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Using Copyright Protection in Architectural Works to Police Unauthorized Photographs

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Can I stop photographers from taking, displaying, and selling photographs of my building? The answer is, like the answer to so many other questions, maybe.

This issue often arises in the context of photographers who license their photographs for a fee through online stock image sites. The photographs are taken without authorization and present a building (and potentially the owner or occupants) in a negative light or disclose features of the building that the owner or architect would prefer remain visible only to those who see the them first hand.

If the area of concern is a building's interior, the first step in limiting unauthorized photographs is to expressly prohibit photography. If you can show proof of such policies, most websites will remove the photographs without further question. But for various reasons, you may not have an express policy posted in your building. If that is the case, another option may be to enforce your intellectual property rights in the building itself.

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, including architectural works. 17 U.S.C. § 102(a)(8). An owner of a copyright in an architectural work may prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is not located in or ordinarily visible from a public place. *See id*. § 120(a). Thus, if a building embodying a design to which you own the copyright is the subject of someone else's photograph, you can potentially stop the display and distribution of that photograph.

Whether you own the relevant copyright should not be difficult to determine. It either belongs to the creator of the building's design (*i.e.*, the architect) or, by agreement, to someone else (perhaps the building's owner). Whether your building is a building for purposes of the Copyright Act is slightly more complicated. According to legislative history, the term "buildings" includes "habitable structures such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions." H.R. Rep. No. 101-735, 101st Cong., 2d Sess. 20 (1990).

Assuming your structure is a "building," the final question is whether it is located in or ordinarily

visible from a public place. Legislative history does not provide guidance on the interpretation of this phrase, presumably because the legislature believed public place would be understood according to its plain meaning—*i.e.*, “any location that the local, state, or national government maintains for the use of the public, such as a highway, park, or public building.” Black’s Law Dictionary (9th ed. 2009). Courts have likewise been silent on the issue.

Nevertheless, stock image sites are reluctant to simply accept a presumption. Their business depends on their users being able to take and license photographs, and, for them, a more expansive view of public place is preferable. In our experience, many sites will argue that any property open to the public is a public place, regardless of whether the property is privately owned. This interpretation, however, would render buildings like churches and museums not protectable despite the clear intent that such structures be eligible for protection.

Moreover, other areas of the law support the proposition that opening private property to the public does not affect a property’s private nature. For example, a person granted a license to enter a property is still liable for trespass if she exceeds the scope of the license. Similarly, a property owner does not surrender her right to exclude simply by allowing invitees to enter her property. In addressing the nature of private property open to the public, the United States Supreme Court stated the following in the context of First Amendment public forum analysis: “Property does not lose its private character merely because the public is generally invited to use it . . . the essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.” *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

In light of the foregoing, the logical conclusion is that an otherwise private place open to the public is still private and not a “public place” under the Copyright Act. Applying this conclusion to 17 U.S.C. § 102(a), interior spaces of buildings located on private property should be entitled to protection, because they are not located in or ordinarily visible from a public place. Whether a building’s exterior is protectable, however, would depend on whether the building is visible from a public place, such as a road or sidewalk. Assuming the building is not visible from a public place, your copyright entitles you to stop others from taking, displaying, and selling photographs of the building.

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