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# Architectural Copyright: Recent Developments

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## Architectural copyright: recent developments

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This article traces the development of American copyright law as it applies to architectural works from its earliest foundations in the United States Constitution until the enactment of the Architectural Works Copyright Protection Act in 1990. By focusing on the outcomes of the latest legislation through recent case law affecting residential design, the authors evaluate the effectiveness of the protection and illustrate some unintended consequences. In addition, they discuss architectural originality and its relationship to legal protection in the context of individual design freedom.

The concept of originality in architectural design creates some interesting issues for the profession. While architects regularly struggle with creating new, innovative design solutions, they often need to use traditional and/or conventional architectural configurations. Clients' requirements and expectations often influence the degree of originality in a project, which may be further influenced by budgetary constraints, site limitations, available construction materials, zoning ordinances, building codes and design review boards. The issue of originality provides even more challenges when considered from a legal perspective, particularly in light of the relatively recent enactment in the United States of the Architectural Works Copyright Protection Act 1990 (the AWCP Act) (United States Congress, 1990a). This legislation was enacted to bring U.S. copyright law into adherence with the Berne Convention, an international treaty dealing with intellectual property, and was drafted to provide greater protection for architects in retaining ownership of their intellectual property. We believe that the Act is far from perfect and may have resulted in several unexpected outcomes that do not favour the architect.

This article will focus on residential architecture, which has generated a noticeable amount of litigation since the passage of the AWCP Act. By reference to substantive issues raised during recent cases, we will also evaluate the usefulness of the legislation to the architectural profession, and will discuss the concept of architectural originality, the need for its protection, and its ultimate impact on the professional and the physical environment.

### Protection before the 1990 AWCP Act

The origins of copyright protection for architectural designs have foundations in the United States Constitution (Article I) and the original Federal Copyright Acts of 1790 and 1909. Before the AWCP Act was passed, most contemporary architectural works in the U.S. derived copyright protection, if any, from the 1976 Copyright Act. Case law based upon the 1976 Act indicates that protection was quite limited, due largely to the omission of either architectural plans or designs – both deemed ‘useful articles’ – which meant that virtually no building (beyond a few monuments and decorative elements) was covered (Demetriadis v. Kaufmann, 1988). The Act afforded some protection to architectural drawings, which

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*‘We believe that the Act is far from perfect and may have resulted in several unexpected outcomes that do not favour the architect’*

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were conceived as similar to the work of an author or artist, and which were therefore capable of some coverage of their intellectual merit. Courts, however, tended to distinguish between the drawings themselves and the ideas they encapsulated so that, as long as only the building and not the drawings that were created to incorporate them were copied, no liability could ensue (Imperial Home v. Lamont, 1972).

Copyright protection for architectural works came

under review when the United States joined the Berne Convention in 1989, a move precipitated by the huge financial losses suffered by U.S. copyright owners to overseas countries where no bilateral copyright agreement with America existed. To understand the 1990 amendments to the Copyright Act, some background on the Berne Convention will be helpful. By the time of the first Berne Treaty in 1886, no member country provided specific statutory protection for architectural works, and the issue of copyright protection for architecture was first addressed in the 1986 Paris Conference of the Berne Convention (Ricketson, 1987). Some delegates opposed expansion of coverage for architects for fear that even the most common structures would be entitled to copyright protection.

The national laws of Berne member countries are not uniform with regard to architecture, and foreign statutes have failed to provide much guidance in determining whether an individual work merited copyright protection (Pinner, 1960). Consequently, the Berne member countries have taken a variety of approaches to copyright protection for architectural works (Hewett, 1985).

In the U.S. Congressional hearings on adherence to the Berne Convention, it became obvious that the 'problem' in the American approach to copyright protection for architecture had never been much more than a peripheral concern for legislators (United States Copyright Office, 1989). Moreover, American architects did not unite behind the principle of expanded protection for architecture (United States Congress, 1988).

During the 1988 Berne Convention hearings, the American Institute of Architects initially supported a bill that would have expanded copyright protection for architectural structures. Later, however, the organization dropped its support for the provision because the official position was not shared by all of

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its members (United States Copyright Office, 1989). The hearings before the U.S. House of Representatives on the AWCP Act show that prominent architects expressed apprehension that copyright protection might affect their ability to use elements from the work of other architects: 'Our concern is that the well-accepted traditions of reference and limited borrowing of elements and details should be suppressed' (United States Congress, 1990b). Nevertheless, Congress determined that the Copyright Act should be modified to align with the more restrictive provisions of the European treaty as expressed in the section concerning Protection of Literary and Artistic Works. The Berne treaty is recognized by many nations as creating the appropriate standards for copyright protection, which are held as natural rights rather than solely

statutory obligations. Accordingly, Congress passed the AWCP Act in 1990, creating extensive new protection for architects and their work in the United States.

#### **A review of the AWCP Act, 1990**

The new legislation expands the copyright protection afforded to architectural works, defined as 'the design of a building as embodied in any tangible medium of expression, including a building, architectural plans and drawings'. It also extends much further into the realm of the protection of ideas and originality than previous Acts, and makes U.S. law more compatible with over 24 other countries regarding copyright issues. However, the AWCP Act has not existed without criticism, and a review of literature generated in the aftermath of the Act's creation indicates a number of perceived problems (Hixon, 1995; Hancks, 1996; Newsam, 1997; Pollack, 1992; Ray, 1995; Thiel, 1996).

For example, the AWCP Act covers those entities defined as 'architectural works', including both habitable and non-habitable structures (such as churches and gazebos), but specifically excludes other forms of three-dimensional structures such as clover leaves, pedestrian walkways and bridges (Pollack, 1992). Given the recent surge of design excellence brought to the last category by such luminaries as the Spanish architect/engineer Santiago Calatrava, the anomalies of the arbitrary limitations of protection are evident. It is not clear whether less easily defined structures that could potentially imbue architectural excellence and which certainly have a demonstrable physical presence, such as parking garages, grain silos or even free-standing walls, are afforded copyright protection. Thus, while some structures may have no protection, others, which may already have protection as sculptural works or 'artistic statements', may arguably be afforded dual coverage by the provisions of the AWCP Act, which overlays existing legislation in this field.

Similarly, criticism has been directed towards the two-part test for copyrightability under the AWCP Act, which seeks, first, to establish whether any original design elements exist and, second, whether these elements are functionally required (Scholl, 1992). The critics claim that the test is very difficult to administer without a strictly limited interpretation of the terms, and therefore that it may ultimately provide little more protection than the 1976 Act (Scalione, 1992; Scholl, 1992; Winnick, 1992).

There is also the potential for confusion as to the legitimate owner of copyright – the architect, the architectural practice, the party commissioning the work or the builder of the work – and the degree to which originality, and therefore protection, can be attributed to individual structures (Pollack, 1992).

The AWCP Act states that copyrightable material must be 'an original work of authorship', although quality, aesthetic merit, ingenuity or uniqueness are not necessarily factors in its determination. It is important that such work contains a minimum amount of original creative expression and that

protection is not given to standard designs such as common architectural features, nor any functionally required elements such as structural walls, doors or windows. Arguably, standard configurations found in small houses and apartments, particularly bathrooms or kitchens, are not protected. The distinction between original creation and functional necessity may become difficult, particularly in smaller design projects where the range of design elements and variables is more limited.

Since the AWCP Act has been in effect for almost a decade, it is time to evaluate its overall impact on architects, builders and others who are potential plaintiffs or defendants in architectural works copyright litigation. The next section of the paper will therefore address several major issues arising from disputes concerning copyright protection that have recently emerged.

### The Act in operation: unintended drawbacks

While it is reasonable to conclude that the AWCP Act is an improvement on the previous protection afforded to architects in protecting not just their drawings but also their ideas, several recent disputes have illuminated some drawbacks, or unintended consequences, of the Act's provisions. The authors have identified five specific issues for discussion:

#### 1. Who has the right to sue?

An initial reading of the Act would suggest that the protection of copyright is afforded to the creator of the idea – logically the architect. However, in most cases involving architectural works, the plaintiff has not been the designer, but a secondary party to whom copyright ownership had been assigned, typically a developer or builder. Most of the defendants named in suits alleging copyright infringement involving architectural works are also builders – in fact, the plaintiff's competitors. This raises interesting issues regarding the original purpose of the legislation to protect creativity when that creative idea has become a commodity to be sold or transferred to a third party for their ownership and use.

#### 2. How can damages be apportioned fairly for copyright violation?

The problem of providing a remedy for infringement has led to some interesting, and perhaps unforeseen developments. While damages in several recent cases have been determined based upon the architect's loss of profit according to his/her fee scale, there have also been some attempts to push the concept of damages beyond simply the cost of the design work to the cost of the actual property and even to the potential income derived from that property over its useful life. In a recent case (settled before trial), the plaintiff, a contractor/developer who claimed to own the copyright of an unremarkable group of apartment buildings, sued the owner of a similar building some distance away. The claim extended beyond the loss of fees to design the project, and even beyond the loss of profit the contractor claimed for not building the second project. It included not only the cost of the buildings themselves but, by a remarkable stretch of logic, the rental income of the

alleged infringing apartment for a period of 40 years – a total claim exceeding the modest architectural services fee by hundreds of thousands of dollars. While the immediate remedy provided by the Act to architects in securing reasonable fees for their legitimate work is useful, the extent to which claims can be made for loss of profit is still unclear, and may lead to further enormously inflated claims until some clarity is brought to the situation.

#### 3. To what extent does copyright protection address standard features, functional elements and basic design ideas?

Determining what constitutes a protectable architectural structure is a variation of the familiar and troublesome question of what constitutes a 'work of art'. This is a major issue for consideration,

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particularly with regard to residential designs, which are often dictated by numerous standard, functional, conventional and/or code-required design features.

Clearly, the U.S. Copyright Act does not protect all architectural works (Scalione, 1992). In fact, the Act specifically states that it does not protect standard configurations of spaces or individual standard features, covering only the artistic (non-standard) features and/or designs of buildings. Unfortunately, determining what is a 'standard' feature or a 'non-standard' design element is an ad hoc and subjective exercise.

Architectural creativity and progress, you could argue, are best served by making standard individual elements and configurations freely available for use by others. Hence, an architect's work should not encompass the exclusive right to use basic design elements such as skylights, courtyards, domes, columns, gables, and other basic shapes (Shipley, 1986). Copyright protection for basic architectural shapes and configurations would therefore inhibit or preclude architects from drawing upon common sources, borrowing ideas, and concepts, or from imitating the styles of their contemporaries and predecessors (Brainard, 1984). Accordingly, architects need some latitude so that they can modify and perhaps improve upon basic architectural styles, ideas, and concepts without the threat of infringement actions associated with every building they design. Allowing architects to use copyright law to empower themselves to prohibit subsequent use of basic shapes and layouts would be problematic because it would create a monopoly on the standard features encompassed in a particular building (Scholl, 1992).

Similarly, copyright protection does not extend to functional items in architectural works. The legislative history of the AWCP Act explains that the

Act does not protect architectural design elements that are determined by function (United States Congress, 1990c). Patent law, not copyright law, is designed to prevent the copying and use of utilitarian works such as architectural drawings and buildings, and courts of law are mindful to avoid interpreting the Copyright Act so as to create an illegitimate patent-type claim (Buecher, 1990; Copyright Office Report, 1989; Demetriades v. Kaufmann, 1988).

According to U.S. House of Representatives Report No. 101-735 (United States Congress, 1990c), functionality cannot be ignored in evaluating the copyrightability or scope of protection for architectural work. Even if the Copyright Office issues a certificate of registration, copyright protection should be denied for all functionally

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determined design elements. The report states: ‘Under such circumstances, the Copyright Office should issue a certificate of registration, letting the courts determine the scope of protection’. This raises an important issue, of course, especially in residential buildings, where it could be argued that the majority of elements are functionally determined (Hewett, 1985).

Elements such as roofs, gables and windows are likely to be dictated by the structure’s primary function – providing shelter and light to the building’s occupants. Such features cannot exist independently from their utilitarian aspects as independent works of art and, therefore, should not be entitled to copyright protection.

Most house designs – especially small or low budget designs – are influenced by substantial functional considerations that may contain few non-functional architectural design elements that would qualify for copyright protection. For example, the neo-Shingle Style houses designed by the architect, Robert A. M. Stern, which incorporate turrets and other fanciful embellishments, are likely to merit copyright protection, whereas the roof of a simple, traditional Cape Cod-style house should not qualify (Roth, 1979).

The functionality test has been used to preclude copyright protection for numerous useful articles in the design realm. For example, a light fixture which had a ‘pleasing shape’ and was designed for use for outside lighting was not afforded copyright protection, because it was judged that no artistic feature was separable or distinguishable from the article’s useful form (Esquire, Inc. v. Ringer, 1978). Similarly, the idea of a tower with an enclosed

structure on top was equally uncopyrightable (Wickham v. Knoxville, 1983).

With regard to basic design ideas incorporated into residential designs, copyright protection extends only to the particular expression of an idea, never to the idea itself (Reyher v. Children’s Television, 1976). Copyright protection, unlike a patent, gives no exclusive right to the art itself (Mazer v. Stein, 1954). This idea-expression distinction is necessarily subjective, and where idea and expression are indistinguishable, copyright law will protect only against identical copying (Peter Pan v. Martin Weiner, 1960; Sid & Marty Krofft v. McDonalds, 1977).

An example of this problem can be found in *Hubert Rosenthal Jewelry v. Kalpakian* (1971). In that case, plaintiff charged the defendants with copyright infringement of a pin in the shape of a bee encrusted with jewels. While the case did not involve architectural works, it is instructive with regard to the ideal expression dichotomy. The court explained:

*We think the production of jeweled bee pins is a larger private preserve than Congress intended to be set aside in the public market without a patent. A jeweled bee pin is therefore an ‘idea’ the defendants were free to copy. Plaintiff seems to agree, for it disavows any claim that defendants cannot manufacture and sell jeweled bee pins and concedes that only plaintiff’s particular design or ‘expression’ of the jeweled bee pin ‘idea’ is protected under its copyright. The difficulty, as we have noted, is that on this record the ‘idea’ and its ‘expression’ appear to be indistinguishable.*

In other words, when the ‘idea’ and its ‘expression’ are inseparable, copying the ‘expression’ will not be barred, since protecting the ‘expression’ in such circumstances would confirm a monopoly of the ‘idea’ upon the copyright owner free of the conditions and limitations imposed by patent law.

Similarly, in the context of literary works, courts have adopted a *scènes à faire* approach, these being stock literary devices which are not protectable by copyright (Reyher v. Children’s Television, 1976). In the context of architecture, stock design elements, similar to stock literary devices, are not copyrightable. In other words, similarity of expression, which necessarily results from the fact that the common idea is only capable of expression in more or less stereotypical forms, precludes copyright protection.

Cases such as *Rosenthal Jewelry* indicate that copyrightability should be approached as a sliding scale or spectrum (Concrete Mach. v. Classic Lawn, 1988). At one end of the spectrum lie the ‘strongest’ works in which complex or fanciful artistic expressions predominate. Such works are entirely products of the author’s creativity, rather than a collection of similar themes (Sid & Marty Krofft v. McDonalds, 1977). At the opposite end of the spectrum is the bee pin which was the subject work in *Rosenthal Jewelry*. In the *Krofft* case, the court explained: ‘The scope of copyright protection increases with the extent expression differs from the idea’. Some residential works will certainly fall towards the noncopyrightable end of the spectrum.

In many residential designs, bedrooms, kitchens, bathrooms, living rooms, dining rooms, deck/patios, windows, doors, stairs or gables, are no more than standard architectural features. Thus, the entire layout of some small houses will be the architectural equivalent of *scènes à faire* – and may therefore receive copyright protection only with proof of *identical copying* (Coates-Freeman v. Polaroid, 1992).

*Howard v. Sterchi* (1992), is a case in point. In that case, the designer of a country-style log home brought suit against a company in the business of manufacturing and erecting log homes, alleging copyright infringement. On appeal, the plaintiff asserted that the district court erred in holding that there was no infringement. The federal Court of Appeals held that the plaintiff failed to establish copyright infringement of the floor plan. The court determined that, although the plaintiff proved that the defendant had access to the designs, the copyright infringement claim failed because the defendant's plans were not substantially similar to the plaintiff's. In determining whether the plans were substantially similar, the district court evaluated points of similarity and points of dissimilarity between the two plans. After this analysis, the court held that, although the floor plans were visually similar and the layout was generally the same, the dissimilarities were significant, particularly along the rooflines, the bay window and the dimensions. The court noted that, in country-style frame houses and in houses built with logs which dictate that only square angles be used, similarities in the general layout of rooms can easily occur innocently:

*The variety of ways that 2-story rectangle can be divided into three bedrooms, two baths, kitchen, great or a living room, closets, porches, etc., is finite. In architecture plans of this type, modest dissimilarities are more significant than they may be in other types of art works.*

The appellate court determined that the district court did not err in determining that the dissimilarities were significant.

In a similar case, *J. R. Lazaro Builders, Inc. v. R. E. Ripberger Builders, Inc.* (1995), the court held:

*Thus, in order for there to be infringement, the substantial similarity must be of the protectable expression and not the idea itself. The idea/expression dichotomy is very important for copyright protection of architectural works and home designs; obviously, placing a bathroom adjacent to a bedroom or a walk-in closet in a master bedroom in a house are ideas not capable of copyright protection. Substantial similarity must be evaluated, instead, 'on the basis of the original design elements that are expressive of the [designer's] creativity'*

The court went on to explain that, 'the instance case is illustrative of the difficulty of accessing a designer's creativity in the context of a rather common house'. Both parties conceded that home designers regularly look to existing home designs as departure points for expressing their creativity, which therefore raises the definition and acceptability of derivative design (Winnick, 1992).

#### 4. What is derivative design?

Copyright law provides protection for 'derivative works', although this protection is quite limited. Most reasonably-priced residential buildings can be considered – at best – 'derivative', and copyright of derivative works is subject to two important and related limitations. First, the original aspects of a derivative work, if any, must contain some 'substantial originality' (L. Batlin v. Snyder, 1976; Chamberlin v. Uris Sales, 1945). Second, the scope of copyright protection afforded a derivative work involves only the substantially original and non-trivial features, if any, contributed by the author to the derivative work.

A derivative work must be substantially different from the underlying work to be copyrightable (Gracen v. Bradford Exchange, 1983). The substantial originality rule is designed to ensure a 'sufficiently gross difference' between the underlying work and the derivative work to avoid 'entangling' subsequent authors in 'copyright problems'. Failure to enforce the substantial originality rule would wrongfully inhibit the creation of any other derivative works by giving the first 'creator' the power to interfere with the creation of any subsequent works from the same underlying work. The problem can best be illustrated with an analogy:

*Suppose Artist A produces a reproduction of the Mona Lisa, a painting in the public domain, which differs slightly from the original. B also makes a reproduction of the Mona Lisa. A, who has copyrighted his derivative work, sues B for infringement. B's defense is that he was copying the original, not A's reproduction. But if the difference between the original and A's reproduction is slight, the difference between A's and B's reproductions will also be slight, so that if B had access to A's reproductions the trier of fact will be hard-pressed to decide whether B was copying A or copying the Mona Lisa itself (Gracen, 1983).*

In *Past Pluto v. Dana* (1968), the plaintiff brought a copyright action concerning Statue of Liberty memorabilia. On appeal, the principal question

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concerned whether plaintiff's work was sufficiently original to be copyrightable as a derivative work under section 103 of the Copyright Act. The court held as follows:

*Although derivative works may be copyrighted, see 17 U.S.C. § 103(a), the copyright protection extends only to the original contributions of the derivative work's author, see 17 U.S.C. § 103(b). The new copyright in no way embraces or protects the underlying, pre-existing work.*

The court explained:

*If a court, upon examining a derivative work, cannot discern any original contribution, it follows that the derivative work cannot be the subject of a valid copyright. The Second Circuit has consistently held the derivative*

*works, in order to be copyrightable, must 'contain some substantial, not merely trivial originality'.*

The substantial originality rule is designed to prevent the extension of copyright protection to minuscule variations that would put a 'weapon for harassment' in the hands of plaintiffs. The rule is also designed to prohibit the appropriation and monopolization of work already in the public domain, so that where the only changes to the pre-existing work are minuscule, the current work is not subject to copyright protection (Durham Industries v. Tomy Corp, 1980).

Similarly, where the evidence shows that similarities between two works can be explained by a prior common source or independent creation, an infringement claim is likely to fail, as in the case of *Hayden v. Chalfant Press, Inc.* (1959), where judgment was given to the defendant because the maps published by the defendant were not copied from plaintiff's maps: 'On the contrary, they were copied, with additions, from maps prepared by [a third-party] the Automobile Club ...'

Consequently, to be subject to copyright protection, the technical drawings for a 'derivative' building must contain some new and substantially original material. If two separate works are strikingly similar to one another, it does not necessarily

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constitute an infringement if each can be proven to be the result of completely independent effort. This is especially true where both works are derived from common sources and materials available to all.

##### 5. How will architectural design be affected by the protection of originality?

On first examination, copyright protection for architects would seem to be an improvement on the previous state of affairs: buildings, not simply drawings, can now be protected. While the new Act may be generally beneficial to the profession, there appears to be another unintended consequence of the legislation which can be disadvantageous to the practitioner in the design realm.

Recent cases show that most parties claiming copyright protection for architectural works are not the designers who created the original work. Furthermore, most of the cases have concerned housing units, which have hardly fallen into the category of cutting edge design. Thus, there has been a great deal of copyright activity, often by homebuilding companies claiming, and often receiving, protection for housing prototypes that are modest both in scale and in design aspirations. These

plaintiffs have sued their local competitors alleging that the competitors' designs are copies. This raises a question as to the degree to which simple buildings can vary, given the limited number of variables in their composition – doors, windows, roof, etc. – and the necessity for all to share certain 'functional features' which are common to all, an issue that was explored previously. Simply put, there are only so many configurations possible between a kitchen and dining room, and finite possibilities of appearance given the volumetric and functional limitations of a modest functional building.

The problem is compounded because the plaintiffs' designs are often not particularly original in the first place, deriving their form and appearance from traditional styles such as 'Saltbox', 'Colonial' or 'Williamsburg'. Should copyright law prohibit the architect from designing in a similar style to neighbouring properties for fear of legal action? Such a chilling effect would add a strange new dimension to the design process by forcing the architect to strive for new degrees of originality based not on client requirements, site considerations or personal vision, but upon fear of liability. Further implications of a design-to-be-different strategy can also be predicted at a collective level, where the visual impact of such diversity could be problematic. This concept was initially elaborated upon at the U.S. Senate hearings for the AWCP Act by a representative of the American Institute of Architects, who stated that:

*The pleasing aesthetic unity presented by a New England fishing village would have been, at best, extremely difficult to achieve had someone possessed a copyright on white clapboard Cape Cod cottages and picket fences (United States Congress, 1988).*

Furthermore, as copyright protection covers the rights of individuals on a building-by-building basis, it cannot deal with the notion of multiple buildings or, therefore, the issue of architectural precedent and the need to create visually coherent communities. In most residential neighbourhoods, creating visual harmony with existing surroundings by taking a contextual approach is a reasonable design strategy. If copyright protection is vigorously pursued in each building's case, then each new addition to the community should, it could be argued, be designed consciously to avoid any similarities to its neighbours – hardly a recipe for a coherent physical environment. Such was the case in the legal battle involving the Trump Tower in New York City where, following a successful copyright protection suit against the owner of a nearby building, changes were mandated to alter its form and appearance to look less like the original building. This, despite the fact that the buildings emanated from the same designer, who had assigned his copyright to the eponymous owner of the Trump Tower (Greenstreet, 1998). Arguably, the two towers together would have created a coherent and visually powerful gateway to the street and the neighbourhood, but copyright protection forced a design change to the newer building to achieve the opposite effect.

If architects are forced to design each residential

building differently, it has been suggested that the legislation might 'encourage architectural homogeneity of quite a different sort'. The AIA evidence at the Senate hearings reflects on the possible incentive architects may have to repeat their own earlier copyrighted work to avoid the potential legal exposure that creating new (and possibly already copyrighted) design solutions would entail. The chilling effect of the legislation is to limit the free flow of ideas and curtail the architect's creative development, resulting instead in a limited palette of conventional, safe solutions – an inappropriate climate for the healthy development of architectural design ideas.

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## Biography

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