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COPYRIGHT ISSUES ON THE PROTECTION OF ARCHITECTURAL WORKS AND DESIGNS

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Architects and engineers depend on copyright law to protect their original works. Copyright protection is automatic once a tangible medium of expression in any form of an innovative material, conforming the Copyright Designs and Patents Act 1988, is created. In terms of architectural works, they are protected as literary works (design drawings and plans) and as artistic works (the building or model of the building). The case law on the concept of "originality" however discloses that it may be difficult for certain artistic works of architecture to achieve copyright protection. Although copyright law provides automatic protection to all original architectural plans, the limitation is that it only protects the expression of ideas but not the ideas themselves. The purpose of this research is to explore how effective the UK's copyright law regime is for protecting the rights and interests of architects in their works. In addition, the United States system of copyright law will be analysed to determine whether it provides more effective protection for architects and engineers with regard to architectural works. The key objective in carrying out this comparison is to compare and contrast the extent to which the two systems protect the rights and interests of architects against copyright infringement. This comparative analysis concludes by considering the possibility of copyright law reform in the UK.

Keywords: architectural works and design, copyright, infringement, intellectual property.

INTRODUCTION

In the field of architecture, architects and engineers depend mainly on copyright law and contractual provisions to protect their work. Copyright law protects the rights and interests of authors on their original works of authorship such as literary, dramatic, musical, artistic, and certain other intellectual works including architectural works. Copyright protection is automatic once a tangible medium of expression in any form of an innovative material, conforming the Copyright Designs and Patents Act 1988 (CDPA 1988), is created. In terms of architectural works, this includes architectural plans, drawings and buildings. There is no official copyright registry in the United Kingdom nor is there any requirement to pay registration fees to secure copyright protection. The works can be published or unpublished materials. Copyright owners have the right to control the reproduction, display, publication, and even derivation of the architectural design. Copyright infringement or 'unauthorised copying' is a breach of the exclusive rights of the copyright author, however, there are limitations. It is well established that copyright law only protects the expression of ideas but not the ideas themselves. This can be problematic for artistic works of architecture. This

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research analyses the extent to which copyright law protects the rights and interests of the creators of architectural works.

UNITED KINGDOM COPYRIGHT LAW

Copyright law protects original architectural drawings and plans as literary works under s3(1) CDPA 1988. However, a work of architecture, being a building or a model for a building is also protected by copyright law as an "artistic works" under s4 CDPA1988. Section 4(1)(b) defines a building as including any fixed structure or part of a building or fixed structure:s4(2). This definition includes for example, a modern addition to a building from another era, such as the Clore Gallery at the Tate Britain in London. However, there is no need for architectural works to have 'artistic' quality. In principle, the same protection is afforded to a simple square office block as to the Houses of Parliament, although it would be harder to argue that the design of the simple office block is original.

It is the skill and labour which goes into the creation of the drawings and plans or an architectural work that gives rise to 'originality'. The amount of skill and labour necessary for subsistence of artistic copyright in a building or a model of a building is a matter of fact and degree. In assessing the originality of an artistic work, a distinction is drawn between what is visually significant (i.e. where the skill and labour employed are highly relevant) and what is not visually significant, whether the skill and labour employed are insignificant. For example, in *Drayton Controls (Engineering) v Honeywell Control Systems* [1992] FSR 245, the court compared two drawings of a valve. It was held that the later drawings were original because there was a change of shape which was visually significant. A mere reduction of scale and dimension of the original work was not visually significant and therefore not held to be original. This decision instructs that not all skill and labour will assist to ensure that an architectural work is original for the purpose of copyright protection. A scaled-down drawing of an original work or an exact copy of a design drawing would not be. There must also be some unique element or element of material alteration or enhancement which is sufficient to make the work original: *Interlego AG v Tyco Industries Inc* [1989] AC 217, [1988] 3 All ER 949.

The idea/expression dichotomy in artistic (including architectural) Works

Whilst copyright law protects original architectural drawings and plans as literary works, it does not protect the ideas and concepts embodied in them. This is known as the 'idea/expression dichotomy'. Similarly, an architect or engineer, when creating an artistic architectural work, may embody a number of ideas, including his own skill, labour and effort, combined in a particular way. However, the decision in *Kenrick & Co v Lawrence & Co* (1890) 38 WR 779 suggests that the more general the idea expressed in the artistic architectural work, the more difficult it will be to establish infringement. It can be argued that in this way, the development of architectural ideas and concepts is encouraged without restriction. Copyright only subsists in the form of the expression of ideas: *Jones v London Borough of Tower Hamlets* [2001] R.P.C. 23. The underlying policy is to prevent the monopoly of the common stock of architectural ideas. The difficulty arises however when the courts are called upon to draw a distinction between a general idea, which is not protected, and its expression, which is. Below, we will explore the extent to which the UK copyright law protects the rights and interests of architects and engineers against copyright infringement.

PRIMARY INFRINGEMENT

The copyright owner has the exclusive right to copy the work, issue copies of the work to the public, perform show or play the work in public and make an adaptation of the work, or do any of the former in relation to an adaptation: s16(1) CDPA 1988.

There are two key elements to primary infringement. Denning LJ in Francis, Day and Hunter Ltd v Bron [1963] Ch 587 held that there must be a causal connection between the copyright work and the allegedly infringing work. This means that the copyright work must be the source of the infringing work. Secondly, there must be copying of a substantial part of the copyright work. In terms of the first element, for a work to infringe, it must derive from the copyright work. In other words, it must be copied. If two works created independently are found to be substantially the same, the first in time to be created will not be infringed by the second. The similarity may be coincidental or perhaps the result of the creators choosing similar subject matter, a townhouse. On the other hand, the two works may have derived from a common source such as a famous building, St Paul's Cathedral. If the second author uses the first author's work to identify the common source, there will be no infringement, since by going back to the primary source the second author will have expended his own skill and effort on his work: Pike v Nicholas (1869) 18 WR 321. The copying of architectural plans by duplicating the original plans is an example of copyright infringement. A perfect replica is not necessary to prove infringement, as long as an ordinary average layman would realise that there is an appropriation from the original work. Angela Adrian suggested that

"The test is whether the plan or building was a copy of the concept or style and therefore legitimate or a copy of the author's original manifestations of that concept or style and therefore an infringement." (Adrian, 2008, p529).

INDIRECT COPYING AND SUBCONSCIOUS COPYING

It is established legal principle that an infringing work need not be copied directly from the original work. It may very well be that the infringing author may not even know of its existence. A good example concerning the "causal link" element of the test for infringement is the case of Solar Thomson Engineering Co. Ltd v. Barton [1977] R.P.C. 537. In this case, the defendant asked a design engineer to design a spare part for a machine. In order to avoid infringing the copyright in the original design drawings of the claimant's spare part, the defendants gave the design engineer detailed instructions and the surrounding hardware, but did not show him the claimant's original drawing. The design engineer created a design drawing which was very similar to the claimant's original design drawing. The Court of Appeal held that the instructions given to the design engineer amounted to a sufficient causal link for copyright in the original drawings to be infringed.

Apart from a causal connection, in order to infringe copyright must be in relation to the work as a whole, or any substantial part of it: s16 (3) (a) CDPA 1988. A 'substantial part' is defined qualitatively, not quantitatively: Ladbroke (Football Ltd) v William Hill (Football Ltd (1964) per Lord Pearce. The case of Pearce v Ove Arup Partnership Ltd [2002] ECDR CN2 illustrates the 'substantial part' principle. Here, an architectural student, Pearce, had made some drawings of a town hall in 1986. He claimed that an English civil engineering company together with the Dutch architects

and builders as well as the Dutch local authority had infringed his copyright under the Dutch copyright statutes by erecting the Kunsthall in Rotterdam. Pearce claimed that features of Kunsthall's design had been copied from his Docklands plans therefore infringed his UK and Dutch copyrights. In this instance, the judge struck out the action on the grounds that there was insufficient similarity between the building and the claimant's drawings. It was held that "Kunsthall was independently designed with a similar feature to Pearce's design" hence there was no infringement incurred. In particular the judge held that the degree of similarity between the claimant's drawings and those of the defendants was not sufficient to give rise to an inference of copying. He considered that the claim was based on speculation and accordingly ordered the whole claim against each of the defendants to be struck out. Further, in determining whether a substantial part of an artistic work has been taken for the purpose of copyright infringement in *Designers Guild Ltd v Russell Williams (Textiles) Ltd (No 2)* (2001) the House of Lord held that the correct approach was not to deal with the copied features in isolation, but to compare their cumulative effect.

However, the issue of subconscious copying is relevant to architectural works. The infringer need not be aware that he is copying in order to infringe another's copyright work. By way of illustration, in the field of music and composed works, a composer may listen to a tune and integrate it into his own composition subconsciously without realising that a similar tune already exists. This was the basis for the claim of copyright infringement in *Gomme (E.) Ltd v. Relaxateze* [1976] R.P.C. 377 in which Walton J held that there was no copying, although he accepted that subconscious copying was possible because a tune can remain in human memory for a considerable duration. Similarly, if an architect inspects an architectural plan, he or she may be influenced by the prior viewing. It is possible that he may take the architectural concept and style embodied in the plan and applied it to his own design in an original plan produced by him without any infringement.

It is clear that a key issue for architects and engineers is determining whether the line is to be drawn between: (1) the manifestation of original concepts or styles contained in the architectural plans protected by copyright as a monopoly or (2) express concepts and ideas that may be legitimately used: *Jones v London Borough of Tower Hamlets* [2001] R.P.C. 23. As copyright is a negative right which prohibits the duplication of the work of the authors by others, it is submitted that the correct approach is for architectural concepts and ideas recorded architectural plans to preclude unauthorised copying however, in certain instances they may be used to encourage further architectural developments. If the architectural drawings contain "unique" designs, copyright protection applies.

The Royal Institution of British Architects (R.I.B.A.) conditions of appointment contract has an expressed term stating that unless an alternative agreement has been made the architect retains his copyright in his drawings and the work executed by reference to them. The architect owns the copyright in the drawings and any documentation produced in the course of the project. Therefore, a builder who physically constructs a work of architecture cannot claim copyright even he builds it: *Meikle v Maufe* [1941] 3 All ER 144. The RIBA conditions of appointment contract express it clearly that the architect remains the author of the architectural works. In situations where a building contractor building for an employer, the commissioning client (*Cyprotex Discovery Ltd v University of Sheffield* [2004] RPC 887) or an employee working for an employer, the employer, in both situations, is normally the author and owner, unless there is an agreement between them stating the contrary:

s11(2), CDPA 1988. If a client would make use of the calculations, plans, or memoranda, the contract should make express as provision as in *Leicester County Council v Michael Faraday & Partners Ltd.* [1941] 2 KB 205.

AUTHORISATION

In practice, architects and engineers create particular architectural plans for specific clients which generally attract copyright protection. Accordingly, architects and engineers should take care to expressly authorise third parties permission to use the plans. An example of the nature of authorisation arose in *Pensher Security Door Co Ltd v Sunderland City Council* [2000] RPC 249. The Council wish to install a particular door design in its council flats. In the call for tenders, the council specified a design which had originated from the claimant. The successful tender submitted a design similar to the claimant's design. The claimant alleged infringement. The Court of Appeal held that a person who commissioned another to produce an article to a particular design sanctioned and impliedly purported to grant him the right to make it to that design, thereby authorising production of the doors, in this case. The rationale for the decision was that the Council had clearly been aware that the door design in the winning tender was similar to the claimant's door design.

ASSIGNMENT AND LICENCE

Architects and engineers as designers normally have two ways of dealing with their copyright: assignment or licence. The first method is to expressly assign their copyright to the employer in terms of engagement which must be recorded in writing: ss90-92, CDPA1988. This copyright assignment must be stated clearly in the contract signed by both parties. Provided the architect or engineer does not replicate the whole design in another architecture s64, CDPA1988 allows the designer to retain the rights to reproduce some parts of the design for development, to be reused in another project. In general, architects prefer licensing than assigning copyright of architectural plans. Licensing provides architects freedom of future use and modification of their design for development.

The architect can also authorise a third party to use his copyright materials but he continues to retain the copyright. If there is no expressed agreement on copyright, the employer, that is, the commissioning client, will have an implied licence to use the drawings and plans for him according to the fee paid to the architect: *Stovin-Bradford v Volpoint Properties Ltd* [1971] Ch 1007, [1971] 3 All ER 570, [1971] 3 WLR 256, CA; *Blair v Osborne and Tomkins* [1971] 2 QB 78, [1971] 1 All ER 468, CA. The normal use of the plans may be for the alteration by a different architect, the printing of a developer's brochure for enquiring potential buyers (*Robert Allan & Partners v Scottish Ideal Homes* [1972] SLT (Sh Ct) 32). Unless agreement is made, certain unique distinctive features in the design cannot be used in an extension of the original building (*Meikle v Maufe* [1941] 3 All ER 144).

An architect can licence a client or other design professions to use the drawings, but the copyright normally remains with the architect who creates the drawings. The Royal Institution of British Architects (RIBA) has RIBA standard form of appointment contract which protects architects. If fees due to them are not paid, the licence would not be valid. It is an infringement of copyright if the drawings are copied, distributed or rented to other designers or to make alterations base on the original drawings without the author's permission in the form of a valid licence. If a third party uses the plans for construction knowingly that it is an infringement of

copyright, they are in breach of copyright law. Apart from Copyright there are other forms of protection for architects' work such as unregistered design rights, registered nationally as registered designs and European design rights.

Both the Royal Institute of British Architects, Conditions of Engagement (CE/99) Clause 6.2 and the Association of Consulting Engineers Conditions of Engagement 1995 (2nd ed, 1998) Agreement D have expressly licensed the commissioning client to copy and use, and also allowing other consultants and contractors to copy and use the drawings and documents for the purposes related to the project. This is under the condition that the fees have been paid according to the agreement, and the architect has completed the scheme design, detailed design and production information.

The reason behind an implied licence is because if the client who commissions an architect to design for him does not entitles to use the designs, it is unlikely to settle on an agreement between the client commercial efficacy and the architect's interest. Hence, if the architect has not have an expressed copyright on the design, a licence to the commissioning client will normally be implied. Most architects and engineers favour the granting of a licence than assignment of their copyright.

In *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd and others* [1996] 2 All ER 487, although a licence was granted to Glengate to reproduce the designs after completion of work stage D of the contract between the architects and Glengate, the architects had reserved the copyright in the drawings and designs, per Clause 3.15 of the Royal Institute of British Architects (RIBA) Conditions of Engagements.

ENFORCEMENT AND DEFENCES TO COPYRIGHT INFRINGEMENT

Under s62 CDPA 1988 the remedies for copyright infringement are damages, injunctions, accounts or otherwise. For architectural works, it is unlikely that the court would order the demolition of the building because of the cost involved; hence, typical remedies are likely to be involved financial compensation. Another remedy for architectural works would be to register a caution under the Land Registration Act 1925, s54(1) against the property which is alleged to infringement of copyright of architectural plans owned by an architect (Arnold, 1997).

Sections 28-76 CDPA 1988 provide certain defences against copyright infringement. For example, the copying of copyright works may be allowed for fair dealing if the purpose of using the materials is for research and private study, criticism or review, reporting current events or incidental inclusion, provided it is not for substantial financial gain.

In conclusion, we have examined the legal principles relating to copyright protection in the context of architectural works under the UK copyright regime and noted the difficulty particular with respect to artistic architectural works (e.g. buildings). There is a dearth of case law on the issue of infringement of architectural works; however the idea-expression dichotomy as a theme has clearly emerged. We will now examine the system in place in the United States for protecting architectural works and in particular buildings. The US system is of particular interest because it has enacted specific legislation in relation to the copyright protection of architectural works.

UNITED STATES OF AMERICA COPYRIGHT LAW AND ARCHITECTURAL WORKS

In the USA, for approximately 200 years before the Architectural Works Copyright Protection Act of 1990 (AWCPA 1990) was enacted, architects were only entitled to copyright protection for their literary works i.e. their drawings and specifications and not for the building or models of buildings. In other words, US copyright law did not protect architectural constructs other than non-function monuments. The Washington Memorial for example, was protected as a sculpture under s102(5) of the Copyright Act (US). Buildings such as houses, offices, hospital or airports were not protected. This meant that in the United States, the author of an architectural design had no copyright remedy if a building structure was constructed from the original drawings and specifications or from viewing the building itself, provided the drawings and specifications were not copied. Infringers could copy buildings with no fear of action being taken against them.

The rationale for the earlier lack of copyright protection for buildings was that the constructed building, as depicted in the plans, was in fact the idea expressed in the plans. As we have seen from our discussion of the idea/expression dichotomy above, ideas are not eligible for protection. A competitor who wishes to copy a building could take measurements of the original building, draft their own plans, and construct it from those plans.

To overcome this problem, the AWCPA 1990 was passed in order to fulfil the US' obligations as recent signatories to the Berne Convention to provide protection for architectural works, i.e. buildings. Congress decided to take a minimalist approach and do only what was necessary to bring the U.S. into compliance with the Berne Convention.

Scope of Protection, Copyright Infringement and Substantial Similarity

Under the AWCPA 1990, "architectural work" work is defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form, as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." A "building" is defined to encompass habitable structures, such as houses and office buildings, as well as structures which are used but not inhabited by human beings, such as churches, pergolas, gazebos and garden pavilions. The House of Representatives Committee on the Judiciary, Report 101-735, September 21, 1990 ("Congressional Committee Report") explained that while the interior design is included in the definition of "building" other structures such as "bridges, cloverleafs, dams, highways or walkways are not "buildings" under the definition of architectural works.

However, how is the word "building" been judicially considered in the United States? This question was considered in the *Yankee Candle Co v New England Candle Co* 14 F Supp sd 154 (D Mass 1998) The facts were that Yankee Candle opened a store in the Holyoke Mall which was fitted out with several features including dark wood display cases, multi-paned windows, brass hardware and French doors. Yankee Candle was assigned the architectural plans from the architect and registered the plans and the building with the US Copyright Office. A competitor, New England Candle, opened a look-a-like store in a nearby mall. Yankee Candle sued for copyright infringement. In its defence, New England Candle argues that the store did not

qualify as an architectural work under the AWCPA 1990. As this was the first case to consider the definition of “building” under the Act, the court considers the legislative history of the Act. The court noted the types of structures that were given protection and compared them with structures specifically excluded from protection. Yankee argued that that their store had more similarities to a traditional or conventional structure than to a gazebo or pergola. The court said that copyright protection extends to free standing structures. It distinguished the store as a structure within a structure more like an office in an office building than a building in and of itself. The court did decide, however, that New England had infringed the architectural plans finding that New England’s architect had access to Yankee’s plans. It found that the two stores were so similar in the non-utilitarian elements that independent creation could not explain the similarities.

Accordingly the AWCPA 1990 has resulted in the architect having two separate copyrights in his work, one in the design embodied in the drawings or building as “architectural work” and the other in the drawings themselves, as “graphic” or “pictorial” works.

As in the United Kingdom, only “original” work is protected by US copyright law. Similarly, “originality” does not mean novelty, uniqueness or artistic merit; rather, a work is “original” if it is independently created. However, functional elements of the design are not protected. Such functionally determined elements are usually essential for the structure of the buildings, it may not be reasonable to impose infringements if they are applied. In order to access whether a particular architectural work is copyrightable or not, firstly, is the design of the overall shape and interior architecture “original”? Secondly, is the element functionally required by the structure? If the design is “original” and the element is not a functionally required element, then it is clear that the work can be protected. The designer can apply for a separate protection for non-functional elements, or the combinations of standard element even if the combination features are not original.

The copyright protection afford to a given architectural work will therefore involve a two-step analysis: (1) are “original” design elements present, including overall shape and interior architecture; and (2) are such design elements functionally required? The Congressional Committee Report states that if none of the design elements is functionally required, the work is protectable. If functional considerations determine only particular design elements, separate protection will be afforded for the non-functionally determined elements. Original combinations of standard features may be protectable even if the particular features themselves are not original. .

There two copyrights limitations on the author concerning the constructed architectural work. First, the copyright owner cannot restrict the production or distribution or public display of photographs, pictures or paintings if the architecture is in a public location ordinarily visible by the general public. Secondly, it is not necessary to seek consent of the copyrights owner before alteration or destruction of the work. Owners of buildings can make or authorise to make any alteration of the building or to destroy or authorise destruction of the building. They are also allowed to complete the partially complete building with the architecture plans.

Dietz (2001) highlighted an interesting extension of copyright protection to architectural works. The owners of 801 Tower gave permission for the filming of the first Batman motion picture on the site. It was claimed that the photography infringed the owners’ exclusive right to produce pictorial reproductions of the work of art. In

another case, *Leicester v Warner Brothers* 57 U.S.P.Q. 2d 1001 (9th Cir (US)), the court held that the sculpted elements lost the broad protection of a work of art because they are embodied in the architectural work. However, the court declined to endorse that the conceptual separability test can never be applied to works of art embodied in an architectural work. Dietz raised the question of whether a statue be considered an architectural component if it is set in the lobby of an office building. It seems unfair to deprive designers of their intellectual property rights of copyright protection simply because the work embodied in an architectural work.

The copyright owner can normally recover damages: statutory damages or damages related to profits of the person who infringed the copyright law. The Federal Court has the power to order the destruction of the infringing elements or issue an injunction relief. Damages is the most common remedy.

ANALYSIS AND CONCLUSIONS

The AWCDA 1990 is more useful for the architect that designs smaller projects and homes rather than one off high profile buildings. Homes and other smaller project are easier to copy in the first place and many purchasers are not necessarily as interested in buying a one of a kind, particularly since the typical modern subdivision has many copies of several basic designs.

In summary both the UK regime and the US legislation provide a similar level of copyright protection. The fact that the US has specific legislation does not mean that the level of protection afforded to architectural plans and works is higher. Both systems comply with the requirements of the Berne Convention. An advantage of the UK system is that the definition of building in s4 (1) (b) CDPA 1988 is very broad. The AWCDA definition of 'building' is more precise and therefore potentially more restrictive.

It is submitted that neither the UK nor the US system of copyright protection provide completely satisfactory protection to modern architects and engineers in respect of their architectural plans, drawings or buildings (or models of buildings) in several respects. There is a need for reform with respect to the protection of the rights and interests of the authors of architectural works and designs. To quote Lord Oliver in *Interlego AG v Tyco Industries* (1988), the "essence of artistic copyright is that which is visually significant" however often does not sit well with works of architecture.

Firstly, it is submitted that features of architectural plans or building which are original, even if they are functional, should be rewarded with legal protection against unauthorised copying. However, in the UK copyright law, the physical buildings are considered as artistic works. In *Shine v Childs* 382 F.Supp at 610 the court held that the Olympic Tower had met the criteria copyright subsistence noting an "unmistakable dash of originality need be demonstrated, high standards of uniqueness in creativity are dispensed with". The combination of the architectural design elements of twisting towers, diamond-windowed facades, set-backs and support grids were the features described as merely a "dash of originality" and do not adequately reflect the skill, labour and judgment expended. Furthermore, architects and engineers often include original elements into a common feature, which is seemingly not able to be protected. Nevertheless the protectable novel elements should still remain protected.

Secondly, there is a need for clear infringement standards in terms of artistic architectural works especially in terms of the degree of "originality" and "substantial similarity" required to found a successful action for copyright infringement.

Thirdly, architecture should be protected in its own category separated from “artistic works”, “graphic works” or the American category of “pictorial, graphic and sculptural works”. Because of their nature and characteristics, architectural works and designs should have *sui generis* protection. Most buildings are designed to be functional and practical rather than simply for attaining an artistic purpose. Because of their integrated characteristics of being utilitarian, functional as well as artistic, architectural works and designs should not have to be evaluated under conceptual separability test. There is a need to establish a new test to satisfy their *sui generis* characteristics. Authors should have exclusive rights on architectural works and designs preventing them from unauthorised use and copying. If artistic and functional architectural works were protected, architects and designers might be motivated for greater creativity, and they would be rewarded for their creative works and designs.

Adrian (2008) said recently that architecture has its special place in the law of copyright. While an architectural drawing can be protected by the UK copyright law, the law does not restrict the development of creative ideas and concepts but prevents the copying of plans.

In conclusion, the law of copyright protection of architectural plans and works is ripe for modernisation. It may be that the most effective way to protect the rights and interests of architects and designers of their architectural works and designs is by *sui generis* protection. *Sui generis* protection would enable the special characteristics of architectural works and designs requiring to be more adequately addressed.

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