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JUDGING ORIGINALITY: THE LIMITS OF INTELLECTUAL PROPERTY IN ARCHITECTURAL WORKS

Abstract

This research examines the possibility to improve the way courts of law decide on the issue of architectural infringement. In doing so, we will examine the originality criterion – the sine qua non of copyright – from a philosophical and legal perspective, suggesting that theories of personality from the past can, and must, still play a major role in judicial proceedings. Therefore, we suggest a new test for originality (the continuum test), in accordance with the latest CJEU decisions and taking into account the international homogenization that we are seeing in intellectual property law, one that is better suited to probe the personality of the author.

Key words: Originality, copyright, architecture, personality, *the continuum test*.

1. Introduction

Either we like it or not, architecture plays a central role in our daily lives. It is everywhere. Not only in our homes – in actuality, *it is our home*! – but in every other medium: from the big movie screens to the little gaming screens of our devices. Someone once observed that it "is the most commonly experienced and pervasive of all the arts",[1] its creative efforts culminating "in structures used for shelter, pleasure, business, entertainment, and transportation".[2] Alas, not unlike any other forms of human intellectual creation, it is prone to illegal and immoral forms of appropriation. Simply put, people steal other people's creations. In order to prevent this, certain legal measures were put in place, and they all come from one of the most speculative areas of law, namely Intellectual Property Law (IPL).

In Romania, in the past two decades since the new copyright law[3] came into effect there has been an explosive rise in the number of court trials

that settled matters concerning IPL, but it must be properly understood that the right granted in IPL is a limited one. For instance, a book author is protected by an exclusive right to exploit as he sees fit his work by making copies of it. The law prevents others from copying his work, hence the name copyright. Nevertheless, the book author copyright does not bar others from using the ideas of thoughts contained in his work, as under the copyright's provisions it is merely the expression of ideas which is protected from copying. Even more, this expression has to reflect the unicity of the author personality which is, in fact, the sole reason that is being protected.

IPL is unlike any other branch of the law in that it is highly dependable of the object it protects. That is to say there are different tests that are employed if one wants to determine if a novel is an original work that has to be protected or if a certain painting is an infringement on another's rights. From all the artistic works that the law grants protection, architectural works are the most juridical complex matters. This is due to the fact that they are also exceptional in their manifestations, partly because we protect not only the drawings, the "blueprints", but also the structure that is erected from those plans. It is often the case that, in order to convince the client of the skillfulness of the architect, he or she will make an artistic drawing or even a small-scale replica of the structure that will be erected. It is obvious that this expression of ideas is radically different from both the plan and the structure that will hopefully emerge and it is only natural that this is also protected under the copyright provisions. For that reason, legal scholars[4] surmised that an architectural creation is granted protection on three stages: (a) as a two dimensional technical writing, plan, drawing or design; (b) as a two dimensional artistic illustration of the projected structure or as a three dimensional model of the structure to be executed; (c) a architectural structure completed or even an unfinished one.

In the succeeding pages we will take a look at the way the concept of originality is seen around the world, in order to detect if the notion has a different meaning or we are basically understanding the same thing, no matter what legal systems we employ.

2. Originality: International Homogeneity?

The first statute in the world to provide for copyright was passed in 1710, as an act of the Parliament of Great Britain. *The Statute of Anne* (8 Anne,

c. i9), named as such due to its passage during the reign of Queen Anne (1665 –1714), is traditionally seen as a historic moment in the development of copyright. But the pivotal moment, that originated in Europe, remains the signing of the Berne Convention of 1886, with its final amendment in 1979. The purpose of the convention was to extend copyright protection to all literary and artistic works of creators from all member countries. The Berne Convention specifically protects architectural works, including both building and other structures located in a member country. Coming closer to the present day, in the past twenty-five years, the strong tendency to homogenize copyright law, though clarifications or modifications of the way in which originality is construed, have considerably reduced the differences among jurisdictions. In so doing, common law countries have tightened their standards by renouncing the position that labor alone is sufficient to support copyright protection, while civil law countries have softened their standards, reducing the amount of creativity they require.[5]

2.1. Two views of originality

The fact is that few, if any, intellectual creations are original in the sense that the author is the creator of all that is expressed in his composition,[6] and as a great legal scholar said 140 years ago, "knowingly or unknowingly, one writer borrows from another, and in the most original works of modern genius are found thoughts and sentiments as old as language itself",[7] This discovery, true as it is, gives way to two different approaches, as we emphasize work or expression.

2.1.1. Sweat of the brow

This law doctrine rests on the idea that if nothing new can come up, then the criterion of originality has to be found in the amount of work the author is willing to do. Copyright in this case comes from diligence, because of the creator's entitlement to have his effort protected. Still, even if in the sweat of the brow it is not a particularly difficult condition to satisfy, originality is still a requirement.[8]

2.1.2. Author's personality

Another way of looking at this entanglement is this: maybe nothing new – as unlikely as that is – in the sense of objective knowledge can be

found, but the way we express the things we already know can definitely be novel. From this perspective, originality is the expression of the author's personality, his soul poured into the creative work that now seeks legal protection. In the following pages this concept will be thoroughly dissected, as it is the prevailing criterion for scholars and judges alike in determining originality.

2.2. Comparative copyright law

One should begin a section dedicated to comparative copyright law with a list of US court rulings pertaining to the issue, but such is too long and complex to be summarized here; also, because the fifth chapter will present in detailed the relevant cases for architecture, we will only address the landmark mention in *Feist*,[9] the famous decision by the Supreme Court of the United States, establishing that information alone without *a minimum of original creativity* cannot be protected by copyright.

2.2.1. Canada

The corresponding doctrine in Canada was recently adjusted in the same direction as the US counterpart, by a 2004 Decision of the Supreme Court of Canada.[10] who adopted what it characterized as an intermediate position, in which in order to satisfy the originality requirement the creation of a work must involve an "exercise of skill and judgment". By "skill" it is meant the use of one's knowledge, developed aptitude, or practiced ability, and by "judgment" it is inferred the evaluation of and discernment between different options.[11] Apart from this exercise of skill and judgement, nothing else seems to be required: neither creativity, nor novelty, nor non-obviousness. It is safe to say that Canadian courts interpreting the originality requirement are fixated on the degree to which a work resulted from the author's deliberate choices. Of course, this analyses closely resemble the approaches of U.S. courts, where the term "creativity" is taken under account. For example, a court have found architectural plans were deemed original because the author chose which architectural components to place where.[12]

2.2.2. Australia

As was to be expected, the courts in some other common law jurisdictions have followed the lead of the United States in tightening the

originality requirement. Initially, in Australian copyright law creativity was unnecessary and the courts held the position that "substantial labor in collecting, verifying, recording and assembling ... data" was adequate to obtain the statutory prerequisite of originality.[13] But in 2009 the Australian High Court repudiated this position, holding that originality pivots around the fact that the author made creative choices, rather than just employing his skill or labor. From this point on, for the originality criterion to be met by the use of creative selections, the High Court[14] ruled that assembled work should not be "dictated by the nature of the information", and in no way "obvious and prosaic". In the subsequent cases, the courts have applied the clarified standard in ways that closely resemble post-Feist jurisprudence in the United States[15].

2.2.3. Court of Justice of the European Union (CJEU)

Recent decisions[16] of the Court of Justice of the European Union (CJEU) endorses that copyright spreads to works that are original in the sense that there are the 'author's own intellectual creation and that no other criteria may be applied to determine its eligibility for protection. For example, in *Football Dataco*, the CJEU explicitly dismissed the traditional common law "skill and labor" standard asserting that even significant labor and skill are not enough to declare a database original. The CJEU reiterated that originality is about making "free and creative choices" and stamping "personal touch" on the final work and no amount of labor or investment can replace that.[17] In *Painer* case, the Court explained that an intellectual creation is the author's own "if it reflects the author's personality" by way of expressing "his creative abilities in the production of the work by making free and creative choices".[18].

2.2.4. United Kingdom

For Europe, the different understandings of the originality requirement largely depend on whether a rights-based approach (in Continental Europe) or a utilitarian/incentives-based approach (in the United Kingdom) is adopted.[19] Evidently, this makes UK the EU member country whose approach to originality was most different from the standard developed by the Court of Justice of the European Union. For decades, the U.K. adhered expressly to the "sweat of the brow" approach, but recently one intermediate appellate court has acknowledged that that approach

cannot survive the decisions in *Infopaq* and its progeny and has redefined originality in terms of whether the author made expressive and creative choices.[20]

In a nutshell, the story goes like this. Following the *Infopaq* decision, the English judiciary was given the occasion to apply the CJEU decision under UK copyright law for the first time in *Meltwater*.[21] The judge ruled that the test of quality of a work under copyright protection had been restated, but not altered, by *Infopaq*, while mentioning that the full implications of this famed case had yet to be worked out. More importantly, the "skill and labour" standard was deemed sufficient to produce an original copyright work, after acknowledging "[t]he effect of *Infopaq* is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article".[22] The Court of Appeal approved the first judge judgment, adding that "[t]he word 'original' does not connote novelty, but that it originated with the author",[23] and that the CJEU decision had referred to an "intellectual creation" only in relation "to the question of origin not novelty or merit".[24] This resistance to change most likely stems from the fact that the traditional UK standard of originality has been looser than the continental one, namely "author's own intellectual creation", being defined as "what is worth copying is prima facie worth protecting".[25] But, as one author noticed[26] when the U.K. leaves the EU, the British courts may be able, if they wish, to reconfirm the validity of their traditional stance.[27]

2.2.5. France

Traditionally, French copyright law contained a much more arduous obstacles in way of protection as the courts required an objective test reminiscent of novelty. This changed in the late nineteenth century when they commence to put emphasis on the relationship between the work and its author. It is at this point that the French courts began more commonly to use the term *originalité*.[28] Recently, The French court of cassation, in a case concerning the possible protection of a multifunctional architectural complex,[29] held that "the demonstration of the absence of precedents and the new character of the choices made by conceiving the buildings and their arrangement is not sufficient to establish the originality of the elements in question, in the absence of showing what constitutes the choice of the personality of their author".

2.2.6. Austria & Germany

Other courts in the member countries of the European Union adjusted their originality thresholds to meet the CJEU requirements. Countries that previously had strict rules have somewhat softened them and this is also the case in Austria and Germany. In the first, for example, it's now easier to obtain copyright protection for modestly creative photographs than it used to be,[30] and in the second, more software programs are now qualified for copyright protection.[31]

2.2.7. The Netherlands

The Dutch Supreme Court has also emphasized that the bond between the author and the work counts in establishing originality. In the *Van Dale v. Romme*[32] case it held that a collection of headwords would be entitled for safeguarding only if they "were the result of a selection process expressing the author's personal views".[33] This is due to the fact that although the copyright edict does not expressly require that works be original, the courts have long understood it to contain such a requirement and have construed it to dictate that a work bears the personal mark of the creator. In a recent decision, the Dutch Supreme Court offered some additional detail when saying that a work enjoys protection if and only if the author made enough creative choices in order for the work not to be trite or trivial.[34] Naturally, opinions by the Dutch Supreme Court rendered after the CJEU use a slightly altered language, but the main substance is kept the same. As one legal scholars observes,[35] in determining that the design of a chair can be original, the Court referenced *Infopaq's* declaration that a work must be the expression of the author's intellectual creation, or in another ruling found the color scheme of the Rubik's cube to be original because it was not dictated by technical requirements.

2.2.8. Belgium

As in the Netherlands, the copyright law in Belgium does not expressly necessitate that a work be original, but the *Cour de cassation de Belgique* habitually holds that it satisfies the originality condition if it either constitutes an expression of the author's intellectual work or bears the author's personal touch.[36] Notwithstanding a short departure from this classical position in *Artessuto*[37] where it upturned an appellate court's decision that had found the need for an original work to bear the stamp

of the author's personality, the Court position is now totally aligned with the CJEU jurisprudence.[38]

2.2.9. The global outlook

There are still some countries that do not feel the need to join the harmonization process. Following the bizarre way in which the Swiss copyright statute of 1992 demarcated the subject of copyright protection, namely "intellectual creations with an individual character"[39] the Swiss courts seem to consider the "statistical uniqueness" of the work at question, suggesting that some degree of objective novelty is compulsory for copyright protection. At the opposite part of the globe, New Zealand jurisprudence still uphold the core of the "sweat of the brow" model, considering that nothing more than a minimal level of skill and labor is necessary to establish originality. Although, as it was rightly remarked,[40] there are some signs[41] that this stance may be weakening. India, on the other hand, departed from a similar course, where up until 2007[42] the courts interpreted originality in the old common law style, but then decided that this approach "was to generous to the authors to the detriment of the public interest".[43] Instead, they adopted a standard that closely resembles the Canadian "skill and judgment" threshold, but manner in which the Court applied that standard it is said[44] to differed little from the approach used by the U.S. Supreme Court in *Feist.*

3. Philosophical Background

Let us now turn our attention to philosophy where the originality criterion roots can be traced back to the ancient Greek thinkers. Both Aristotelian and Platonic philosophy accept the existence of property rights, and Aristotle explains that private ownership is desirable, given the human nature to squabble over things.[45] In his view, acquiring property as part of household management, namely that property given for subsistence, was natural. This position gives birth to one of the three philosophies that offer ground for understanding originality as a component of intellectual property. We will briefly address them in the pages that follow.

3.1. Natural law theory

As we seen above, perhaps the most familiar theory of justification of property ownership comes in the form of natural law. For the common law countries, Locke's fruits-of-their-labor theory seems to be one of the philosophical justifications heavily relied upon.[46] To name the most important one, U.S. Supreme Court decisions[47] and legal scholarship[48] regarding U.S. copyright law indicates a widespread belief that natural law is the best applicable doctrine regarding originality. It comes as no surprise then that "the sweat of the brow" is the manifestation into the legal world of Locke's "labor acquires property" philosophical model.

For Locke, any analysis of property must start from a "positive community"[49] that God bestowed upon "the earth and all inferior creatures" to be used by "mankind in common".[50] But from this commonality comes individual ownership: how is this possible? For Locke the answer resides in labor, the ultimate tool that by affecting the material world, as an effect of an action, makes the difference.

Even though Locke did not extend his theories on tangible property to intellectual property *per se*, the merit of creating a property right in the first copyright statute was due to the Lockean fruits-of-their-labor concept.[51] Indeed, he backed statute limitations for copyright, a significant departure from tangible property rights, that they are imprescriptible.[52] From an economic perspective, the natural law theory, as accepted by the lawmakers, disregarded Lockean opinion and prior to the enactment of the Statute of Anne, the right to copy creative works was treated as a perpetual right.[53] This was a gross departure from inception, as even in regard of tangible property, Locke believed that property should not be wasted, and that the appropriation of property by one should not harm others in society.[54] As an author fittingly observed, Locke's theory was primarily concerned with avoiding what he perceived as the excess of rivalrous resources due to the tragedy of the commons. We believe this is a strong inclination towards elements of the second philosophical doctrine that we will now discuss.

3.2. Utilitarian Philosophy

This school of thought views IPL as a means to an end. Therefore, there is no higher purpose than assuring the endgame. Again, U.S. intellectual property law provides good example of this philosophical theory, the

utility of it resides in "promot[ing] the Progress of Science".[55] Echoing Locke, The Supreme Court of the United States found that the existence of copyright law is not to "provide a special private benefit",[56] but to "stimulate artistic creativity for the general public good".[57] The logic sequence goes like this:[58] in order to increase the common good, the society needs to motivate "the creative activity of authors" through "the provision of a special reward".[59] Naturally, the reward is just a means, not an end, resulting in a limited copyright term. Otherwise, the public will "be permanently deprived of the fruits of an artist's labors".[60] This marks the fine articulation between a utilitarian goal and a natural law practice, that finally allows authors to reap the rewards of their creative efforts.[61]

3.2.1. Hegel Theory

For Hegel the state of nature was a mess, utterly chaotic and without any freedom.[62] Evidently, this means that he did not view property, nor intellectual property, in terms of natural law,[63] freedom is not granted, but has to be obtain through the intersubjective relations in civil society.[64] Enters property. For Hegel only property enhances intersubjective relations, but through recognition of rights in positive law, not natural law,[65] because property is an effective means to obtain a social recognition.[66] In a word, Hegel has the merit that he grounded the rationality of property in the human need for recognition.

3.2.2. Hohfeldian theory

Hohfeld's theory[67] starts with the works of Hume and Bentham and puts forward a legal theory that has, at its core, the belief that property rights are a collection of rights that establish the legal relationship between the property holder and the world at large. Being a refinement of the utilitarian theory, that property is a means to an end,[68] Hohfeld sees copyright as a legislatively created means to serve the interests of the public. In it, the public and the author are both served through intersubjective relations, but the existence of the object is not personified; rather it is utilized for personal or social purposes.[69] Accordingly, the essence of property cannot be universal, but merely a human conceived tool, fashioned to satisfy social needs.

3.2.3. From natural law to utilitarian system

Taking into account that Locke and Hegel's works have shaped the most dominant discourses of justification for copyright theory, it is not unusual that their presence is observed not only in legal scholarship, but in courts decisions as well. As it was perceived,[70] at some point the Supreme Court of Canada[71] directly built its discussion of the "sweat of the brow" principle on Lockean theory of "just desserts", but at the same time keeping its emphasis on originality, that signaled an implicit move towards Hegel's property theory. But the rabbit hole goes much deeper, as the Lockean- Hegel alliance will be quickly analyzed below.

In contrast to Locke's theory of property, Hegel's has "a free will" property theory. At the other end of the natural state, Hegel starts from "negative community", instead of Locke's positive community. He begins analysis with an absolute, infinite free will, as the basis of right is the mind, wherein the precise place and point of origin is the will.[72] But the will is not material, nor was the Lockean idea that commended the labor. Therefore, it needs something external, and property is for Hegel "the first embodiment of freedom",[73] and someone humorously notices[74] that Hegel's theory of property is a story of "I own, therefore I am". And although for Hegel "occupancy", a possibly analogous concept to Locke's "labor", is necessary to safeguard the embodiment of "free will" in a thing to appropriate it, it is ultimately the free will that is most important. So yes, Locke's theory is a labor oriented, while Hegel's is free will oriented, but in the long run this dissimilarity in approaches does not stop them from sharing the same points of view on the significance of property.[75]

3.3. Personality Theory

Despite the ancient heritage of philosophical introspection, legal scholars[76] trace this personality theory to Immanuel Kant.[77] Kant thought that intellectual property rights could and should be allowed under positive law, and the argument stems from the fact that the artist's creation is filled with the artist's personality, therefore not just an innate thing. Being more than just property, it required a special protection under the law.[78] To reach this conclusion, Kant followed this argument: the natural law paradigm cannot answer for intellectual creation because it is concerned with inborn rights in one's own person, that which internally is "mine".[79]

But property relates to an object, that which externally is "mine", and follows from the autonomous act of first acquisition. After that, the provisional right is subsequently ratified by the state, invested with institutional coercive powers. Basically, we are referring to a way of acquisition (of property), but creative expressions are created (property), not acquired, therefore Kant sees that IPL did not appear to address the issue. It is only logical then that a creative expression is a personality right, bestowed to the author, who could later dispense to an agent the right to sell the expression. Kant view gave birth to the moral rights of the author and constitutes a cornerstone for the continental interpretation of originality.

4. Originality: A Critique

4.1. The scope of originality

The term "originality", as crucial as it is, it is actually undefined. There is no international accepted definition, nor any uniform standard,[80] every state has to create its own national concept and deal with it. In order to try to better understand it, we need to begin by asking ourselves what is the purpose of copyright. Conservatively, there are four different perspectives[81] on what the copyright law should be about: respect and enforcement of the natural rights of authors, nurturing and shielding the psychic bonds between creators and their creations, social inducement of beneficial innovation and resourcefully reaping its fruits and, lastly, fostering a rich and diversified culture that offers all individuals opportunities for human flourishing.

Taking into account all of the above, a rather general legal definition could see originality both as a work originated from the author (*authorial originality*) and that it satisfies a threshold of creativity that differ, as we have seen in chapter 2.2, from country to country (*creative originality*).

4.2. (Post)modern views on authorial originality

It was argued[82] that the analytic philosophers who spoke about originality developed two basic approaches to deal with it, one that addressed originality as a property of the work itself and one in which originality is construed as a property of artists. Some scholars[83] maintain

that the postmodern rejection of originality relies on an excessively limited sense of originality as "historic novelty" by isolated geniuses and thus misconstrues the nature of the term.

4.2.1. Originality as a property of works

Haig Khatchadourian analyzes[84] originality in terms of the properties of a work in relationship to other works, and sees originality as laudable when it produces new effects or materials, or employs novel techniques and subject matter, but Julie Van Camp considers[85] his view incomplete, as he cannot produce a standard to "distinguish praiseworthy originality from unpraiseworthy novelty".

Frank Sibley considers[86] the synonymy between originality with "novelty", and sees originality in terms of the properties of the work, making it to differ from anything previously existing in relevant ways, while Harold Osborne rejects[87] this view on account that originality in his understanding implies a positive aesthetic value, wherein novelty is rather neutral. Novelty is also not the solution because it imposes a diabolical task for proving it, as it implies a truly vast knowledge of the author or the critics.

4.2.2. Originality as a property of artists

There are, nonetheless, great accounts of originality that focus exclusively on the artist. For Monroe Beardsley originality is genetic and differs, at the moment it was created, from anything else that was known by its creator.[88] In a sense, the work does not count, just the creator's originality. The characteristics of the artist are imbued in the work in such a way that, as Richard Wollheim believes,[89] originality becomes consistent with positive choices like "spontaneity" and "freedom", and incompatible with "constraint" and "coercion". The property of the artist now become essential in the search for originality, as it becomes a function of the artist working "in comparative autonomy".[90]

R. G. Collingwood grasps[91] originality in terms of genuineness of expression, and not as "resemblance of anything that has been done before",[92] enunciating a somewhat romanticized notion of originality, but one decisively embraced by copyright practice.

4.2.3. Originality as an obsolete notion

Roland Barthes and Walter Benjamin refute traditional notions of originality, while arguing that in an age of technological innovation and easy reproduction originality is nothing more than an antiquated notion. Benjamin has reasoned[93] that modern systems of reproduction have obliterated the authority of the original work "by making many reproductions [that] substitutes a plurality of copies for a unique existence",[94] while postmodern theorists such as Baudrillard attack the romantic notion of the artist as an independent, creative, original agent, since he "can no longer produce the limits of his own being, can no longer play nor stage- himself, can no longer produce himself as mirror. He is now only a pure screen, a switching center for all the networks of influence".[95]

The amusing thing about this pseudo-problem is that, as van Camp accurately observed,[96] the same authors who proclaim the "death of the author" continue to claim identification of their names with the works they produce, and when possible, they do not seem to hesitate to claim copyright protection.

5. Copyrightable Architecture: A Conundrum?

5.1. Architectural structures versus work of architecture

As we well know by now, architectural structures are protected, being "works of architecture", a term expressly defined in (present day) copyright law around the globe. But when does a structure begin to be a work of architecture? First of all, if the said blueprint has enough elements to be immediately erected, but still remains in the two-dimensional state, is the author entitled to protection? Naturally, otherwise it would mean that the copyright holder is somewhat punished for not urging the construction, even though it is not in his power – but in the hands of the beneficiary or the developer. In *Hunt v. Pastemack*[97] the court found the defendants liable for using plaintiffs copyrighted plans for a restaurant even though the building depicted in those plans had not been constructed.

Secondly, we have to turn to the question if a design is not capable of construction (in the state that it is), should it still be protected? The answer is definitely yes, because the rationale behind it concerns the way the author manifests his personal touch, not if his plan is sufficient detailed to be immediately put in practice. The courts agree: in *Shine v. Childs* the

court said it was irrelevant whether a skyscraper for the World Trade Center site could be constructed from the plaintiffs highly-acclaimed designs, renderings, and models, stating "that plans or designs not sufficiently detailed to allow for construction still may be protected".[98] The same must go for a plan that is too conceptual to be used as a blueprint for erecting a building, but detailed enough to be more than an idea. In *Oravec v. Sunny Isles Luxuy Ventures*[99] the judge rejected the defendant's argument that plaintiffs plan for a high-rise building was unprotectable, being too conceptual – it consisted of no more than commonly-used functional features, without floor plans or an overall plan of the surroundings; even though no constructability test exists, plaintiffs use of certain shaped segments was distinctive in relation to other aspects of his design, and that his arrangement original and concrete.[100]

5.2. The specific originality of architecture works

We have now some idea about what originality tends to be under the copyright law, namely, as the U.S. Supreme Court elegantly put it, "the *sine qua non* of copyright".[101] But for architecture, the main aspect in this regard is that it works similar to the way a compilation is copyrightable,[102] in the sense that "the architect's selection, coordination, or arrangement of the standard features may, together, constitute a protectable whole".[103] This means that the presence of shared design features in a building's design does not preclude the design as a whole from achieving copyright protection,[104] as long as "one considers the plans or the building as a whole and the ways in which the architect combines"[105] these elements.

Normally, one would think that it should be fairly easy for an architect to satisfy the originality requirement in designing an architectural work, but because almost all the building have a functionality desideratum attached to them, the copyright protection is quite limited for many architectural works.[106] There are constrains ascending from the purpose of the building (some are meant for living, others for working and leisure etc.), the structure (strength of materials, the distribution of stress etc.), the environmental (seismic activity, different whether etc.) or external constrains (political regime, urban planning regulations etc.). While there are numerous ways in which architects may joggle with these constrains, in the end there must be an appropriate overall order for the building to suit the purposes for which it is designed,[107] the right combination of materials, composition structures and assembly methods employed, to ensure that their creations are robust

and safe,[108] and of course a compliance with aesthetic guidelines on how buildings must be shaped.[109] This comes out as saying that if one breaks an architectural project in its most basic components, it becomes clear that originality is more limited than might be supposed.[110] One scholar even went out of his way to notice that "the design of a shopping center produced by an architect who is bound by strict instructions concerning its function and cost will have some originality in this sense, but less than the plot of a typical novel".[111]

5.3. Infringement of architectural works

From a procedural standpoint, an infringement can be established by direct evidence,[112] but when that is absent, proof often focuses on showing that the defendant had access to the plaintiffs works, meaning that it is "reasonable possible"[113] that an inference took place. But if the plaintiff's proof of access is frail and the likenesses between the architectural works in dispute address only general design ideas and concepts, then there is a good chance that the plaintiff will lose the litigation.[114]

The courts sometimes stress the importance of demanding from an author who accuses another of infringement to prove "the existence of those facts of originality, of intellectual production, of thought, and conception ...",[115] while some legal scholars[116] believe that it is up to the perpetrator of a copyright to define the contours of originality, an obligation that he has because he is the only one able to identify the elements of translation of his personality, so that the defendant can know precisely the characteristics behind the infringement that he supposedly perpetrated. In effect, this means that the process which the author went through to create a work, his or her personal qualities and skills, become part of investigation for originality assessment.[117]

The fact that a building is copyrighted as an architectural work does not mean that every element is protected,[118] but merely that infringement exists when there is substantial similarity between the defendant's work and protectable elements of the plaintiff's work.[119] By way of jurisprudence, substantial similarity exists "where an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work".[120] Of course, this has to be determined through an analysis of the court and in time two approaches stand out.

5.3.1. The subtractive/analytical dissection approach

This approach is a two-step process, the fist is to identify which, if any, features of the architect's work are protected by copyright and the second, after subtracting the unprotected aspects of the work, is to determine whether there are noteworthy similarities between the protected aspects of the plaintiffs work and the allegedly infringing work.[121]

The first phase requires, as we have seen, excluding ideas and those noncopyrightable elements, like common features or the ones that fall under *scenes a faire* doctrine, meaning those settings which are indispensable, or at least standard, in the treatment of an architectural theme.[122] The problem here, as one author observed[123] with a quipped remark, "the risk is in missing the protectable forest for the unprotectible trees", because often protectable authorship in how an architect selects and arranges components and features is left out.

The second phase involves side-by-side comparison of the works to determine if a reasonable person would conclude that the second architect illegitimately appropriated the protected expression of the first.[124] If the suspected infringing architectural structure does not utilize any protected parts of the plaintiff's structure, then there is no infringement. Let's imagine that copying a two-floor layout, if it is identic, would constitute an infringement, but the exact same square footage or the number and function of the rooms, if nothing else is the same, cannot be deemed infringement, because these are unprotectable standard features.[125]

Regularly, in evaluating substantial similarity the court view the competing designs side by side to identify and evaluate their shared characteristics, compile a list of elements in design which a party alleges evidence substantial similarity, evaluate those elements to determine whether they are features which copyright protects, and finally analyze these elements, individually[126] and collectively, to determine whether there is enough similarity so that a reasonable jury, properly instructed, could return a verdict that the designs are substantially similar".[127]

5.3.2. The totality method

An approach that uses the application of the principle that unprotected elements can be selected and arranged to create a copyrightable works well in litigation. Infringement takes place when the plaintiffs work and the alleged infringing work have the "same concept and feel".[128] This means that even if the two architectural works we question are no organized or

structured the same way, but they have the same concept and feel in terms of atmosphere and overall approach, then an infringement is present.[129] The main critique of this method targets overprotection, because in protecting a work's concept and feel, there is a risk of improperly extending protection to ideas.[130] Architecture has, as other forms of art, schools of thought, *i.e.* modernism, and by definition the "feel" will be identic between different works of architecture that tend to evoke the same style. In this regard, the totality approach is highly problematic.

5.4. The "Idea-Expression" Distinction

Copyright law has long recognized a division between "ideas" and "expressions", and this distinction is needed because protection exists only for particular expressions of an idea, and not for the ideas contained therein. For example, an architect can protect its work if it has a certain plan that draws inspiration from a circle, if it is sufficiently enriched with different design elements – this is his expression – but not the circular plan *per se* – this is an idea. As fairly straightforward as this concept of "idea/expression" dichotomy may seem from this example, it has proven infamously problematic to sift out the expression from the idea in actual court cases.[131] This difficulty was also apparent to the famed Judge Learned Hand,[132] when he wrote that "no principle can be stated as to when an imitator has gone beyond copying the «idea» and has borrowed its «expression». Decisions must therefore inevitably be ad hoc. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible".[133]

But the ad hoc decisions that the judges need to make are not the most troubling part of this equation. What if the distinction is impossible to make? In this case, the idea is so imbued into its expression that it is impossible to set them apart, and now the expression can be limited. A court found that "[w]hen the *idea* and its *expression* are . . . inseparable, copying the expression [is] not barred".[134] The reason for this rather bizarre twist resides in the sound logic that protecting the "expression" in such circumstances would confer a monopoly of the "idea" upon the copyright owner, which in this instance is the bigger evil. Following this, one author[135] even stated that "ideas are themselves expressions", and no idea "can exist separately from some expression of the idea".[136]

5.5. Does copyright in architecture really work?

A keen observer of the relation between architectural works and copyright law once said[137] that "an architect who is alleging that the copyright on a relatively simple structure like a home or a condo complex has been infringed must prove near identity between his or her architectural work and the alleged infringing work". The more unique and creative an architectural structure is, the better chance to win a litigation against someone trying to rip-off your intellectual creation. In that sense, to be sui generis seems to be the best approach in copyrightable architecture. But isn't this the goal in life itself, one might ponder? Maybe so, but the rights of the author movement were not designed to work just for the lucky few whose creations exceed anything that come before them, but to every person struggling to express his ideas.

6. Conclusions: The Need for a Continuum Test

We have seen that, from an international perspective, even though the view on originality isn't exactly the same, the personality of the author is the general requirement, whether this means "skill and judgment" or his/her "creative choices", or plain old "personal touch". But the sheer Lockean labor of the author is not enough anymore, because there is simply nothing personal in it to warrant any protection. We also need a Hegelian will that would be labor's *primum movens* and this could start to build upon a "personality" sufficiently distinct to be copyrightable. Ultimately, it was Kant who exposed us to the relationship between personality and property of immaterial things, like creative expressions.

Recent (post)modern philosophical forays into the philosophy of originality also revealed that we can imagine an horizontal linking, in which a work originality is judged in connection with other works, or a vertical one, where the criterion ascends to the mind of the author. The first perspective tends to accentuates novelty, but we know the courts have ruled that novelty is not a measure of originality, in a negative sense, meaning that if it is absent, the work could still be original. The second, and this is far more interesting from a legal perspective, tells us that the only thing that matters, way above the work itself, is the creator and his choices, his genuineness of expression.

Albeit theoretically sound, the problem with the legal concept of originality as the author personality is that occasionally court decisions miss out on some infringements. This is due to the fact that with just a tweak, a small scaling procedure or a replacement of some materials, an architect could get off scot-free. We remember that the Court of Justice of the European Union expressly said in *Infopaq* that only through the choice, sequence and combination of the specific elements that he uses an author may express his creativity in an original manner, but we ask ourselves what is the necessary degree of this rearrangement in order to be in the presence of a different, original work?!

We think the answer to this, and ultimately our contribution to this field resides exactly where everyone is looking, but cannot see the proverbial forest: *in the author personality*. The trick is not just to assert it, but to try to devise a system to prove its manifestation. We think that for architecture a solution could take the form that I will present momentarily, but first a word of caution: the legal reality is that proof of originality is every so often a difficult chore and could vary depending on the subject matter to which the standard would be applied, so what is good for the architectural goose may not be good for the general gander.

The courts have stressed the importance of author personality, alas no actual step was made in the direction of sketching the said personality in the pending trial. My argument is that in order to affirm that an architectural work is original we have to question the *past works* of the same architect. Personality, as complex and intricate concept as it is, may be affected and changed during the years, but apart from some pathological condition, it is not unrecognizable from before. This is to say that an architect could prove his style, his conceptual long-life "idea", by using past projects, drawings and sketches that share some light into his inner creative circle.

We believe that despite some legal difficulties regarding evidence admission and burden of proof, that differ from country to country, the way to honorably resolve the architectural copyright conundrum is for the judge to decide on originality based on what we would call *the continuum test*: submission of previous intellectual creations of the defending architect in order for the court to appraise if the personality in those works is consistent with the one from the work in question.

We consider this test to be indispensable, since it is precisely delineating the structure of the author's personality, the only thing the judge is called upon to answer. We do not know whether and when it will be implemented. But we sure need him!

NOTES

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