


The Architectural Works Copyright Act: Can it Protect an Architect's State of the Art Development When Funded Through Federal Dollars?

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THE ARCHITECTURAL WORKS COPYRIGHT
ACT:

CAN IT PROTECT AN ARCHITECT’S STATE OF
THE ART DEVELOPMENT WHEN FUNDED
THROUGH FEDERAL DOLLARS?

KYLE R. MOORE*

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INTRODUCTION

Westlawn Gardens, the multi-million, multi-phase redevelopment, is nearing completion. As it stands, the LEED award winning development is the largest public housing neighborhood in Wisconsin.¹ But what if a commercial company or individual tried to recreate that development; would the original architect’s work be protected under copyright law?

Copyright law has provided no answers and the law typically protects the architect, but when federal dollars are handed down to independent agencies

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1. Casey Studhalter, *Green neighborhoods for all in Milwaukee’s Westlawn Gardens*, LEED (Apr. 9, 2014), <http://www.usgbc.org/articles/green-neighborhoods-all-milwaukee’s-westlawn-garden> [<https://perma.cc/2KRY-7ZET>]; *Westlawn Gardens*, THE J. OF THE AM. INST. OF ARCHITECTS (Nov. 24, 2014), <http://www.architectmagazine.com/project-gallery/westlawn-gardens-6101> [<https://perma.cc/3QNY-HZ8Z?type=image>].

the ownership line is blurred.² 17 United States Code Section 105, states that “copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.”³ Thus, the federal government cannot create a copyright. As a result, no one knows if an independent housing authority, and the contracting or subcontracting architects, can protect their work when they receive money from the Housing and Urban Development (“HUD”), a cabinet in the executive branch.⁴ It would make sense to say that the Housing Authority of the City of Milwaukee (“HACM”) has the ability to copyright its project, since it was the agency that procured the various architects to create this masterpiece. However, should HACM be barred from protecting its development, since the funds are from the federal government? And do the architects have any say in this, because, after all, it is the result of their work?

This writer asserts that there should be available protection for both the independent agency and the architects. This Comment will shed light on those questions by analyzing the breadth of the Architectural Works Copyright Protection Act (“AWCPA”), and the ties between the federal government and local agencies who utilize its funds for public purposes. Milwaukee’s housing authority will be used as an example, and the first section will provide relevant background on the current AWCPA scheme. The second part of this Comment will analyze the ownership issues that arise from the current AWCPA scheme. Finally, this Comment will assert the relief available to architects whose architectural works are funded with federal dollars.

I. BACKGROUND

A. Architects and Their Architectural Works

Architects plan and design the various buildings, offices, houses, complexes, and structures that we live and breathe in.⁵ We often do not think of the impacts that architects have on the world, but they have shaped the world as we see it.⁶ In fact, research has shown that the physical environment of a

2. Rory Stott, *The Copyright Law That Should Have Architects Up in Arms*, METROPOLIS MAGAZINE (Apr. 14, 2016), <http://www.metropolismag.com/Point-of-View/April-2016/The-Panorama-Copyright/> [<https://perma.cc/7Z5D-Q2DY>].

3. 17 U.S.C. § 105 (1976).

4. *Works Not Covered by Copyright*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/works-not-covered-copyright> [<https://perma.cc/7F7U-SKRF>].

5. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK (2018).

6. Tean Chee Ko, Jelena Nikolic, *How can architecture change the world?*, RMJM (Mar. 17, 2016), <https://www.rmjm.com/can-architecture-change-world/> [<https://perma.cc/5AHH-QWXS>].

building can have an impact on its users and patients.⁷ Architect Gene Klow remarked that:

“recent research has demonstrated that the healing experience for patients in healthcare facilities is significantly enhanced when they are in a building that provides a nurturing environment. Just as healthcare facilities can improve the sensory experience of a patient, great architecture can not only meet the individual needs of its inhabitants efficiently, it can also uplift the human spirit.”⁸

Architect Chris Johnston added that:

“[a]rchitecture is a unique blending of the arts with sciences as evidenced by its greatest exponent, Michelangelo. Architects who understand this premise can affect the lives of everyday people with their designs, for better or for worse . . . [g]ood, thoughtful architecture can raise the human spirit to soaring heights, while [a] bad design can crush the life out of its users. It is incumbent upon the architect to not only understand this, but also to strive to achieve it, ensuring clients understand [that] good design will pay for itself in the long term.”⁹

An architects’ livelihood is often dependent on their ability to create good designs for individuals and companies. An architects’ work is vital to our existence and it is not a job that will be easily supplanted by software or machines.¹⁰ That is why architects are highly compensated for their work.¹¹ But how do architects protect the architectural works that they have put a significant amount of time and energy into? Architects turn to copyright law in those situations.

7. E.R.C.M. Huisman, E. Morales, J. van Hoof, H.S.M. Kort, *Healing environment: A review of the impact of physical factors on users*, 58 BUILDING AND ENVIRONMENT 70 (2012); Barbara J. Huelat, *The healing experience*, HEALTHCARE DESIGN MAGAZINE (Feb. 1, 2009), <http://www.healthcaredesignmagazine.com/trends/architecture/healing-experience/> [<https://perma.cc/3X4G-VZEL>]; Gene Klow, *How architecture can change the world?*, RMJM (Mar. 17, 2016), <https://www.rmjm.com/can-architecture-change-world/> [<https://perma.cc/92EC-39DM>].

8. Klow, *supra* note 7.

9. Chris Johnston, *How architecture can change the world?*, RMJM (Mar. 17, 2016), <https://www.rmjm.com/can-architecture-change-world/> [<https://perma.cc/A4UJ-WMUD>].

10. Daniel Davis, *Why Architects Can't Be Automated*, ARCHITECT MAGAZINE (June 15, 2015), http://www.architectmagazine.com/technology/why-architects-cant-be-automated_o [<https://perma.cc/XA6S-LLSD?type=image>].

11. See BUREAU OF LABOR STATISTICS, *supra* note 5.

Copyright law has grown significantly since its creation, but its growth has been sluggish in the world of architecture.¹² Congress enacted the first federal copyright law in May, 1790.¹³ Since its enactment, copyright law has managed to flourish by promoting creativity, while maintaining the integrity of the various artists, musicians, and actors.¹⁴ Yet, the growth has been slow for architects and especially those procured through local governmental bodies because the Act itself fails to mention local governmental bodies and it does not support federal protection.¹⁵ Moreover, the public nature of architectural works makes copyright issues even more complicated.¹⁶ That is, architectural work is put on full display for individuals by its very nature.¹⁷ The finished products are pervasive.¹⁸ As a result, the AWCPA's protection is interpreted broadly, but it still may not apply to a situation like this.¹⁹

B. Copyrights in the United States

“Copyright is a form of protection provided by the laws of United States to authors of ‘original works of authorship,’ including literary, dramatic, musical, artistic, and certain other intellectual works.”²⁰ The rights are not unlimited, but it is illegal for anyone to violate any of the rights provided by the copyright law to the owner of the copyright.²¹ Architects fall into a distinct category because of the utilitarian nature of their work, but their design work is covered under the Copyright Act.²² The copyrightable works under the Act include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.²³

12. See David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made A Difference?*, 18 J. INTELL. PROP. L. 1 (2010).

13. *Copyright Timeline: A History of Copyright in the United States*, ASSOC. OF RESEARCH LIBRARIES, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.WIEkk2NlmgR> [<https://perma.cc/NE5X-Q2SD>].

14. Shipley, *supra* note 12, at 3.

15. 17 U.S.C § 105.

16. Stott, *supra* note 2.

17. *Id.*

18. *Id.*

19. Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598 (1992).

20. COPYRIGHT BASICS, UNITED STATES COPYRIGHT OFFICE (2017).

21. *Id.*

22. *Id.*

23. *Id.*

Architectural works are secured automatically upon creation, and a work is “created” when it is fixed in a copy or phone record for the first time.²⁴ However, there are advantages to registering a copyright. The listed advantages include the following:

“(1) Registration establishes a public record of the copyright claim; (2) before an infringement suit may be filed in court, registration is necessary for works of U.S. origin; (3) if made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate; (4) if registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney’s fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner; and (5) registration allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies.”²⁵

C. Housing Authority of the City of Milwaukee and its Federal Government Relationship

HACM is a nonprofit entity that runs and builds public housing developments within Milwaukee.²⁶ Its funding typically comes from the United States Department of Housing and Urban Development (“HUD”), but HACM also receives funding from other sources.²⁷ HUD is a cabinet-level agency in the executive branch of the United States government.²⁸ This is what makes HACM’s ownership difficult because of the significant funding that it receives from the federal government.²⁹ The complexity does not stop there, because HACM procures architects and other businesses to do most of its work.³⁰

24. *Id.*

25. *Id.*

26. *Development Services*, HOUSING AUTHORITY OF MILWAUKEE, <http://www.hacm.org/business/development-services> [<https://perma.cc/EW7T-X7WQ>] (last visited Jan. 31, 2018).

27. *Id.*

28. David Forbes, *Inside the agency: What are housing authorities, and how do they work*, CAROLINA PUBLIC PRESS (Feb. 2, 2015), <http://carolinapublicpress.org/21689/inside-the-agency-what-are-housing-authorities-and-how-do-they-work/> [<https://perma.cc/P9UQ-3MRC>].

29. *Id.*

30. *Procurement*, HOUSING AUTHORITY OF MILWAUKEE, <http://www.hacm.org/business/procurement> (last visited Jan. 31, 2018).

For this particular project, HACM utilized Torti Gallas and Partners, Kindness Architecture and Planning, and Entelechy.³¹ Those design firms spent many months working together to come up with a redevelopment plan to change the identity of the neighborhood, and to attract mixed financed individuals.³² HACM wanted to attract individuals of different social classes to represent a thriving and diverse environment.³³ The rationale is to promote stability and growth for the low-income individuals who reside at the development.³⁴

D, AWCPA and the Need for Protection

A private individual or company would not create a multi-million-dollar development without copyright protection. Why should the Housing Authority of the City of Milwaukee and the architects that it procured not receive that same protection? Prior to 1990, copyright protection did not extend to the actual buildings depicted in the plans, blueprints, renderings, and models.³⁵ However, the copyrightability of the architectural prints, plans, blueprints, renderings, and models, were already established under the original copyright act.³⁶ The AWCPA would change that, by extending copyright protection to fully constructed works of architecture such as housing developments, condominium complexes, office towers, and parking decks.³⁷ Thereby, the Act provided full protection to the works of architecture and not just the plans.³⁸

There are a couple of reasons behind this expansion. First, the drafters of the AWCPA believed that “[further] protection for works of architecture should stimulate excellence in design.”³⁹ In doing so, architects are now more in line with artists.⁴⁰ Second, and more importantly, the United States became a supporter of the Berne Convention.⁴¹ This convention required its members to afford copyright protection to “works of architecture – the constructed design of buildings,” which is distinct from the plans, prints, illustrations, and

31. 2015 Rudy Bruner Award Project Data, HOUSING AUTHORITY OF THE CITY OF MILWAUKEE, https://ubir.buffalo.edu/xmlui/bitstream/handle/10477/34346/WestlawnGardens_FULL.pdf?sequence=3 [<https://perma.cc/KC44-4KGG>].

32. *Id.*

33. Studhalter, *supra* note 1.

34. *Id.*; HOUSING AUTHORITY OF THE CITY OF MILWAUKEE, *supra* note 26.

35. Shipley, *supra* note 12, at 3.

36. *Id.*

37. *Id.* at 7.

38. Winick, *supra* note 19, at 1603.

39. Shipley, *supra* note 12, at 9.

40. *Id.* at 59.

41. *Id.* at 4.

sketches.⁴² That is, the Berne Convention required the United States to afford “full protection” to architectural works.⁴³

However, full protection has not been defined and there has been disputes over what constituted a building that can be protected as an architectural work.⁴⁴ The AWCPA defined architectural works as “the design of a building embodied in any tangible medium of expression, including a building, architectural plans, or drawings.”⁴⁵ Legal precedent has shown that architectural work protection is limited to structures habitable by humans, and the building must be permanent and stationary.⁴⁶ Further, precedent has shown that the overall form of the building(s) is protected, but the protection does not cover individual standard features, such as windows and doors.⁴⁷ Nevertheless, copyright protects any artistic or graphic authorship that can be identified separately.⁴⁸

E. AWCPA and its Scope of Protection

America’s initial reluctance to extend copyright protection to architecture originated in the policy objectives behind the constitutionally mandated purpose.⁴⁹ That constitutionally mandated purpose is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵⁰ Thus, American intellectual property is based on benefitting the public.⁵¹ That entails for a less restrictive field of law because architecture is ubiquitous and it does more harm to the public than good if severe restrictions are placed on it.⁵² For example, if there are major restrictions on architectural works then it could slow the process of architecture at the public’s expense because many architects would not be able to use, adapt, and modify other works.⁵³ Therefore, American intellectual property law did not look to protect architectural works because it was considered a utilitarian work under American law.⁵⁴

42. *Id.* at 9.

43. *Id.*

44. Winick, *supra* note 19, at 1613; Shipley, *supra* note 12, at 10.

45. Winick, *supra* note 19, at 1612.

46. Shipley, *supra* note 12, at 12.

47. *Id.*

48. *Id.*

49. Winick, *supra* note 19, at 1603.

50. *Id.* at 1600.

51. *Id.* at 1601.

52. Stott, *supra* note 2.

53. Winick, *supra* note 19, at 1601.

54. *Id.* at 1601-02.

However, as stated previously, when the United States got internationally involved with the Berne Convention, this would change.⁵⁵ The Berne Convention forced the United States to reexamine the conception of architecture as a utilitarian work under American law.⁵⁶ Thus, in order for the United States to comply with the Berne Convention, American copyright law would have to recognize the artistic value of architecture by extending copyright protection to architectural works.⁵⁷

The scope of protection does not go any farther, and is limited insofar as to follow the Constitution and to comply with the Berne Convention.⁵⁸ Utilized together, American architects enjoy the right to have its buildings protected, but no farther.⁵⁹ Many believe that allowing architects to protect its buildings is too broad and, in fact, frustrates the Constitution.⁶⁰ Architecture is evolving around the world and the Berne Convention represents a global and progressive approach.⁶¹

II. OWNERSHIP ISSUES AND THE RELIEF AVAILABLE

Even with those broad and progressive views, it is still difficult to identify who would have copyright ownership in this particular instance. In general, the copyright in an architectural work is usually owned initially by the author(s) of the work and that includes contributors.⁶² Solely paying for architectural or other construction plans or designs does not bestow exclusive rights to an owner absent an express written license or transfer of ownership.⁶³ There are exceptions, such as cover works of employees, or “works made for hire,” but design work for an owner usually will not fall under either of those exceptions.⁶⁴ Thus, in the case of construction documents, the owner of the copyright is almost always the architect or engineer who prepared the plans.⁶⁵

It is likely that the architects would own the copyright, here, unless the Housing Authority explicitly went out of its way to negotiate for the written

55. *Id.* at 1602.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Stott*, *supra* note 2.

62. *LLP: Owner vs. Architect: Who Owns the Design?*. FINDLAW, <http://corporate.findlaw.com/intellectual-property/llp-owner-vs-architect-who-owns-the-design.html> [<https://perma.cc/VL2V-7G3W>] (last visited Feb. 15, 2018).

63. Karl E. Geier and Scott Hernandez, *Who Owns the Plans? Owners, Architects and Engineers, and the Federal Law of Copyright*, 21 *Miller & Starr Real Estate NewsAlert* 115 (2010).

64. FINDLAW, *supra* note 62.

65. Geier, *supra* note 63.

license or transfer of ownership. As it stands, the AWCPA does not address copyright ownership, however the American Institute of Architecture (“AIA”) contract provides that “the architect shall be deemed the author of the documents and drawings with respect to [the] project and shall retain all rights to said documents including copyrights.”⁶⁶ Other standard AIA contract language states that the documents and drawings “shall not be used by the owner or others on other projects, for additions to this Project or for completion of this Project by others, unless the architect is judged to be in default under this agreement, except by agreement in writing with appropriate compensation to the architect.”⁶⁷

Even further, many design firms subcontract some of their work. It is possible that the design firms would include that language in its contracts when subcontracting out bits and pieces of the project. Therefore, the major issue with ownership here involves the passing down of the federal funds and the general and subcontracting that took place.

Nevertheless, the AWCPA does permit copyright holders to seek several forms of relief under the current scheme.⁶⁸ The available relief includes injunctive relief, statutory and actual damages, recovery of the defendant’s profits, and impounding or destroying infringing copies.⁶⁹ Another problem arises with the forms of relief available for the copyright holder, especially that of injunctive relief. The House Subcommittee has stated that “architectural works [are] different than other forms of authorship [because] [a]rchitectural works are the only form of copyrightable subject matter that is habitable.”⁷⁰ When a copyright holder argues that they are entitled to injunctive relief, the defendant will often invoke economic waste.⁷¹ Essentially, when a litigant invokes the doctrine of economic waste in this particular situation, they are arguing that it would be wasteful for them to have to tear down a building that they have already started developing.⁷²

Indeed, the architectural community has argued that injunctive relief should not be granted when the construction of a building is already under way.⁷³

66. Shipley, *supra* note 12.

67. *Id.*

68. Winick, *supra* note 19, at 1632.

69. *Id.*

70. H.R. REP. No. 101-735, at 6944 (1990).

71. Mark R. Hinkston, *Repair or Replace? The Economic Waste Doctrine in Construction Defect Cases*, WISCONSIN LAWYER (Aug. 2011), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=84&Issue=8&ArticleID=2308> [<https://perma.cc/DDZ2-MUJM>].

72. *Id.*

73. Winick, *supra* note 19, at 1628.

Perhaps, the tearing down of the building may cause waste to a defendant, but significant harm could also occur to the plaintiff if the building is allowed to encroach. The United States Court of Appeals for the Second Circuit has discussed the availability of injunctive relief for copyright holders and it stated that “[a]ll now agree that injunction is not the automatic consequence of infringement and that equitable considerations are always germane to the determination of whether an injunction is appropriate.”⁷⁴ Thus, courts are likely to weigh competing factors before determining whether injunctive relief is an appropriate relief.

III. SUGGESTION

An independent agency that uses federal funds should be allowed to own a copyright for its architectural works. In this particular situation, HACM, which is an independent agency, is using federal funds as a part of its funding for a large-scale development. HACM, or any of the design firms that it procured, should be able to copyright that work. There are two reasons for this suggestion: (1) these independent agencies are contractors who work with the U.S. government, and those agencies should not be considered government employees for copyright purposes; and (2) even if these independent agencies have the ability to protect themselves, courts still weigh the equitable remedies for a copyright infringement claim.⁷⁵

First, if the rules that apply to the federal government were imputed upon architectural design firms who are two to three links removed from the federal government, then the applied rules would be far-reaching. It is likely that the architectural firms have an idea that federal funds are included in the money that it is being paid, but when the government is just a helping hand should that bar those architectural firms from protecting its work? The answer to that question is no, because the design firms are building something with a different agenda in mind. The architects likely believe that they are building something for HACM, and that HACM will own that development. Indeed, either HACM or another independent agency will own and run the development and not the government, thus the architects should be able to protect their work in a situation similar to this.

Second, even if HACM or the design firms that it procured are allowed to copyright its architectural work it does not mean that the public nature of the development is destroyed. To wit, courts will weigh the equitable relief

74. *Id.*

75. *Copyright Law and U.S. Government Works*, COPYRIGHT LAWS, <http://www.copyrightlaws.com/us/copyright-laws-in-u-s-government-works/> [<https://perma.cc/6DM6-4ML9>] (last visited 1/31/2018); Winick, *supra* note 19, at 1628.

available even if a certain claim had merit. Therefore, it will be an uphill battle for the design firms to enforce that protection even with the ability to copyright its work. Thus, if the claim had significant merit then that design firm will be able to protect its masterpiece, however, if the claim does not have any merit then the relief would likely be denied.

CONCLUSION

If protection is needed, let the courts be the judge. There are three factors that went into this conclusion. First, independent architects and engineers are the ones that are punished by this rule and these independent firms may not realize that federal funds are being utilized as a part of the large-scale project. Second, if federal funds are only part of the overall funding then that should not preclude third party architects and engineers from protecting its independent work on that project. Third, courts have done a good job weighing the equitable reliefs available and whether a certain plaintiff requires that relief.

Nevertheless, discouraging protection in situations like this does not promote the purpose of the AWCPA. The constitutional mandated purpose is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷⁶ The drafters of the AWCPA believed that “[further] protection for works of architecture should stimulate excellence in design.”⁷⁷ Thus, protection should be allowed because it would stimulate excellence in the architects or engineers’ work. Without that protection, architects and engineers may not do their best work on projects that receive federal funds, because those firms will know that the project would not be protected. However, if protection was afforded, architects and engineers would be encouraged to provide excellent work because they would understand that they can protect the work that they have done. Therefore, the AWCPA should protect architects or engineers that work on projects that are federally funded, because better architectural works benefit the public, and courts can enforce protection only when it is truly warranted.⁷⁸

76. Winick, *supra* note 19, at 1600-01.

77. Shipley, *supra* note 12, at 9.

78. Johnston, *supra* note 9; Winick, *supra* note 19, at 1647.

