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Has the Architectural Works Copyright Protection Act Worked? An Architect's Perspective

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Twenty-two years ago, the Architectural Works Copyright Protection Act became law, ostensibly providing greater protection for original architectural work. Before the Act, there was very little architects and their attorneys could do to stop copyright infringement beyond the prevention of unauthorized use of actual drawings, so the new legislation was generally believed to be a great step forward for the architectural profession.

Two decades later, however, we must ask: has the Act really helped? A brief review of the history of the legislation and its subsequent implementation suggests that, in many instances, it may have led to unanticipated consequences, taking designers, builders, developers, and their legal counsel into new realms of litigation that have little to do with the protection of original creative work.

The History of the Act

Prior to the 1990 Architectural Works Copyright Protection Act, most architectural work received limited protection from the 1976 Copyright Act, which tended to deal only with drawings rather than buildings and actual design ideas themselves. The new Act, which was designed to bring the United States into compliance with the Berne Convention, extended copyright protection to the design of buildings that could be shown to be original works of authorship. Following its adoption, there were some perceived shortcomings of the Act,¹ notably the exclusion of some three dimensional structures (bridges, walkways), ambiguity about others (such as garages, silos, and freestanding walls), the legitimacy of copyright ownership, and the exclusion of non-original but nevertheless integral building elements. Now, after a couple of decades, there is ample evidence of the Act's application in a number of cases to enable an assessment of its value. Some of these cases indicate a legitimate pursuit by designers to protect their original ideas from being used by others without attribution or compensation. A new trend has emerged in one sector of the construction industry, however, which suggests the Act is being used as much for market protection and outright opportunism as the preservation of design originality, in an area with relatively little connection to architectural creativity or the original intentions of the Act.

In the housing industry, particularly the market rate sector, the number of architects involved is relatively small.² While housing units (exclusive of customized, larger, and more expensive models) no doubt meet market need in both price and consumer demand, they are not usually known for their originality. They are unlikely to garner many architectural housing awards, receive much attention in the architectural press, or be lauded for their creativity. Their very names, culled from websites, brochures, or newspapers, evoke standard, recognizable, and traditional styles—such as Georgian, Saltbox, Cape Cod, Colonial, Williamsburg—and they do not seek to set themselves apart from the existing stock of comparable housing.

And yet, it is this field that is producing a considerable degree of legal activity as the owners of enforceable copyrights seek to prevent other homebuilders and developers from building houses that approximate their own, and sue their competitors for building houses similar to their protected models.

Obviously, copyright protection is entirely justifiable when unique designs are being used without permission, and some high profile names and buildings have been involved in legal tussles.³ The modest end of the housing scale, however, where very little design originality is evident (or, to be frank, often desired by prospective buyers), seems an unlikely battleground for establishing the concept of originality.

Most housing, and certainly the housing involved in a number of recent cases, is modest in size, mass, and detail. The units exhibit much the same number of rooms, have a similar overall appearance, and contain few or no original details that could be categorized as “creative.” Because the Act specifically excludes functional requirements, standard architectural features, and traditional spatial relationships, it could be argued that in the typical market rate house design, there is very little left to copyright. This has not deterred a number of house builders and plan sellers, however, from applying for and receiving copyright protection from the Copyright Office of the Library of Congress by demonstrating their ownership of the work and claiming that their models were original

to their creators. As long as they aver that they (or their assignors) are the originators of the drawings being submitted for registration, they receive automatic copyright protection without having to prove further originality or creativity beyond a statement that the work is not derivative—perhaps a startling claim, for many of the buildings are clearly derived from widely known, existing styles developed long before the creation of the Act, and may even bear the names of those styles (such as Colonial or Traditional).

The fact that these “original” works look remarkably similar to many other models—“Mediterranean” or “Cape Cod” styles will inevitably share common physical characteristics that are rooted in traditional understanding of the terminology—is perhaps not important in a design sense. When the owner of the copyright then sues other builders or developers for building very similar models, however, the question of appropriateness of the protection arises, as well as the legitimacy of the copyright owner's claim that the copyrighted material is not derivative, one of the few requirements for legitimate copyright protection.

Why should one owner of a home based on traditional, recognizable, and well-used design elements that have existed long before the 1990 Act be able to exclude others from the market and even claim damages for comparably built work because he or she holds the copyright for a design that is questionably creative or original? Certainly, if a builder has deliberately used the design drawings of his or her competitor to build and sell a house so that the latter has suffered financial loss as a result, there should be legal redress, which the Act provides. But where the owner of copyrighted designs systematically reviews the websites and promotional materials of other homebuilders who have no former connection to him or her, and sues those homebuilders for copyright infringement, the relevance of the Act is questionable and its use is arguably a misuse.

Do these cases succeed? Many of them are settled before trial, so it is hard to assess the overall impact. Certainly, there have been many instances of extensive litigation involving unsuspecting builders and

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¹¹The “Four Pillars of our Republic” were (1) no third terms, (2) the Monroe Doctrine, (3) only a Protestant by creed can be President, and (4) no wars of conquest.

¹²Although phrenology as a means of determining sanity and criminality was largely out of vogue in the U.S. by the 20th century, recording such measurements became integral in Schrank’s case.

¹³Zabel, born in Germany in 1877, came to Milwaukee in 1884. His father was a Milwaukee County deputy clerk of court. Schooled in Milwaukee, Zabel worked at the *Milwaukee Sentinel* prior to going to Ohio Northern University, where he earned an L.L.B. degree in 1900. He returned to Milwaukee and became a member of the bar in 1901. He joined W.B. Rubin in law practice and ran for D.A. in 1910, winning as the first socialist D.A. elected in the nation.

¹⁴“Any person being armed with a dangerous weapon who shall assault another with intent to rob or murder shall be punished by imprisonment in the state prison not more than fifteen years nor less than one year.” The D.A. and Schrank squelched statements that Schrank waited to strike in a state without the death penalty.

¹⁵In 1859, the Legislature established the Municipal Court of Milwaukee County as a formal criminal court, replacing the criminal jurisdiction of the city’s “police justice system.” The Municipal Court jurisdiction included appellate review of justice of the peace (and later District Court) decisions, and excluded cases in which defendants adjudged guilty would face life imprisonment or death sentences. (These excluded cases remained in the Circuit Court’s jurisdiction.) In 1899, the District Court of Milwaukee County was authorized by the Legislature, and in 1902, it replaced the civil police justice system. The District Court, subordinate to the Municipal Court, heard ordinance, misdemeanor, and traffic cases. The bifurcated District and Municipal Court jurisdictions were absorbed by the County Court system in 1962 and by the Circuit Court in 1977.

¹⁶James Greeley Flanders came to Wisconsin at age four from New Hampshire. He was schooled in Milwaukee, at Phillips-Exeter Academy, and at Yale College (1867). He spent a year reading law at Milwaukee’s Emmons & Van Dyke before attending Columbia College Law Department (1869). He returned to Milwaukee to practice; eventually became a member of Winkler, Flanders, Bottum & Fawcett; and was elected to the school board and later to the State Legislature in 1877.

¹⁷The newspapers recorded some of Schrank’s activities in jail: drawing a checkerboard on a blank paper and playing with fellow inmates; insisting on wearing his rosary around his neck (despite authorities’ concerns of suicide); writing, in closely written lines, page after page of foolscap.

¹⁸The commission consisted of Dr. F.C. Studley (superintendent of a sanitarium), Dr. William Becker (former head of the Northern Hospital for the Insane at Winnebago), D.W. Harrington (a nerve specialist), Dr. W. Wege (an alienist), and chair Dr. Richard Dewey.

¹⁹Judge Backus subsequently became an active member of the American Institute of Criminal Law and Criminology, and of ABA committees regarding “insanity.”

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dedication of a new church on Sherman Boulevard where his courtroom deputy was a member of the congregation. On other occasions, he delivered the annual member memorial address for the Milwaukee Bar Association. As in Mauston, Judge Curran enjoyed contributing his time and talent to civic affairs, education, the legal community, and his church. At the same time, he was able to enjoy big city attractions such as Marquette basketball and Irish Fest.

Among the honors bestowed upon Judge Curran were Marquette University Law School’s Lifetime Achievement Award, the State Bar Foundation’s Truman McNulty Service Award, the Eastern District of Wisconsin Bar Association’s Myron L. Gordon Lifetime Achievement Award, and the State Bar’s first Mentorship Award. Judge Curran, however, considered his family of six children and sixteen grandchildren his most important lifetime achievement. He would be proud to know that his grandson, Richard Orton, is one of the newest members of the Milwaukee Bar Association, and that another grandson, Peter Curran, recently joined the Juneau County Bar.

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The most common penalty provisions relate to any false statements made in connection with health care matters. For example, the ACA allows the Secretary of HHS to require health care plans to document and certify compliance with the ACA. The Secretary then may institute proceedings and assess financial penalties not only for failure to comply with the paperwork requirements, but also for any false statements made in connection with the forms.

In addition, any intentional false statement to the federal government or participation in a scheme to defraud involving a health care matter may give rise to criminal penalties. The ACA further directs federal judges, through the U.S. Sentencing Commission, to consider increased incarceration for health care offenders. The government maintains the manpower, including federal investigators and attorneys, to ensure enforcement. In short, it remains extremely difficult to fight “City Hall” (in this case, the federal government) by either ignoring the law or lying about compliance.

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designers who discover that, without any previous knowledge of their accuser, they are forced to defend their work because it bears a strong resemblance to the work of others that has prior legal protection.

These aggressive tactics are possibly fostered by the recession and a weak housing market, which causes some groups to favor legal action over actual construction as a major part of their business plan. These tactics are costly and time-consuming, and have little to do with actual design originality or creativity, the protection of which was presumably the primary intention of the Act. There do not appear to be any moves afoot to revise the Act (itself a costly and time-consuming venture), or to strengthen the implementation of the copyright process to address the issues of originality and creativity. Accordingly, designers (including those architects who venture into the housing design market) need to be aware that they are not immune from legal action should their work be regarded as derivative, regardless of the lack of wrongful intent or previous knowledge of comparable copyrighted designs. Furthermore, as a matter of good practice, attorneys can help their designer clients by strongly recommending that all architectural work, however modest in design aspiration, be systematically copyrighted to protect against not only unauthorized use but also the threat of ownership challenges by competitors.

The author is an architect specializing on the impact of law on architecture and architectural practice, and has served in numerous cases as an expert witness, many of which involve market rate housing as described in this article.

Notes

¹Greenstreet, R., Klingaman, R., “Architectural Copyright: Recent Developments,” *Architectural Research Quarterly* (Cambridge University Press), Vol. 4, No. 2, 2000, pp. 177-183.

²La Barre, S., “Truth in Numbers,” *Metropolis Magazine*, January 1, 2012. Depending how the question is framed, the percentage of architects involved in housing design varies from 2% to 28%.

³Greenstreet, R., “Who Really Owns Your Design?” *Progressive Architecture*, April 1985, pp. 63-64.

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