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The Myth of Originality

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The Myth of Originality

For architects, the concept of originality has always been a sensitive one. After all, we are hired for our ideas and the service we provide to clients via our architectural drawings are the foundation of our professional viability.

Before 1990, there was relatively little protection for the realm of ideas. Admittedly, the AIA contracts provided some contractual control over the actual drawings, the instruments of service, but architectural creativity did not fit well within prevailing copyright laws.

This all changed with the enactment of The Architectural Works Copyright Protection Act 1990, which provided direct, explicit protection for the works of architectural merit.

On the face of it, this should have been a great relief for the profession as a whole (despite some initial qualms by the AIA during the early hearings of the bill), but has the Act improved the overall lot of architects with regard to protection of their ideas and, by extension, their livelihood?

Ironically, the implications of the Act over the past few years have, in my experience, provided as many problems for architects as relief. I have been involved in a steady stream of copyright infringement cases in the role of expert witness and in the great majority, I have been engaged to defend architects from fairly frivolous claims, usually made by individuals or corporations outside of the architectural profession. It is a rare occasion when I work with architects claiming that another architect has appropriated their ideas.

So where do these claims come from? Well, they are usually instigated by contractors or developers who have become the owners of a particular design (ownership of copyright can be assigned to a third party, and a surprising number of designers have transferred their ownership rights, presumably for a fee) and, seeking to protect their market, vigorously oppose any designs that are substantially similar within their sales area. As the building type involved is invariably single family housing, it is little wonder that so many of the variations bear at least a passing resemblance to each other, especially when most of the designs in question bear traditional and historically recognizable traits such as Colonial, Williamsburg, Georgian, etc.

A number of architects I have worked with have found to their surprise that housing models that they have developed — standard, market-rate suburban housing of no great design distinction or originality — are now the focus of a civil suit to which a costly defense must be mustered.

Is this unexpected outcome of an Act created with the best of intentions likely to become a major impediment to contemporary practice, where architects should consciously work to ensure designs are demonstrably different from all others to avoid legal action? What about contextualism and working within a certain style or accepted building vocabulary?

Fortunately, although there is no remedy that prevents overly zealous litigants from taking legal action, the mounting of a credible defense against copyright infringement is reasonably straightforward. Although registration for copyright protection is very simple

— and the quality of designs that have successfully registered can be laughably low — demonstrating originality and creativity that merits legal recourse can be more difficult.

Take, for example, the basic house. No more than a couple of thousand square feet, it encloses a traditional menu of rooms and spaces arranged in predictable relationships — bathroom next to bedroom, kitchen next to dining space, etc. The rooms are clad in a usual array of materials and punctured with windows and doors to provide access, light and ventilation.

While this simple, finite numbers of variables can, in the hands of a skilled designer, be outstandingly creative and original, the majority of design solutions in market rate housing present predictable, recognizable design outcomes.

So how can one owner who has taken the foresight to seek copyright protection corner the market on what is effectively a huge proportion of the housing market? Well, they can't. In order for them to be successful in court, they will have to prove a minimum level of expression which demonstrates originality and creativity. Specifically omitted for protection are functional elements (i.e. such as roofs, floors, etc.) and standard features (windows, porches, chimneys, etc.) which, it is reasonably easy to argue, constitute the majority, if not the totality of much of America's single family housing stock. Take away all the obvious relationships of the internal spaces (e.g. kitchen to dining area), which also tend to determine the massing of the building, eliminate the doors, windows and other elements normally considered as standard to any building, and it becomes difficult to mount a convincing case of copyright infringement unless there is some explicit spatial

characteristic or design flourish that sets the work apart — a difficult task in the routine housing market. Of course, the bigger and more complex the building type, the more opportunity exists to be creative beyond the basics of functional relationships and standard features. However, the larger the project, the greater the likelihood exists of differences in design outweighing the similarities as the number of variables increases accordingly.

So, while The Architectural Works Copyright Protection Act has not had the entirely positive impact on the profession we had hoped, it has been useful in giving protection to some architects (in my experience, in high growth areas in building types such as condominiums). The unforeseen consequences of aggressive developers trying to restrict their competition has been an annoying occurrence but not a major problem and, given the likelihood of failure in trying to enforce their protection, will hopefully wane in the near future.