

FAQs – Copyright and designers

These FAQs are intended for property owners who are considering engaging an architect or other designer to preparing a design, plans or drawings for their development project, or for those owner-clients who have already engaged an architect or other designer.

Introduction to Copyright and Moral Rights

The *Copyright Act* is a piece of national legislation that protects and controls the copyright and rights of the creator (known as moral rights). This Act automatically gives rights to every ‘author’ over the ‘artistic work’ they create (artistic work is a term used in the Act – there doesn’t need to be any assessment of artistic merit in the work, only that a person creates something original). Under the Act, an author can be a writer, artist, performer or film maker, as well as an architect or other designer. Any design an architect imagines and creates, is an ‘artistic work’ that will be protected by copyright under the Act. Because an architect is also the author of their work, the moral rights provisions of the Act also apply to the architect, so that the architect has a legal right to be acknowledged as the original creator of their design in the work. There are legal penalties for breaching a creator’s copyright and for failing to respect their moral rights as the author. There is also the potential for a court to award damages and costs against a person who breaches another person’s copyright.

Can I copy a design I have seen elsewhere and ask an architect or draughtsperson to re-draw it?

No. This would in almost all cases be a breach of the copyright of the original architect (designer). Why merely copy a design when you could ask the architect to apply their design skill to the particular qualities, context, problems and advantages of your site and your project needs?

When I engage an architect to prepare a design for me, do I own the copyright?

Not automatically. The default position under the national Copyright Act says that typically whoever conceives of and creates the design, that person owns the copyright in the design. In nearly all cases, the architect will have combined your ideas with others and taken them to the stage where they amount to an ‘artistic work’ that is protect under the Copyright Act. You should also look at the specific terms of your client-architect agreement which might deal with copyright ownership.

An author of the ‘artistic work’ (the architect or designer in this case) will own the copyright, but the architect or designer as author can agree in writing to transfer the copyright to you or a third person, including a company.

When I engage an architect, what rights do I have to reproduce the design, particularly in built form?

It depends. You do have, at law, an express or implied copyright licence to build the building, once, on your land for which it was designed. However, you should also look at the specific terms of your client-architect agreement which might deal with copyright ownership and replace or modify the copyright licence.

If the commission is for partial services, such as a feasibility, or an indicative design (for example, a scheme to show a purchaser what could be built on the land) where it is not the intention that the design itself, should be built, there might not be an implied licence to build.

Can I rebuild or repair a building without breaching the architect’s copyright?

Yes. Section 73 of the *Copyright Act* permits the reconstruction of the building if the original construction was not in breach of copyright.

Can I extend a building in a way that repeats the original architect's design, or substantial parts of it, without breaching copyright?

It depends. You should look at the terms of the express or implied agreement about copyright between you and the original architect. If this is what was contemplated when the architect was first engaged, and it was clearly understood that the architect would be engaged for an initial stage, but not necessarily be engaged for expansion or of later stages, such as further wings of a building, there is probably an implied licence to use the architect's copyright to the extent that it is necessary to ensure consistency. In most other cases there would not be such a licence or permission. Ideally, this would be documented in the client-architect agreement, so the terms of the client-architect agreement should be the first reference point.

In the above we were only referring to copyright. If you are intending to extend or alter a building, whether as the original client or as a subsequent owner, you should also be aware that the original architect may well have moral rights which, under the Copyright Act, also need to be respected. In particular, altering a building is likely to infringe the moral rights of the original architect unless that architect has:

- been given notice of the proposed changes
- been given the opportunity to make a record of the work before it is altered
- been consulted in good faith about the proposed works, or
- given a written consent to the original owner which allows you to alter or extend the building without consult with the original architect.

Am I allowed to have another architect finish the work if the first architect resigns?

Usually yes, but every case will be different. You should consider the terms of the client-architect agreement and if in doubt seek legal advice.

Am I allowed to have another architect finish the design work if I terminate the first architect's commission?

Usually yes, so long as you have properly terminated the client-architect agreement in accordance with its terms. For example, the transfer of the copyright licence to the client is very likely to be conditional on payment of all outstanding fees. You should consider the terms of the client-architect agreement and seek legal advice.

My architect did not say that their design is copyright. There is nothing on the architect's documents that indicates that the architect has copyright in them. Can I use the plans how I want?

No. In Australia there is no legal requirement for an architect (as a creator of a work) to assert copyright or to include a copyright notice on the designs, drawings, plans, renderings. (Note: Internet material originating in the USA can mislead on this point, because the law there is different.) Australian law protects the creator's work by automatically applying copyright to that work the moment it is created. In almost all cases, you will know who the architect or designer of your designs, drawings, plans, and renderings are and so you should approach them, or their firm, to ask for their permission to use these works for any other purpose that is not the original purpose in the brief or client-architect agreement they were created for.

Bear in mind that an architect's designs not only have hard work and skill put into them, but that the design, plans, drawings and renderings themselves are also commercially valuable to the architect and to a third party who might intend to use them to develop a project.

To what extent does a building plan need to be changed/customised to no longer be copyright to a particular architect or designer? What type of changes must they be? Can it be simple changes, or does it require a combination of changes?

Generally, merely making a few changes to an original design or plan, but leaving it 'substantially similar' will not avoid the original designer's copyright. The Copyright Act protects the expression of the ideas as a plan or design, not the ideas themselves. If you are using a 'substantial' part of a design, plan, drawing or rendering, it is likely you are using the *expression* of the ideas in the original work – which is copyright to the original author (architect or designer). If you don't have their permission to use, alter, delete or add to for a different purpose any substantial part of their design, you are potentially breaching their copyright.

If you want to use a design, plan, drawing created by an architect, you should first get the architect's permission to do so, preferably in writing. Even if you only want to make a small change to it, you should get their permission. Of course, the architect has a right to protect the integrity of the original design, plan or drawing, so they would be within their rights to not give permission to a client or third party, depending on what the proposed use or change is, or, according to the amount you would pay for their permission in exchange for the economic value of their work.

The Copyright Act does provide for various exceptions to getting permission to use an original author's copyright, such as for repair or rebuilding after a disaster, but it is unlikely that any of these apply in the case of a third party using an architect's copyright in their design, plans, drawings or renderings.

How long does an architect's copyright in their design exist for?

Copyright continues to protect an architect's work for 70 years from the end (i.e., after 31 December) of the year in which the architect died, or 70 years from the end of the year in which the work was first 'published' to the public.

While theoretically, a design could remain 'confidential' and not 'published' by the architect, so that the architect's life +70 years is the correct copyright period to apply. However, as soon as it was used or shown to anyone to be built, it was 'published' as expressed in the drawings for this purpose.

If the design was created by an architect or designer working for an architectural practice or other firm, it is almost certain that copyright was transferred to the entity that operated that firm. A lawyer can help you determine whether an old design is still within the copyright protection period, so you should get legal advice about this.

If I approach an architect to take over from the original architect, what copyright or moral rights issues are relevant to protect the architect's rights?

Good practice usually involves the following, although this not to be taken to be legal advice in individual cases. If there is any doubt about whether the client or the original architect owns the copyright, legal advice should be obtained.

- If the client owns copyright, the client must license the incoming architect to use the copyright work as expressed in the drawings, or partially completed work, if applicable.

While this may be implied when you engage the incoming architect or designer, it is best to clearly express this licence rights in the new client-architect agreement. The client must also make appropriate arrangements for moral rights attribution of the original architect in relation to the drawings and the project, unless the original architect has consented in writing to effectively waive their moral rights.

- If it is beyond doubt that the previous architect or designer owns copyright, the client must obtain to obtain the copyright or licences to use the copyright plans and design in order to pass a licence to the new architect or designer. The client must also make appropriate arrangements for moral rights attribution of the previous architect in relation to the drawings and the project, unless the original architect has consented in writing to moral rights infringement. Similarly, the client must also make appropriate arrangements for moral rights attribution of the previous architect in relation to the drawings and the project, unless the original architect has consented in writing to moral rights infringement.
- If the previous architect or designer refuses to grant copyright permission, or transfer copyright, legal advice should be obtained.