

# A House of Cards: How Much Copyright Protection Remains for Architectural Works

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Although copyright protection in the United States was extended to architectural works in 1990, this protection has become increasingly narrow. A recently issued Eleventh Circuit opinion, *Arthur Rutenberg Homes, Inc. v. Jewel Homes, LLC*, affirmed a ruling on summary judgment of no copyright infringement, despite the fact that there was evidence the architectural plan at issue had been copied. Has protection for architectural works waned since it was created in 1990, or is there something else at issue?

## The Architectural Works Copyright Protection Act

Prior to December 1, 1990, architectural designs were protected under copyright law only as “graphic” or “pictorial” works—the structures and buildings themselves were not provided copyright protection. Thus, a building or structure could be copied in its entirety without liability under copyright law, as long as the architectural plans for the building or structure were not themselves copied. Prompted by the Berne Convention, the Architectural Works Copyright Protection Act extended copyright protection to constructed buildings, architectural plans, and drawings as “architectural works.” Under current law, architects and designers have two copyrights in architectural designs created on or after December 1, 1990<sup>1</sup>: one in the architectural plans and drawings as “graphic” or “pictorial” works under 17 U.S.C. § 102(a)(5), and the other in the constructed buildings, architectural plans, and drawings as “architectural works” under 17 U.S.C. § 102(a)(8).

## Copyright Law Protects Only “Original Works of Authorship”

“Original,” under the Copyright Act, refers to a work that possesses some minimal degree of creativity, and which has been independently created by the author. As with any copyrightable material, protection extends only to the expression of an idea, and not to the actual idea itself. However, the elements of a work that constitute the expression of an idea and the elements which constitute the idea itself are not always clear. Architectural designs often include both ideas and the expression of ideas. For example, an idea might be a three bedroom floor plan which can be expressed in an infinite variety of ways by, for example, arranging the rooms in a different manner, creating different dimensions for each room, etc.

## Architectural Designs Are Treated As Compilations

The Eleventh Circuit has likened architectural designs to compilations. Under copyright law, a compilation “is a work formed by the collection and assembling of preexisting materials . . . that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” Compilations are given only “thin” copyright protection because their substantive content is not an original work of authorship.

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<sup>1</sup> Designs that were created, but not published or constructed, on or before December 1, 1990 are also eligible for protection under the Architectural Works Copyright Protection Act if the design was constructed before January 1, 2003.

## Which Elements of Architectural Designs Are Protectable?

Copyright protection is available for the overall form of the architectural design, as well as for any arrangement or composition of spaces and elements in the design. Standard features and functionally determined design elements will not, however, receive copyright protection. The Eleventh Circuit has held that these non-protectable components include architectural elements which (1) are standard configurations of spaces or features, (2) are attributable to customary architectural styles, (3) are standards derived from consumer demand or market expectations, (4) are regulated by local building code, (5) are industry standards, (6) are necessitated by engineering, (7) are necessitated by topography, or (8) are necessitated by existing structures. In circuits—such as the Ninth Circuit, in many cases—that utilize a filtration test to determine the similarity between two works, only the protectable features of an architectural design will be considered by the court—any non-protectable element is filtered out of the legal analysis. Thus, any copied, but non-protectable element cannot be the basis for copyright infringement.

## The Eleventh Circuit's Recent Decision Illustrates the Narrow Protection Afforded to Architectural Designs

Relying on prior precedent holding that architectural designs are provided only thin copyright protection, the Eleventh Circuit in *Arthur Rutenberg Homes* upheld a finding that a defendant homebuilder was not liable for copyright infringement, despite the homebuilder's stipulation that it had printed out the plaintiff's architectural plan, made redline modifications to it, created a PDF by scanning the modified plan, and then provided that PDF to a draftsman to prepare the allegedly infringing plan. The Eleventh Circuit affirmed the trial court's holding that the only similar element between the two plans, the floor plan, was not protectable because it was standard in the industry. On the other hand, the protectable elements of the plan, the "dimensions, wall placement, and the presence, arrangement, and function of particular features around the house[,] were different. Therefore, despite evidence of copying, the Eleventh Circuit affirmed that no reasonable jury could find the two plans to be substantially similar.

## Has Copyright Protection Actually Narrowed, or Do Architectural Designs Just Have Fewer Protectable Elements?

This is a tough one. The Eleventh Circuit's decision seems to suggest that one may copy the architectural designs of another, and as long as a sufficient amount of protectable elements are altered, liability for copyright infringement can be avoided. Yet, the substantial similarity determination rests at least in part on the viewer's subjective impression and courts have found liability for infringement of architectural designs. Perhaps the best answer is that, as with anything in copyright law, the more "original" an architectural design is, the more likely a court is to afford it copyright protection.



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