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THE CONSEQUENCES OF COPYRIGHT: THE ORIGINS AND IMPLICATIONS OF ARCHITECTURAL COPYRIGHT PROTECTION AND ITS IMPACT ON ORIGINALITY IN DESIGN

Robert Greenstreet

The Architectural Works Copyright Protection Act was heralded as a major step forward in the protection of original design ideas. However, since its inception in 1990, a number of shortcomings that have reduced its effectiveness have become apparent. Most recently, a potentially major consequence of the act, unforeseen at its creation, has emerged, leading to considerable litigation that may have significant repercussions for design freedom, actually reducing or inhibiting the concept of originality in design. Its impacts on architecture, urbanism, and architectural education are still unknown. This paper explores the implications of copyright protection and limitations on design, examining the unforeseen shortcomings and negative consequences of its enforcement, and reviews several recent judicial decisions that suggest some positive modification in the interpretation of copyright protection. The paper concludes with an account of the impact of the act on originality within the architectural profession and suggests some strategies for architects to safeguard their intellectual property while maintaining control of their original ideas in the design process.

INTRODUCTION

The enactment of the Architectural Works Copyright Protection Act (AWCPA) in 1990 was promoted as a significant advancement in the protection of original design work from unauthorized copying and a benefit to members of the architectural profession in the United States. However, despite its alignment with copyright-protection standards established in Europe by the Berne Convention, the act had a number of shortcomings in both its coverage and definitions, which were highlighted in the years following its creation and which, according to some, have reduced its overall effectiveness (*e.g.*, Hancks, 1996; Hixon, 1995; Newsam, 1997; Pollock, 1992; Scholl, 1992; Thiel, 1996).

While some of the AWCPA's shortcomings, including actual ownership of ideas, apportionment of damages, and a confusing definition of "building," have been known for some time, a further and potentially more negative consequence of the act that was unforeseen both during its drafting and in the years immediately following its enactment has become apparent in recent years. This consequence has had significant repercussions for the single-family-home area of design, which does not typically affect the majority of architects.¹ However, it may subsequently have deeper implications for the profession in the realms of originality and creativity. While there are indeed cases that indicate some architects have been better served legally when they believe their ideas have been used without their knowledge and permission, an unexpected surge in litigation involving the single-family-home industry has evolved from circumstances in which housing companies — few of them belonging to architects — have registered their designs for copyright protection and then systematically sued other home builders with similar designs for copyright infringement. The majority of the copyrighted homes are (from the perspective of the present author, an architect experienced in expert-witness work) based on traditional, preexisting housing solutions that are common throughout the U.S. and conform in layout and appearance to market and consumer expectations. These homes display little in the way of originality — the very characteristic the AWCPA intended to protect. Inevitably, many of the home builders facing claims had models conforming to generic designs seen across the country for many years — possibly similar to the plaintiff's models but equally similar to countless other traditional models also on the market. There are a limited number of design variables involved in single-family houses, many of which are not covered by the AWCPA. Specifically, copyright protection does not cover functional requirements, such as roofs and walls; standard configurations of spaces (kitchen to dining room, master bathroom to bedroom, etc.); standard architectural features, such as doors and windows; or interior-design elements (U.S. Copyright Office, 2019). Once these non-protected elements are removed from consideration, it is often difficult to see what is left to compare within the remaining elements.

For some years after the consequences of the AWCPA became apparent, courts appeared reticent to stop ongoing proceedings by declaring summary judgment² and were cautious in their judgments on the issues of substantial similarity of contested models and the alleged originality of copyrighted ideas: "because substantial similarity is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon in copyright litigation" (*Sturdza v. United Arab Emirates*, 2002:1296). Given the perceived subjectivity of concepts such as creativity and originality, caution is not surprising. However, the outcome of this hesitant approach has been the encouragement of more "troll" activity. As one judge pointed out, "[w]hat [the plaintiff] did in response [to the alleged copyright infringement] was either an 'intellectual property shakedown' and 'copyright trolling' (*Design Basics, LLC v. Lexington Homes, Inc.*, 2017:1096-1097), or the vigorous protection of its copyrighted works ... depending on your point of view" (*Design Basics, LLC v. Big C Lumber Co.*, 2019:4).

Plaintiffs recognized that they could secure substantial settlements at mediation from defendants looking to avoid costly and time-consuming legal action in which the outcome would be far from certain: "In recent years, opportunistic holders of copyright, patents, and other intellectual property have developed unsavory reputations for 'trolling,' bringing strategic infringement claims of

dubious merit in the hope of arranging prompt settlements with defendants who would prefer to pay modest or nuisance settlements rather than be tied up in expensive litigation” (*Design Basics v. Lexington Homes*, 2017:1097).

While most of the defendants in these cases were not architects, the proliferation of legal action in copyright infringement has brought the issue of the reuse of existing elements to the forefront. The success of copyright enforcement, however unwarranted, and a few high-profile cases, including the Trump Tower judgment (Greenstreet, 1985), suggest that the American Institute of Architects’ (AIA) concern about the limitation of originality (discussed below) may have been well founded and that the concept of originality, a cornerstone of architectural design, may be under threat.

However, several recent rulings indicate that courts are beginning to focus attention more critically on architectural copyright infringement cases and that judges are becoming more assertive in their assessments of claims of copyright violation. This paper examines the background of the AWCPA, explores its largely unforeseen consequences within the home-building industry, and reviews several recent legal decisions that indicate a shift in attitude toward trolling and a clearer approach to the determination of substantial similarity in design. It concludes with an assessment of the impact of copyright enforcement on the architectural profession and some observations on strategies for architects to safeguard their intellectual property while protecting their work against unfounded claims of infringement.

THE DEVELOPMENT OF COPYRIGHT PROTECTION

Prior to 1990, under the prevailing 1976 Copyright Act, architects in the U.S. were afforded very limited copyright protection beyond the coverage of their actual drawings. As instruments of service, architects’ designs were regarded as more of a product than a service, and their original ideas were therefore vulnerable to misappropriation.

In order to conform to the Berne Convention Implementation Act of 1988, the U.S. Congress enacted the AWCPA in 1990. Interestingly, the AIA ultimately did not support the AWCPA. Its members expressed concerns about the proposed act’s impact on originality and contextualism within the built environment. While the AIA initially supported expanded copyright protection, the organization later dropped its support for the provision during the Berne Convention hearings held by the U.S. House of Representatives. During the hearings, a number of prominent architects expressed their concern that copyright protection might affect their ability to use elements from other architects’ work, a long-standing tradition in the profession, in which contextualism and “fitting in” to an existing design vocabulary are considered acceptable and appropriate. As the AIA spokesperson told the House subcommittee, “Our concern is that the well-accepted traditions of reference and limited borrowing of elements and details should not be suppressed” (U.S. House of Representatives, 1990:116).

However, the AIA’s concerns were not heeded. Subsequent to the enactment of the AWCPA, studies of its effectiveness revealed a number of shortcomings, including a lack of clarity regarding ownership of original ideas; a wide range of interpretations in the apportionment of damages; and an inconclusive definition of “building” covering habitable and non-habitable buildings like churches and gazebos but excluding significant structures such as garages, bridges, and silos (Greenstreet and Klingaman, 2000).

Despite these shortcomings, the AWCPA did provide additional copyright protection for architects and has been instrumental in the resolution of a number of cases, usually at a larger scale of construction than single-family homes, such as condominiums and hotels (*Humphreys & Partners Architects, LP v. Lessard Design, Inc.*, 2014).

UNINTENDED CONSEQUENCES

A further outcome of the AWCPA, unforeseen during its creation, has primarily occurred not within the architectural profession but within the home-building industry, where reliance on traditional, preexisting designs often precludes the role of the architect. For example, in some states, single-family housing is not legally defined as “architecture” if it does not exceed 50,000 ft.² and therefore does not require an architect’s involvement and stamp of approval. In recent years, countless designs for single-family homes, mostly at the modestly priced end of the spectrum, have been registered with the U.S. Copyright Office. Once granted protection, the designs can be systematically compared with the designs of other home builders, and if the copyright owner decides they are “substantially similar,” legal action can be, and frequently has been, initiated.

Given the limited cost, a market-rate single-family home is inevitably limited in size, program (*i.e.*, the number and type of rooms and spaces), layout, and appearance. Such homes are also heavily influenced by market and consumer demand. It is hardly surprising that the number of solutions considered to be similar may therefore be high — and the consequent number of lawsuits numerous.

Moreover, the expansion of legal action by design trolls was likely exacerbated by the expansion of the Internet, which provides almost unlimited access to design work. One of the tenets of proving copyright violation is a demonstration that the defendant had access to the copyrighted material. In the age of the universally accessible Internet, it is now easier to claim a defendant was aware of the design work without proving materials such as books or brochures were sent to or seen by the defendant prior to the creation of the alleged copies.

THE COURTS’ INITIAL RESPONSE

In the first 25 or so years of the AWCPA’s existence, some cases resolved appropriately after careful deliberation of the substantial similarities between contested buildings (Greenstreet and Klingaman, 2000), but they were typically large, complex, and expensive structures with multiple components involving architectural expertise and input, such as condominiums and hotels. In that context, substantial similarity of protected elements is easier to prove or disprove. Cases addressing design similarity among traditional, generic, single-family homes posed challenges for the judiciary, which initially handled them tentatively given the subjective, loosely defined concepts involved, such as originality, creativity, and substantial similarity.

Certainly, in the assessment of pleadings to determine whether there was a genuine need for trial, courts often appeared reluctant, from an expert witness’s perspective, to issue summary judgment, deferring the judgment call on these matters to “the ordinary reasonable person” (*i.e.*, members of a jury) and allowing many cases to go forward to trial. This strengthened the resolve of plaintiffs, who calculated that settlement was a less-costly option for defendants to avoid a long trial, and increased the number of complaints accordingly.

Paradoxically, while most courts found that copyright protection afforded by the AWCPA was “thin” (*Zalewski v. Cicero Builder Dev., Inc.*, 2014), the degree of originality necessary to successfully claim copyright protection was minimal and rarely successfully challenged. A review of copyrighted homes registered with the U.S. Copyright Office, all of which claim to be original creations that are “completely new” and not based on previous designs, reveals that many of the houses are clearly based on preexisting, traditional design solutions. Such solutions have been used throughout the country for many years but have rarely been challenged either upon or subsequent to registration. In short, almost any design appears to be protectable under the AWCPA with little proof of originality required beyond a brief statement asserting that no previous material was used in the design, unlike the stringent process required to obtain a patent (a comparable form of intellectual-property protection).

Similarly, access — a fundamental prerequisite for claiming copyright violation — became almost automatically assumed by the courts. Prior to the universal reach of the Internet, some proof of direct contact, such as mailed promotional materials, books, or sales meetings, would have been important to establish direct access to allegedly copyrighted materials. However, when all of the plaintiff's materials are conveniently posted on the Internet, they are available to all, including potential defendants. Ironically, widening the potential audience for design purchase has also increased the potential for misappropriation, allegedly leading to a drop in sales in one case³ and, it would seem, a shift in the business model of some home builders from the building of homes to the aggressive pursuit of other home builders for alleged copyright infringement.

Finally, the issue of design comparability and how to fairly determine substantial similarity raised challenging questions. Given the unquantifiable definitions of the AWCPA, courts were focused on the broad “look and feel” of designs and had to wrestle with comparing subjective elements such as “character” and the “flow of space” or “overall concept and feel.” These are conveniently nonspecific terms for plaintiffs to invoke to demonstrate a general similarity without having to provide specific, quantifiable details of copying.

Consequently, the first 30 years of the AWCPA has seen a great deal of unnecessary litigation in an area of design protection for which it was never directly intended. The result has been a significant number of legal settlements by parties who, it could be argued, were never culpable of conscious copyright violation but were forced to settle to prevent further nuisance and cost. One consequence of this phenomenon, in which preexisting elements can potentially be co-opted, registered, and rendered legally problematic if used again, goes to the heart of originality and creativity, as the AIA feared, and raises serious concerns about the use of traditional design solutions in appropriate contexts.

RECENT DEVELOPMENTS

In the past few years, several cases have indicated an interesting shift in the judicial approach to copyright infringement (see *Design Basics v. Lexington Homes*, 2017; *Design Basics, LLC v. Kerstiens Home & Designs, Inc.*, 2018; and *Design Basics, LLC v. Heller & Sons, Inc.*, 2019). All three cases discussed here follow a similar pattern to dozens of comparable cases across the U.S. The plaintiff, having registered multiple home designs with the U.S. Copyright Office, then scrutinized the housing models of scores, if not hundreds, of home builders in search of actionable infringement of their intellectual property. The targeted home builders were not necessarily direct competitors and were often situated in other states, many hundreds of miles away from the plaintiff's home base. If the plaintiff (*i.e.*, the copyright holder) detected some similarity in appearance and layout to any of its registered models, they sued for copyright infringement. The cases considered here are three of the approximately 150 cases instigated by just one plaintiff in the past few years, representing a lawsuit against one in every 300 builders in the U.S. (*Design Basics v. Heller & Sons*, 2019). Unlike many others, these three cases were resolved by the granting of summary judgment against the plaintiff.

Both *Kerstiens* and *Heller* and, more recently, *Design Basics, LLC v. Signature Construction, Inc.* (2019) reaffirmed the legal thinking exhibited in *Lexington* and indicated some important changes in attitude and actions concerning copyright protection. While it is still premature to establish these as a firm direction, there appear to be three important clarifications and shifts in these cases that, from an expert witness's perspective, strengthen the hand of counsels in defending against copyright-infringement claims.

A Closer Look

In contrast to the earlier reluctance of judges to make firm judgments on similarity, choosing instead to pass the responsibility on to a jury of “ordinary persons,” in *Heller*, Judge Brady expressed

her intention of applying an “analytic review” of the plans in question (*Design Basics v. Heller & Sons*, 2019:25), confirming the previous opinions in *Kerstiens* and *Lexington* that the “court would have erred if it had surveyed the plans from 30,000 feet, or even 500 feet. The court had to take a close look” (*Design Basics v. Lexington Homes*, 2017:1105).

This contention — that, at a small scale, even seemingly minor differences are relevant — indicates a willingness to take a detailed look at the contested designs, reaffirming the thinking in several other cases (*Design Basics v. Signature Construction*, 2019), and shows a willingness to act emphatically on clear evidence of a lack of substantial similarity. This willingness to look carefully at the evidence led to summary judgment in all three cases.

Differences Rather Than Similarities

In addition to confirming that access is not proven simply by alleged substantial similarity — a retreat from the universal, automatic access previously inferred by the Internet — the cases show a shift in attitude toward looking at differences, as opposed to similarities, which moves the assessment of substantial similarity from the vague “look and feel” to more specific, quantifiable, and demonstrable differences among protectable elements. As *Heller* indicated, “[T]his Court views *Lexington* as requiring the Court to focus on the differences between the plans rather than the similarities. Where sufficient differences exist, the existence of superficial similarity cannot demonstrate a copyright violation” (*Design Basics v. Heller & Sons*, 2019:25). This reverses the approach used in two previous cases (*Sturdza v. United Arab Emirates*, 2002, and *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 2006), which, referencing an earlier case, noted that “summary judgment has traditionally been frowned upon in copyright litigation” (*Sturdza v. United Arab Emirates*, 2002:1296). “[U]nder the *Sturdza* analysis, a court is to focus on the similarities rather than the differences” (*Design Basics v. Heller & Sons*, 2019:26).

However, *Sturdza* and *T-Peg* were not really comparable cases. They involved buildings that were large, complex, and custom built: *Sturdza* involved the design of a large embassy building, while *T-Peg* was focused on a customized, one-off, timber-frame house. Both designs involved architectural expertise and had substantial budgets, a far cry from the modestly priced, minimally scaled designs of the market-price home-building industry. The three new cases focused more directly on simple housing models, which are, by definition, largely composed of preexisting, traditional elements, to develop more specific views on substantial similarity.

An Analytic Tool

The judges in all three cases expressed a preference for objective, quantifiable data rather than vague, subjective claims of similarity and “look and feel” and relied on analytic tools to inform their decision making. In each case, the judges’ opinions enumerated specific differences among the contested plans, and in two cases, they relied exclusively on the defendants’ expert-witness reports: “The court had to take a close look, and it did so using [the defendant’s expert-witness] report as an analytic tool” (*Design Basics v. Lexington Homes*, 2017:1105).

The expert-witness reports, which thoroughly detailed the differences among the models, demonstrated that the designs had multiple differences in shape, program, layout, square footage, dimensions, materials, and design details that refuted the claims of substantial similarity. The sheer number of quantifiable differences within the various categories, regardless of size, often led to 50 pages of data and provided the judges with measurable, objective evidence that collectively demonstrated the lack of substantial similarity. The judges determined that, despite many of the differences being small, the review of “subtle” differences in cases of architectural copyright is appropriate, for “where copyrights are ‘thin,’ it is the details that matter” (*Design Basics v. Heller & Sons*, 2019:37).

SUMMARY

Despite the good intentions behind the AWCPA, a number of shortcomings have been discovered since its implementation, although perhaps none as unintended or consequential as its impact on the home-building industry.

Loopholes and laxities in the copyright-registration process have led to countless lawsuits and settlements in favor of design trolls, who have cynically used the registration of their traditional, generic design solutions to profit from attacks on owners of similar traditional designs that do not have comparable copyright protection. This has raised the broader issue of originality in the face of overprotection of preexisting elements, a consequence that should concern the architectural profession.

In the past, the courts have provided little relief for the accused home builders, who have often settled with plaintiffs to avoid costly and time-consuming legal battles. However, the three recently decided cases discussed in this paper indicate a move toward more decisive court action on providing summary judgment; closely reviewing the details of the contested designs; focusing on specific differences rather than general similarities; and taking a quantifiable, objective approach in assessing substantial similarity through the use of analytic tools. This more rigorous approach shows a clearer understanding of the concept of substantial similarity and a hardening of attitudes toward claims of originality for designs based on traditional, preexisting elements: “We wonder whether there is any blueprint for a single-family home anywhere in the country that [the plaintiff] could not match to one of its own designs by applying the loose standard of similarity it relies upon here” (*Design Basics v. Lexington Homes*, 2017:15). In the architectural profession, this hardening of legal attitudes toward unfair copyright enforcement should be welcomed, as it helps to clarify the definition of substantial similarity and encourages creativity in the development of original design solutions.

Moreover, this new approach will better serve one of the original goals of copyright protection — to preserve ownership of original design ideas while allowing traditional, preexisting design elements to be used in circumstances where contextualism and “fitting in” are appropriate design strategies. To that end, this paper concludes with four recommendations, based on a careful review of preceding case law, to help architects protect their own copyrights while maintaining an effective defense against unfair claims of copyright violation against their work.

- (1) All original design work should be registered as soon as possible. This is a fast and inexpensive procedure, explained fully in Circular 41, published by the U.S. Copyright Office (2019). It requires the completion of a short online registration along with submission of the appropriate drawings and fee.
- (2) All design development drawings and files (including sketches, diagrams, images of models, etc.) for every project, regardless of size, should be recorded and preserved. They provide invaluable evidence of design development and originality by showing progression of personal ideas through the design process, even if the final product closely resembles the work of another designer.
- (3) If an architect is formally accused of copyright violation, the insurance carrier must be contacted immediately. Full disclosure is required in all “errors and omissions” policies, and failure to comply could invalidate the coverage.
- (4) Before talking to attorneys, all relevant background materials should be assembled and ordered chronologically. This saves time and money during the preliminary discussions and helps the architect to focus on the issues at hand. Documentation should include the following:
 - (a) All files;
 - (b) All drawings, images, photographs, sketches, etc.; and
 - (c) A tabulation of differences between the plaintiff’s work and the contested design. If the architect has access to the plaintiff’s design (sometimes included in the com-

plaint), it should be carefully compared with the contested work with differences in the following categories tabulated:

- Shape and appearance: building profile, rooflines, and overall mass of the building;
- Program: compare the number and use of all rooms and spaces;
- Layout: identify any differences in spatial relationships;
- Square footage: compare the overall footprint of the two models;
- Dimensions: list the different room dimensions of walls and ceiling heights;
- Materials: compare exterior materials on walls, roofs, etc.; and
- Details: compare windows, eaves, porches, louvers, etc.

NOTES

1. Depending on how the question is framed, the percentage of architects involved in housing design varies from 2-28%, although most estimates are at the lower end of the scale (LaBarre, 2008).
2. Summary judgment is granted by a court against one of the parties in a legal dispute without a full trial. It is decided on the basis of an assessment of the presented proofs to determine if there is a genuine need for a trial.
3. In *Kersteins*, the plaintiff claimed that, subsequent to posting its designs on the Internet, its annual licensing revenue dropped from over \$4 million at its peak to less than \$1 million (*Design Basics v. Kersteins Home & Designs*, 2018).

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