reader better understand the history of the Federal Copyright Act of 1976 and define terms used in the law. The article is a great refresher, even for those familiar with copyright law; however, the limits of protection might surprise some. Cheryl L. Davis provides her perspective on the importance of retaining the rights granted by copyright ownership in her article, "Why Maintaining Copyright of Your Architectural Work is Important."



We often think of copyright as protecting us from the infringement of others, but as attorney David H. Bowser outlines in his article, "Protecting Yourself from Claims of Copyright Infringement," copyright cuts both ways. Bowser outlines the basis for a copyright infringement claim and provides six concrete steps for architects to minimize their risk of being named in an infringement suit. And finally, Andrew Smith provides a case for registering your firm's trademark in "Indispensable Tools – How Trademarks Build Better Brands."

Intellectual property created as an architectural work is highly valued by architects. Understanding how the existing laws protect architectural copyright will help architects ensure that value is respected by others in our industry and reduce the chance that you infringe on, or are accused of infringing, someone else's rights.

## Features

### [Does copyright law protect your architectural design concepts?](#)

By Charles R. Heuer, FAIA, Esq.

Since the late 1970s, applicable copyright law in the United States has protected original works of authorship fixed in any tangible medium of expression. This article serves as a basic primer on the nature and extent of protections offered by Copyright Law.

## Why maintaining copyright of your architectural work is important

By Cheryl L. Davis

Your ownership of your copyright has more than theoretical legal value. While your copyright is yours to keep or give away as you like, if you don't understand the value of what you have, you can't strike the best bargain.

## Protecting yourself from claims of copyright infringement.

By David H. Bowser

In 1990, Congress passed the Architectural Works Copyright Protection Act (AWCPA) to protect the intellectual property of architects. In order to minimize the chance of being accused of infringement, there are certain things you should understand about the scope of what is protected and certain steps you can take to protect yourself.

## Indispensable tools – How trademarks build better brands

By Andrew Smith, Esq.

Trademarks, when coupled with recent advances in marketing and mobile technology, offer a practical and low cost tool for professionals in the field of architecture to protect their brand, capitalize on good will, distinguish themselves from their competitors and expand into new markets. The following contains a user-friendly overview on trademarks that outlines the benefits associated with obtaining a federal registration with the United States Patent and Trademark Office (USPTO).

## Contribute to the Digest

The next issue of the *Practice Management Digest* will dive into “Greening Your Practice: Sustainable Business practices and easy ways to incorporate sustainability into your projects.”

We are developing the editorial calendar for the *Practice Management Digest* for the rest of 2017 and would like to hear from you. Some ideas include: pro-bono work/public interest architecture; presentation strategies; and tips for training employees. If you have topics related to practice management that you'd like explored or articles you would like us to consider, please contact Seth Anderson, AIA, at [sanderson@ascentarch.com](mailto:sanderson@ascentarch.com).

## Related resources

### Protect your design: Architectural copyright

By David Barker, Esq for the AIA California Council

Why and how do you register a copyright? What exactly is an architectural copyright anyway? Is it really worth it? David Barker says yes, and here's why. [Read more »](#)

### Economically defeasible rights to facilitate information disclosure: The hidden wisdom of pre-AWCPA copyright

By Kevin Emerson Collins

Pre-AWCPA copyright minimizes the costs of intellectual property's access restrictions in a field in which copyright-

induced incentives are arguably not needed to foster the production of expressive works.

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# Does copyright law protect your architectural design concepts?

[network.aia.org/practicemanagement/blogs/charles-heuer/2016/12/14/does-copyright-law-protect-your-architectural-design-concept](https://network.aia.org/practicemanagement/blogs/charles-heuer/2016/12/14/does-copyright-law-protect-your-architectural-design-concept)

By Charles R. Heuer, FAIA, Esq.

Since the late 1970s, applicable copyright law in the United States has protected original works of authorship fixed in any tangible medium of expression. This brief article will address some aspects of the Copyright Revision Act of 1976 and the Architectural Works Copyright Act of 1990. It is intended to be a basic primer on the nature and extent of protections offered by Copyright Law.



## Copyright protection prior to 1990

Copyright protection applies as of the time the work is created – it is incident to the act of creation. As of 1978, the Act protects, among other things, “literary works,” (e.g. specifications) and “pictorial, graphic, and sculptural works (e.g. architectural drawings and models).” After 1990, it also protects “architectural works” (including constructed buildings).

Under the 1978 Act (prior to 1990), if “Adam” could demonstrate that another party (“Ditto”) had access to the drawings or specifications created by Adam and 2) the drawings or specifications created by Ditto were “substantially similar” to those created by Adam, Ditto’s documents would infringe Adam’s copyright. Although “substantially similar” may sound like a simple test, often it is not. For our purposes, if you imagine two drawings laid side-by-side in front of a member of the general public, would that person say that the drawings were “substantially similar” without specific focus on individual details? Again, if so, Ditto’s drawing would infringe Adam’s copyright.

That is all good for Adam, but a basic overlaying principle is that the copyright only protects the “form of expression” of an idea and not the underlying idea or “concept.” For example, you may want to write a book about the long term value of space exploration by the US. Others may have written books exploring that topic, probably including some of the same concepts as you. That should not stop you, however, if you do not copy the words, phrasing and “form of expression” of the prior books.

So, prior to 1990, the Copyright Act did not protect ideas and concepts. This left situations where, for example, someone might see an early sketch created by an architect on the proverbial napkin, but never see any well-developed drawings. The viewer might well “steal” the concept without ever creating “substantially similar” drawings. Copyright law is not much help here. The point at which a “concept” becomes a “form of expression” is often not particularly clear.

Similarly, although Ditto could not properly copy Adam’s plans, he could copy the building built from those plans.

## Architectural works after 1990

Now let’s turn to “architectural works,” as protected after 1990. They are defined to be:

“. . . the design of a building as embodied in any tangible medium or expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”

On the face of it, this seems much more likely to protect an architectural concept (the overall form as well as the arrangement and composition of spaces and elements). However, since “individual standard features” are not protected, it can be very difficult to determine what is protected and what is not. When assessing “substantial similarity” does one try to filter out the “unprotectable,” functionally-required standard elements or does one assess substantial similarity based on “total concept and feel?” Which aspects originated with the person claiming copyright protection and which did not? What was dictated by convention or site or code and what was really original?

Because of the aforementioned difficulties, many courts have referred to an architect’s copyright protection for architectural works as “thin” and “very limited.”

A widely-known incident of alleged copying of an architectural concept is the situation where Thomas Shine sued SOM with respect to SOM’s design of the Freedom Tower in New York City. Shine alleged that a design he presented as part of his Master’s degree program at Yale University was misappropriated by David Childs of SOM. Childs had seen Shine’s work while acting as a design studio juror at Yale. Shine sued on the basis that his tower design concept, as presented to Childs, was copied by Childs and incorporated into the design of the Freedom Tower. The case settled so there is no public record of the trial.

### **The concept of moral rights**

Finally, architects should be aware of “moral rights” in buildings. These arise from the “Visual Artists Rights Act,” which is now part of the Copyright Law. Such rights are independent of traditional copyrights and can allow the architect to prevent the owner of a building designed by the architect from altering or destroying the work.

In summary, Copyright Law gives architects and others who create original works a number of rights and protections. Even so, the idea or concept underlying and reflected in the copyrighted work may not be so clearly protected.

Further, the reverse may be true and the owner may seek to restrict the architect’s further use of applicable concepts. Therefore, consider addressing this matter (among others) in the contract between owner and architect. (Remember that such agreements will probably not bind third parties.) Consult legal counsel, and then consider language like this:

“Notwithstanding anything to the contrary in this Agreement, [Architect] shall retain all right, title and interest in and to the concepts which are represented and inherent in the Instruments of Service prepared under this Agreement. [Client] hereby agrees that it shall take no action which would in any way operate to restrict or deprive [Architect] of the right to make future use of such concepts and to modify or expand such concepts in the future on other projects or for other clients.”

Never forget that litigation is no fun – win or lose. Therefore, don’t blindly assume that your concepts will be protected by Copyright Law or that you have the right to copy the concepts or documents created by others if you just make minor changes. If you are a “big idea” person, directly address the rights you want to maintain and what you are willing to share.

**This issue of the Practice Management Digest sponsored by**

The AIA Trust offers a free 75-minute webinar for design professionals which covers principles of intellectual property law to provide a working knowledge of copyright law as it affects an architect's work products and use of others' work products. After listening to the webinar in its entirety, AIA members may receive 1.25 HSW learning unit credits. [Visit the AIA Trust webinars page by clicking here](#), and scroll down to the webinar entitled Copy-Catting: Intellectual Property Principles & Rights.



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*Charles R. Heuer, FAIA, Esq. is an architect, attorney and risk management consultant. He runs the LegaLine program for the AIA Trust.*

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# Why maintaining copyright of your architectural work is important

[network.aia.org/practicemanagement/blogs/cheryl-davis/2016/12/14/why-maintaining-copyright-of-your-architectural-work-is-import](https://network.aia.org/practicemanagement/blogs/cheryl-davis/2016/12/14/why-maintaining-copyright-of-your-architectural-work-is-import)

By Cheryl L. Davis

Whenever I make presentations about intellectual property to architects, I am invariably asked: “Why do I care about my copyright? I’m never going to build this building again.” Your ownership of your copyright has more than theoretical legal value. While your copyright is yours to keep or give away as you like, if you don’t understand the value of what you have, you can’t strike the best bargain.



## Copyright owners' rights

As a copyright owner, you have the exclusive right to copy your work. This includes the right to create derivative works based upon your work – which in the design world, can mean a consultant’s ability to use your instruments of service to create their own work product. This is why many consultant agreements provide that an architect must give a consultant a license to use their designs.

It also means that a replacement architect who uses the work of another architect risks being sued for copyright infringement if that initial architect has not given the replacement architect a license; in that case, it is advisable for a replacement architect to get a representation from the Owner that the use is permitted. In addition, a replacement architect should also ask to be indemnified by the Owner if the initial architect disagrees and decides to sue; defending a copyright infringement lawsuit can be a risky and expensive enterprise.

Just like ownership of any other form of property, ownership of a copyright can be transferred. Although the architect generally owns all rights in their designs as a matter of law, many building owners used to assume (incorrectly) that by paying for the architect’s services, the designs, or intellectual property, were automatically transferred to them as well. Fortunately, the AIA’s B101 clearly states (and confirms) that: “[t]he Architect and the Architect’s consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights.”

## Rights for transfer of ownership versus license

It is important to remember that since copyright actually consists of several distinct rights – the right to copy, to authorize copying, or to create derivative work – any one of these rights can be transferred without the others. For example, as the B101 provides, you can give an Owner “a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project”. And, you can do this without permitting the Owner to use those same plans to create an identical building. That is your right as a copyright holder. If, on the other hand, you have transferred your copyright outright (as some Owners demand), you no longer have any control on how the Owner uses your work in the future.

The B101 goes on to state that this license is only granted “provided that the Owner substantially performs its

obligations, including prompt payment of all sums when due, under this Agreement." Here, your ownership of the copyright can be used as leverage to compel the Owner to pay your bills; otherwise, you can terminate the license. If, on the other hand, you transfer ownership of your copyright in your designs immediately to the Owner (as some contracts provide), you no longer have such leverage.

If the Owner terminates the B101 Agreement for convenience, or if you terminate the Agreement, the B101 provides that the Owner must pay you (again, as the copyright holder) a licensing fee for their continued use of your Instruments of Service. Since no licensing fee is specified in the Agreement, you and the Owner should negotiate and agree upon such fee just in case the Agreement is ultimately terminated. This is one of your rights as a copyright holder.

## **Conclusion**

You need not use the AIA forms to protect and leverage your copyrights (although we do recommend them as a general matter). As long as you are aware of your intellectual property rights, you can craft your own license agreements, and even transfer your rights outright if necessary – and for proper compensation.

*Note: Emphasis by italicizing and underlining text is added by article author, not the original source.*

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*Cheryl L. Davis is a litigator who concentrates in intellectual property matters (particularly copyright and trademark cases), employment, and real estate/construction related matters. Menaker & Herrmann LLP is a full-service law firm providing advice and counsel in many types of matters, including Construction Law, Employment Law, Real Estate and Intellectual Property. For more information on the firm, please see the firm's website at [www.mhjur.com](http://www.mhjur.com).*

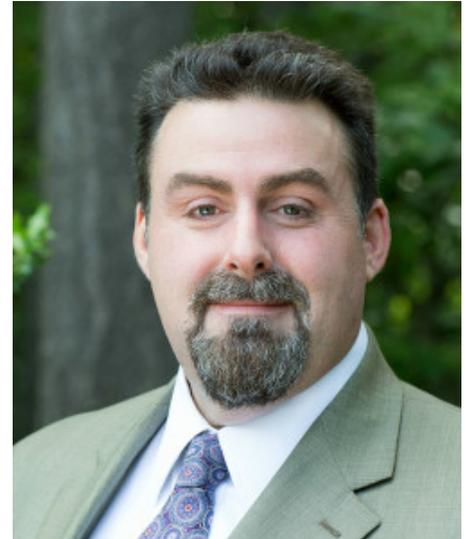
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# Protecting yourself from claims of copyright infringement

[network.aia.org/blogs/david-bowser/2016/12/14/protecting-yourself-from-claims-of-copyright-infringement](https://network.aia.org/blogs/david-bowser/2016/12/14/protecting-yourself-from-claims-of-copyright-infringement)

By David H. Bowser

In 1990, Congress passed the Architectural Works Copyright Protection Act (AWCPA) to protect the intellectual property of architects. In order to minimize the chance of being accused of infringement, there are certain things you should understand about the scope of what is protected and certain steps you can take to protect yourself. While there is no surefire way to prevent claims of infringement, there are ways to limit the chance of such occurring and steps you can take now to help you later.



## Scope of protection

First, you need to understand the scope of protection for architectural works. Under the AWCPA, an architectural work is statutorily defined as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans or drawings,” and “includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features,” such as common windows, doors, and other staple building components.

Accordingly, per the definition, while individual standard features and architectural elements classifiable as ideas or concepts are not themselves copyrightable, an architect’s original combination or arrangement of such elements may be. So, there are two major elements that impact copyright claims: (1) you cannot copyright an idea, only original expressions of that idea; and (2) certain elements of architectural design are so common that they are, by law, unprotected.

To prove copyright infringement, a plaintiff must show: (1) ownership of a valid copyright; and (2) copying by the defendant of the protected elements of the copyrighted work. Copying may be established by showing that the defendant had access to the plaintiff’s work and that the two works are “substantially similar.” To determine substantial similarity, the court engages in a two-part inquiry: the allegedly infringing work must be both objectively similar (the “extrinsic test”) and subjectively similar (the “intrinsic test”) to the copyrighted work. The extrinsic test is an objective measure of whether the two works share clear, specific similarities.

Even with these definitions, it can be confusing as to just which parts of architectural plans are subject to copyright protection. A review of many cases of architectural copyright infringement quickly shows that the level of protection for a functional building, for example, is rather thin. As one court described the problem, “some architectural designs, like that of a single-room log cabin, will consist solely of standard features arranged in standard ways; others, like the Guggenheim, will include standard features, but also present something entirely new. Architecture, in this regard, is like every art form.”

Because only the protected elements of an architectural plan can be compared when deciding whether substantial similarity and therefore copyright infringement has occurred, dissection of individual elements of the work is needed to determine the scope of copyright protection before the work can then be considered as a whole. An expert can be used to help with this dissection.

Unprotected elements of a copyrighted work can include: (1) ideas, as opposed to expression; (2) expressions that are indistinguishable from the underlying ideas; (3) standard or stock elements (called scènes-à-faire); and (4) facts and other public information. A related issue is the merger doctrine, which instructs that some ideas can only be expressed in a limited number of ways and when expression is so limited, idea and expression merge, and expressions merged with ideas cannot be protected lest one author own the idea itself.

Features that are as a practical matter indispensable, or at least standard, in the treatment of a given idea are not protected by copyright. For example, neoclassical government buildings, colonial houses, and modern, high-rise office buildings are all recognized styles from which architects draw. Elements taken from these styles are not protected.

Likewise, certain industry standards or market expectations for homes or commercial buildings and design features used by all architects because of consumer demand also get no protection. Any design elements attributable to building codes, topography, structures that already exist on the construction site or engineering necessity are not protected. Generalized notions of where to place functional elements, how to route the flow of traffic, and methods of construction are unprotected. There is no copyright in a building plan's design parameters either, because constraints placed on an architect related to how the client plans to use the building do not originate with the architect.

In applying the extrinsic test, only those elements of a work that are protectable can be compared. Once the unprotected elements are filtered out and disregarded, the court considers the scope of the copyright. If few similarities remain after the unprotected elements are set aside, the scope of the copyright is thin.

In summary, the level of copyright protection depends upon the subject matter and original creativity contained in the plans. One cannot copyright the "idea" of a kitchen. If it were so, only one architect could design kitchens, which would be ridiculous. Purchasers usually expect a kitchen to have a sink, a window over the sink, and counters and cabinets near the sink. Those are standard client expectations and not protected. To be frank, there are only so many ways to design a two-story, three-bedroom house with all of the code requirements and purchaser expectations. Because none of the elements are protected, copyright protection will extend only to the arrangement and composition. Small differences are usually enough to avoid copyright infringement. As the complexity of the design increases, there should be more and more significant differences between plans to ensure no copyright infringement is occurring.

## **How to protect yourself**

Now that we have a basic understanding of what is protected by copyright, the next question naturally becomes what you can do to minimize the chance of being sued for infringement. Again, there is no silver bullet that will stop all infringement claims from being made. It is an inherent risk associated with being a design professional. As I have repeatedly told clients over the years, any idiot with some paper and enough money to cover the small filing fee can sue you. The mere filing of a suit does not mean the claim is warranted or any good. While the list of potential safeguards is endless, the following are steps you can easily take to lower the likelihood that you will be defending an infringement claim and provide you with the evidence necessary to properly defend against such claim.

1. Do not copy anything. While it may be obvious, the number one thing you can do in your practice to avoid infringement claims is not to copy any prior work. This simple rule can avoid 99% of infringement claims.

2. Avoid non-virgin development. If you are the second or third design professional working on a development, or if your client is the second or third developer on a piece of property, you can be assured that there are disgruntled prior participants who may be inclined to push the boundaries in claiming copyright infringement. You should assume that those prior relationships ended less than amicably. Where there is animosity baked into the project, there is enhanced danger. In addition, designing for a specific site when others have previously done so increases the likelihood that the constraints imposed by the site, the applicable codes, the permitting and industry practices will increase the potential of overlapping design elements, and while these elements are not copied or ultimately copyrightable, they can be used by a disgruntled prior participant to claim infringement. Every infringement suit requires a plaintiff who is ready, willing, and able to take the extraordinary measure of retaining an attorney and filing suit. The easiest thing you can do to avoid this enhanced risk of being accused of infringement by pre-disposed potential plaintiffs is to just avoid such projects. Always ask yourself if the narrow profit margins you charge are worth the substantially increased risk. In short, do not buy other people's problems.
3. Avoid access to prior design work. If there has been any prior design work done for a piece of property or for the client in general, avoid it like the plague. Do not pull prior plans. Tell your client not to send you anything that was done prior to your involvement. If they try to give you something, politely ask what it is, do not look at it, and refuse to accept it or return it unreviewed with a clear statement that it was not reviewed. Limit the information you gather for your work to the greatest extent possible. Document what you saw. You cannot be found to have copied something if you never saw it in the first place.
4. Document right to use. To the extent that you have to review any prior work, you should take the precautionary and extraordinary measure of requiring your client to supply you with documentation of his or her right to use those materials. This may come in the form of prior contracts that give the right to use communications acknowledging such right, or even formal license agreements. It is difficult for a plaintiff to maintain an infringement claim when there is a document granting permission to use the prior materials. If your client cannot or will not provide you with such documentation, that should raise a big red flag.
5. Enhanced warranty and indemnity clauses. To the extent that you need to review any prior work done for a site or project, you should have that information gathered by the client and passed to you. In addition to the documentation for the right to use discussed above, you should negotiate clauses into your agreements with the client that provide enhanced warranties and indemnity. The client should clearly and succinctly warrant that any information provided by the client to the design professional comes with a right to use such materials. This should be partnered with an indemnity clause that requires the client to defend and hold harmless the design professional from any claims of infringement associated with having or using the prior work. Ensure that the party that makes such promises is actually financially able to fulfill those promises. A promise of defense and indemnity from a single-asset entity with no real assets or money is basically worthless. You may want to designate another entity to make those promises (and have them sign) or require a personal guaranty from an individual (and have them sign as an individual) with the assets to meet those obligations.
6. Document your own work. Lastly, you should document your own work. Copyright law recognizes the Independent Creation Doctrine. While it is sometimes called a defense, it is actually a denial of any copying. In a nutshell, you show that you did not copy; you in fact independently created your own work product. To make this showing, you should be able to "show your work," just like your math teachers wanted you to do in school. You should establish a thorough internal records requirement wherein all of the items that were reviewed, all sketches, all plans and revisions to plans, all meeting notes, and all communications are documented and saved in a logical file system. You and your employees should track their time and briefly describe the tasks and activities performed, even where you are working on a flat fee. Your records should be sufficiently detailed that you can easily and clearly show any third-party that this is how you independently produced your own work product. In this digital age, there is no real reason not to thoroughly document your work.

## Conclusion

There is no magic step you can take to avoid an infringement claim. It is just a reality that comes with being a design professional. You can take steps to minimize the risk. You can take steps that maximize your ability to defend yourself if an infringement claim is made. Considering that infringement claims are extremely expensive to defend, this is just one of those situations where an ounce of prevention is all that is available, as there is no cure.

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*David H. Bowser is a design professionals/construction lawyer at Jordan Ramis PC. Call him at (503) 598-7070.*

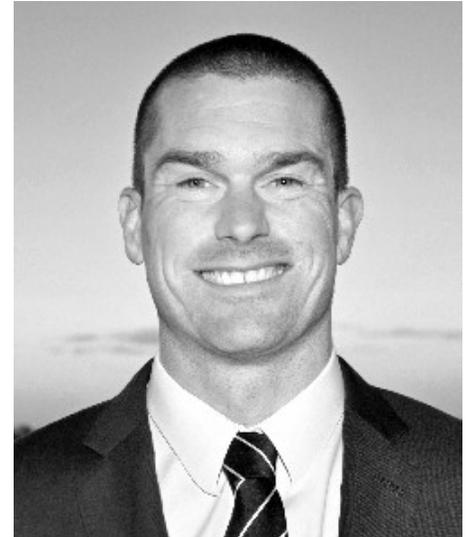
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# Indispensible tools – How trademarks build better brands

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By Andrew Smith

In a crowded and competitive marketplace, it is now more important than ever for architecture businesses to deliver a consistent and integrated brand message. Trademarks, when coupled with recent advances in marketing and mobile technology, offer a practical and low cost tool for professionals in the field of architecture to protect their brand, capitalize on good will, distinguish themselves from their competitors and expand into new markets. The following contains a user-friendly overview on trademarks that outlines the benefits associated with obtaining a federal registration with the United States Patent and Trademark Office (USPTO).



## Trademarks 101

First, what is a trademark? By definition, a trademark is any word, name, symbol or device used to identify and distinguish goods or services, including a unique product or service, from those manufactured, sold or rendered by others, and to indicate the source of those goods or services. While a trademark (referred to as a “service mark” when used with services) typically takes the form of a combination of words and/or symbols, the definition is expansive in nature and can include, for example, colors, scents, sounds, motions and shapes. Simply put, a trademark is anything that conveys to consumers the source of your goods or services and serves to distinguish them from others in the marketplace.

Although trademarks come in a variety of forms, not all trademarks are created equal; strong marks have a greater scope of protection than weak marks. The strength attributable to a trademark is best visualized as a sliding scale with strong marks being fanciful (KODAK for film) and arbitrary (APPLE for computers) on one side and descriptive/laudatory (BEST ARCHITECTURE SERVICES) and generic marks (APPLE for apples) on the other. The investment you make in using and protecting your mark can also contribute to its strength. For example, such well known marks as Google®, Coca-Cola® and Nike® are strong marks not only because the nature of the mark, but also because of the extensive resources that each company has invested into the marketing, advertisement and enforcement of their trademark rights.

## Acquiring Trademark Rights

There are two routes by which a party can obtain enforceable trademark rights in the United States. First, a party acquires “common law rights” simply by using a mark in conjunction with goods and/or services in the marketplace. The good news is that no fee or formal registration is required to obtain enforceable common law trademark rights. However, the bad news is that trademark rights acquired under common law are limited to the geographic areas in which the business has distributed goods or rendered services under a particular mark. As a consequence, an architecture businesses relying on common law rights may not be able to enforce its trademark against subsequent users outside its zone of actual use and may be prohibited from expanding into new markets to the extent a similar mark is already being used in that area.

The second, and far more preferable, route to obtain rights in a mark or design is to file a federal trademark application with the USPTO. A federal trademark registration offers a low cost (filing fees for applications start as low as \$225/class) and effective means for businesses to protect their brand. The following is a non-exhaustive list of the benefits provided by federal registration:

**Nationwide Rights.** A federal registration grants a trademark holder the presumptive right to use and enforce its mark anywhere in the United States for the designated goods and/or services as of the filing date of the application.

**Constructive Notice.** Federal registrations are publically available on the USPTO database and provide constructive notice of ownership in a mark and alerts potential infringers of the liability associated with using the same or similar mark.

**Federal Jurisdiction.** An owner of a federal registration can enforce its rights in federal court where judges are often more familiar with trademark matters and, if successful, may recover (1) any damages sustained, (2) the infringer's profits and (3) the costs of the action.

**Transferable Property.** A federal registration is a tangible asset that may be bought, sold, licensed, used as collateral and shown to prospective investors.

**Incontestability Status.** A federal trademark becomes "incontestable" upon reaching its fifth anniversary of registration and conclusively establishes ownership in the name of the trademark holder. Therefore, an entity with prior common law rights will be barred from challenging an incontestable federal registration based on its prior usage, and its business will be frozen in the geographic area of use as of filing date of the underlying application.

The ability to obtain a federal trademark registration will depend on a number of factors, such as the number and nature of similar marks already on the USPTO register, and those interested should contact an attorney familiar with trademark law to determine whether federal protection is available.

As the architecture industry continues to expand, the most successful professionals will be those that adopt a distinctive mark for their services and take a proactive approach to protecting their brand. Federal registration offers immense benefits and a cost effective means to capitalize on consumer good will and should be integrated into any business looking to expand into new markets, whether across the street or across the country.

*This article and its contents are for informational purposes only and do not constitute legal or professional advice.*

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*Andrew Smith is an attorney at Holley & Menker, P.A., a boutique firm specializing in all aspects of trademark representation including counseling, clearance, prosecution and enforcement.*

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