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Defending Against Claims of Copyright Infringement: The Expert Witness Perspective

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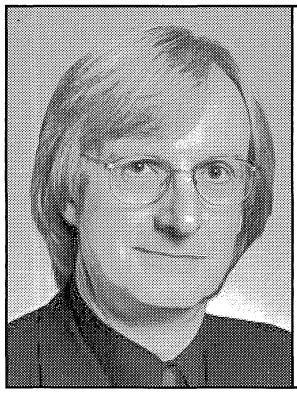

Defending Against Claims of Copyright Infringement: The Expert Witness Perspective

by: Bob Greenstreet,
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Prior to the enactment of the 1990 Architectural Works Copyright Protection Act, architects had little protection against copyright infringement. While they rigorously maintained that they provided a service rather than a product, and that therefore the ideas invested in the completed building remained with the creator rather than the new owner, it was notoriously hard to prove breach of copyright unless the original drawings were obviously reused or replicated.

The AWCPA advanced the protection of architectural ideas, although not without its critics, many of them interestingly from within the architectural profession itself for reasons that will hopefully become apparent in this article.

The Act was initiated to bring the United States into conformance with the Berne Convention and has now been in effect for fifteen years. During that time, it has become apparent that the Act is not perfect. For example, its definition of 'building' remains inconclusive, covering habitable and non-habitable buildings such as gazebos, churches, etc., but excluding significant structures such as bridges, garages and silos[1]. Similarly, while the Act would, on the face of it, seem to be directed towards the protection of ideas belonging to their creator, it instead provides support for the **owner** of the ideas, which could be the designer or, if copyright has been assigned, a contractor, developer or building owner from whom, ironically, many recent copyright cases have originated.

There has also been some concern expressed at the wide range of interpretation in the apportionment of damage in copyright cases, where claims have involved not only lost designer's fees, but the cost of construction, the value of constructed work and, most famously, all rentable income that would be generated by the building over its useful life.

Despite these shortcomings in the Act, it has been the catalyst for a significant amount of legal action since its inception, a great deal of it within the housing construction realm. This is something of an irony, as architects undertake remarkably few housing commissions — perhaps as low as 1% of single family houses in the United States[2] — and it is not a field necessarily renown for originality and design excellence.

A considerable number of the cases the author has completed as an expert witness lie within the housing field, and experience has indicated that a workable defense against claims of copyright infringement is built upon two primary areas: The specifics of the Act and the traditions of architectural practice.

The Architectural Works Copyright Protection Act

The Act was created to protect 'original, creative expression' or artistic (that is, non-standard) building features, not unlike the protection afforded a work of art. There are objective measurements that can differentiate or link two designs, and any expert witness report will have a detailed section of comparative measurements of plans, sections, and elevations (the tell-tale signature of copying often lies in identical structural systems, which no amount of façade alteration can disguise). However, there is inevitably an element of subjective judgment in the determination of copying, which is where the arguments of the expert witness are pivotal.

It is important not to focus on what the Act covers, but on what it does not cover, and the exclusions fall into three categories:

1. The Act does **not** cover standard architectural features and design elements such as skylights, domes, gables, moldings, and column capitals. These are part of a broader architectural vocabulary that can be used freely in any design.

2. The Act does **not** cover functionally required elements, such as walls, doors and windows — elements that are dictated by utilitarian needs and necessary to provide the basics of shelter, light, safety, etc.

3. The Act does **not** cover standard configurations of space or traditional relationships between spaces, such as bedroom to bathroom, dining room to kitchen or bedroom to closet.

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The combined impact of these exclusions on the design of housing is significant, as this is a design field where, by virtue of the scale and size of each housing unit, there are very few variables involved, and therefore only a finite number of design solutions possible. Once you have eliminated the need for doors, windows, etc., many of the architectural details and basic spatial configurations, it becomes increasingly difficult to prove that the remaining elements have a justifiable claim to protectable originality under the AWCPA, particularly if the creative ability of an architect was not involved.

The Traditions of Practice

The robustness of a defense against copyright infringement can be enhanced by reference to the practice traditions of the architectural profession, which casts the use of design protection into a broader perspective. Three points of discussion can be introduced.

1. **Design is derivative**
   Both the teaching and practice of architecture stress the need to learn from the past, to respond to the environment around the proposed building and not to reinvent the wheel with each new project. The design of each new building is rarely a unique singular act, but the manipulation of a language used in an appropriate way in each design challenge. The reliance on precedent has always been a tradition within the profession, and one embraced by designers as individual and original as Frank Lloyd Wright, who created 'pattern book' designs published in early journals for general use by the public. This is compounded by building laws, particularly those in historically sensitive areas, and design review boards (not to mention client demand) which will also likely stress the need for design compatibility, tending to mediate against design originality on each new project.

2. **Style is collective, not individual**
   Many of the cases involving copyright infringement are concerned not with cutting edge design, but with standard, traditional design solutions that have been individually copyrighted and then rigorously protected primarily for market reasons. As most of these designs fall within recognizable styles of past eras, it raises the question of how legitimate it can be to own a design, such as 'Colonial,' 'Georgian,' 'Williamsburg' or 'Saltbox' that so obviously belongs to another period in history and therefore to no one designer in particular[3].

3. **Similarities can mean coherence, not chaos**
   When designing within the context of existing buildings, many designers will respond sympathetically to the context, trying to 'fit in' and be a good neighbor. This is not necessarily copying but can be defended as an attempt to create contextual integration, a factor designed to create visual coherence within a neighborhood. The strategies that created the calm and gracious harmony of Georgian terraces or the unifying cadence of Cape Cod cottages fronted by picket fences in a New England fishing village[4] would become defunct if the AWCPA were too literally enforced. It was for this reason more than most that the American Institute of Architects originally objected to the Act, stressing the broader need to create visual coherence rather than individualized randomness that is at variance with the latter's provisions.

Summary

While the AWCPA does provide some useful relief for designers whose work has in the past been unfairly reused without their permission or compensation, it has led to a number of cases, usually in the housing field, where protection may not appear to be either worthy or necessary. The preparation of a defense against such claims can be created in the objective comparative measurement of the projects in question, but most effectively by establishing the limitations of the Act with respect to a particular design — and the smaller and simpler the design, the easier this is — and framing the defense within the broader traditions of design and building construction within the United States.

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1 Greenstreet, R., Klingaman, R. "*Architectural Copyright: Recent Developments in Protecting Originality and the Architect's right of Ownership,*" Architectural Research Quarterly, Cambridge University, England. Vol. 4, No. 2, 2000, p.177-183.

2 Saint, A. "The Image of the Architect," Yale University Press, 1983, p.154.

3 Greenstreet, R., Klingaman, R. "*Will Architectural Works Laws Have a Chilling Effect?,*" The National Law Journal March 19, 2001.

4 The Berne Convention: Hearings on S.1301 and S.1971 Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 100th Congress, Second Session, 54-55 (1988).