Published on *The National Law Review* https://natlawreview.com

The Architecture of Copyright

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This summer, Pacific Standard Time's world-class exhibits highlight the architecture that gives Southern California its unique reputation for modern but relaxed style. This series of exhibits, a Getty initiative, titled "Modern Architecture in LA," maps the aspect of Los Angeles architecture that is often overwhelmed by residential structures, instead focusing on infrastructure and urban planning, commercial and civic buildings, and housing experiments, among others. **Architecture is an art form, and it is also a distinct practice in and of itself**. When considering the relationship between art and architecture, it is interesting to see how these practices are at once similarly and differently protected by the law. The Copyright Act of 1976 and the Berne Convention have all resolved to give architects the protection they deserve. But is this protection enough?

Under the Copyright Act of 1976, the original design of a building is subject to copyright protection if it is fixed in a tangible medium of expression.[1] The Act also protects architecture plans, models, and drawings. The extension of protection to drawings and sketches is particularly useful for architects because the works they design are not always executed. Therefore, the protection prevents others from building a structure using that architect's previously-drawn plans or models. Unfortunately, though, the Copyright Act does not prevent anyone from "reverse engineering" a building, such as observing the building constructed from those drawings and subsequently replicating the design in a new drawing or in another building. Additionally, the Act does not prevent the right to make, distribute, publicly display pictures, photographs, or other pictorial representations of the work when a building is ordinarily visible from a public place.[2] Intellectual property rights are, in part, intended to promote creativity and innovation by reassuring authors of copyrightable works that the products of their labor will be protected. This "loophole" in the Copyright Act may be seen to stunt innovative architectural works, as architects could fear that their works will be unlawfully replicated.

Fortunately, the Architectural Works Protection Copyright Act of 1990 (AWPCA)—an amendment to the original Copyright Act—extended copyright protection to architectural design itself, eradicating this weakness in copyright law. Under the Act, **architectural works are defined as the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings**. The scope of protection extends to the form, arrangement, and composition of the work, but excludes individual standard features.[3] The Act protects designs embodied in actual works of architecture, which allows an architect to file for infringement when a new building is copied from his or her copyrighted building.[4] While the Copyright Act protects architecture as a subset of "pictorial, graphic and sculptural works," the AWPCA essentially defines

architectural works as a new class of protectable subject matter. Previously, the US lacked a mechanism to protect completed architectural structures. This shift was motivated by the United States' need to comply with international standards on copyright protection. The Berne Convention (the international copyright agreement) specifically includes architectural works as protected subject matter as a literary and artistic work. In order to comply with the standards recognized by 165 countries, the United States had to expand its existing copyright scheme to include architectural works themselves.

Though broadening the reach of copyright protection to cover architectural works as a whole did resolve one deficiency in the Copyright Act, it did not address the restrictive delimitation of protection to "nonfunctional" aspects of the work. The Copyright Act protects pictorial, graphic, or sculptural works only if the work can be identified separately from, and exist independent of, the work's functional aspects. The legislative history of the AWPCA suggests that this restriction is intended to remain; as long as design elements are determined by functional considerations, they are not copyrightable.[5] Therefore, copyrightability still depends on the extent to which a work reflects artistic expression that is uninhibited by functional considerations.[6] Protection is confined to the purely artistic aspects of a building. Even an attractive sofa, for example, cannot be protected if the creative elements are intertwined with the functional element of the sofa, although that separation is nearly impossible to make.

Unfortunately, this severability problem is embedded in the same type of architecture that the Pacific Standard Time initiative is celebrating: modern architecture. The very architecture that has put Los Angeles on the map is less likely to receive protection under current US law than any other architectural form. Modern architecture emphasizes the functional aspects of a building, which often influence or dictate the theme of the design. While the harmonization of design and function is celebrated by those who understand the art form, increasingly streamlined design is less likely to receive copyright protection. Strict application of the US's requirement that copyright protection extend only to nonfunctional building design will deny protection to successfully modern buildings. These limitations on copyright protection pose one of the greatest threats to innovation in architecture—after all, what incentives do architects have to design groundbreaking work if someone else can immediately copy their design and profit from their labor?

Exploring PST's architectural initiative is a reminder of the powerful effect of innovative architecture on a city. Exploring the Copyright Act is a reminder that the law does not always adapt to the realities of modern life.

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[1] 17 USC § 102.

[2] 17 USC § 120 (a).

[3] Vanessa N. Scaglione, Building Upon the Architectural Works Protection Act of 1990, 61 Ford. L. R. 193, citing the Architectural Works Protection Copyright Act.

[4] *Id*.

[5] *Id*.

[6] *See generally* Brandir International, Inc. v. Cascade Pacific, 834 F.2d 1142 (2d Cir. 1987).

National Law Review, Volume III, Number 196