

An architectural cutaway illustration of a house, showing the interior structure, including a staircase and various rooms. The drawing is rendered in a light brown, wireframe style. Overlaid on the cutaway are several technical architectural drawings, including floor plans and elevations, which are also in a light brown, wireframe style. The overall composition is a blend of artistic rendering and technical drawing.

# HOUSE PLANS AND COPYRIGHT

## Sometimes it doesn't pay to “shop around”

By Steven Z. Raber, Fillmore Riley LLP

The Ecklands, an Ontario couple, wanted to build a new house. They had a sense of what they wanted in their new home and looked for a builder. That led them to Oakcraft, a builder of custom homes in their area.

Oakcraft's owner met with the Ecklands and determined their wish list of features. He conceptualized a floor plan incorporating their wishes following visits to custom homes Oakcraft had built for others using plans he had developed over the years.

The Ecklands suggested some changes to the layout and Oakcraft obliged. Ultimately, the Ecklands requested a house plan. Once again, Oakcraft obliged. Finally, Oakcraft delivered to the Ecklands a New Home Proposal that outlined the construction contract and provided the specifications and features of the house under discussion.

The next thing Oakcraft's owner heard was that the Ecklands had consulted other custom home builders and that one of those others, Toscana, sold them a lot and built them a custom house. Oakcraft sued the Ecklands and Toscana for copyright infringement, alleging that the home Toscana

built infringed Oakcraft's copyright in the plans Oakcraft had given the Ecklands.

The case went to trial in Ottawa. The judge considered the provisions of the *Copyright Act* and confirmed that copyright may exist in house plans. The court found that even though Oakcraft had started with plans used in earlier builds, the plans given to the Ecklands involved the exercise of skill and judgment and that Oakcraft's owner had created a unique plan that embodied the vision. As such, the court found that the Oakcraft plan was “an original work deserving of copyright protection.”

The defendants raised several other issues intended to defeat Oakcraft's claim. First, they noted that Oakcraft had enlisted a draftsman to reduce the plans to a form acceptable to the planning authorities. The judge said that step was irrelevant to the ownership of the copyright. Second, the defendants pointed out that Oakcraft's plans were the work of Oakcraft's owner and not of Oakcraft. The judge dismissed that argument on the basis that senior officers of corporations are considered employees of those corporations. Under the *Copyright Act*, where the author of a work creates the

**Under the *Copyright Act*, where the author of a work creates the work in the course of his or her employment, the employer is the owner unless there is an agreement to the contrary.**

work in the course of his or her employment, the employer is the owner unless there is an agreement to the contrary. That said, Oakcraft owned the copyright.

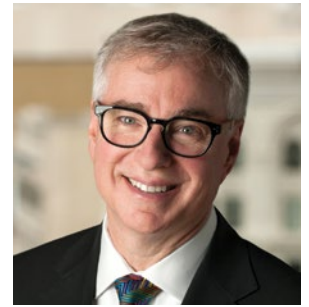
The defendants also relied on Oakcraft’s failure to claim copyright by marking its ownership on the plans. They lost on that point, too, as neither an intention to infringe or even knowledge of copyright was found to be a relevant consideration. The judge said that the Ecklands knew the plan originated with Oakcraft and that Toscana had a duty to enquire. Toscana was found to have failed to fulfil its duty.

Finally, the court had to decide if the defendants had indeed infringed the copyright. The court found that the defendants had substantially copied Oakcraft’s plan. The judge found the Ecklands and Toscana jointly and severally liable to Oakcraft for copyright infringement and ordered that they pay damages and costs.

Although a consumer might save some money by shopping around, it is clear that one cannot shop around copyrighted

material with impunity. Moreover, if a contractor is presented with a plan or other material and a request to copy or otherwise make a manifestation of it (like building a house), the contractor cannot be wilfully blind and fail to make certain the material may be copied. Failure to ascertain the ownership of copyright can turn a project into an otherwise avoidable legal money pit. ☹

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