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What can Croatian Construction Law learn from the US Copyright Law in the protection of intellectual property rights of architects and engineers?

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INTRODUCTION

United States of America copyright law has not always protected architecture. The Copyright Act 1790 protected copyright for "maps, charts and books". While the Act did not expressly mention architectural plans, courts tend to interpret them under the category of "pictorial, graphic, and sculptural works" (*Imperial Homes Corp. v Lamont*[1]). In 1909, the Copyright Act had made a significant revision relating to architecture. It had extended the protected categories to "drawings or plastic works of a scientific or technical character"[2], covering architectural plans explicitly in the *Copyright Office Regulations* of the *1909 Copyright Act*[3]. Architectural plans were eligible for copyright protection provided they adhere to the requirements of the strict publication and notice. While the architectural plans were protected, there was a lack of copyright protection for architectural works in copyright case law. In *Schotz Homes Inc. v Maddox*[4], Schotz had registered for the copyright of the architectural plans of a home he built, and also a pamphet which included the plan of the building for advertisement purpose. Maddox's architect reproduced the plan from the booklet; Schotz sued for copyright infringement. It was held that Schotz's pamphlet did not give him exclusive right for the plans the reason being the purpose of the pamphlet was for advertising, not to give him the exclusive rights to copy the plan. Schotz has no alternative as he cannot copyright the physical building under the *Copyright Act 1909*.

The House Report relating to the 1976 Act had made a clear statement that "technical drawings, diagrams, and models"[5] were to receive copyright protection[6].

The *Architectural Works Copyright Protection Act 1990* (AWCPA 1990) classified architectural works as a separate category to receive copyright protection. An "architectural 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.[7]"

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[1] 458 F.2d 895 (5th Cir. 1972).

[2] Ch. 301 s 5(g) and (i).

[3] 37 C.F.R. s102.12(a)

[4] 379 F.2d 84 (6th Cir. 1967).

[5] 17 U.S.C. s 102(a)(5).

[6] H.R. Rpt. No. 94-1476, (1976).

[7] 17 U.S.C. s 101.

The 1990 Act gives protection in the graphical form, hence even constructing from the original drawings is an infringement of copyrights. The House Report for the 1990 Act explained that:

> "The copyrightability of architectural works shall not be evaluated under the separability test … the principal reason for not treating architectural works as pictorial, graphic, or sculptural works is to avoid entangling architectural works in this disagreement.[8]"

"Conceptual separability" test aimed to distinguish between the utilitarian object and its aesthetic components. The first U.S. Supreme Court case that dealt with this issue was *Mazer v Stein*[9]. The notion of "conceptual separability" was applied to give protection to the "art" in the useful object without the protection of the functional part of the object. It is difficult to separate what part is "aesthetic" which is protectable and what part is functional which is unprotectable.

An architect would have copyrights of both the design shown in the format of drawings and the architecture or the building as in Architectural works. In order to assess whether a particular architectural work is copyrightable or not, two tests are to be applied.

> 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.

BATMAN TOWER 801

Dietz (2001) highlighted an interesting issue of copyright protection to architectural works. In *Leicester v Warner Brothers*[10], Leicester claimed that there was a copyright infringement of the reproduction of the 801 Tower, that the photography and filming infringed the owners' exclusive right to produce pictorial reproductions of the work of art. Leicester granted exclusive right for the owners of 801 Tower to make three-dimensional copies of the sculpture as part of the commissioning contract. Hence, they could grant a licence to Warner Brothers to make the derivative works. In addition to this fact, the district court also considered the sculpted elements had lost the broad protection of a work of art because they are embodied in the architectural work. It was held that there was no infringement. However, the court declined to endorse that the *conceptual separability test* can never be applied to works of art embodied in an architectural work. The argument that the copyright in an architectural work which has been constructed cannot be extended to the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations is that the building in which the work is embodied is "ordinarily visible" from a public place, hence it can be seen by anyone. Therefore it is unreasonable to impose such restrictions. This is to strike a balance between the rights of the copyright owners and the wider interest of the public. Figure 1 shows the site of 801 Tower S. Figueroa Street in Los Angeles. Similarly, Croatian Law considers the reproduction, by means of photography, of works of sculpture and painting and works of architecture in newspapers and reviews, permissible in the territory of the Republic of Croatia without the authorization of the author unless the author has expressly prohibited it (Croatian Copyright Law Chapter II (1)(3)).

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[8] H.R. Rep. No. 101-7

35, at 20 (Sept. 21, 1990).

[9] 347 U.S. 201, 213 (1954).

[10] 57 U.S.P.Q. 2d 1001 (9th Cir(US)).

Figure 1 Site of Tower 801 S. Figueroa Street in Los Angeles
http://www.loopnet.com/property/14585952/801-S-Figueroa-St/

The district court concluded that pictures taken of the streetwall towers along with the 801 Tower are not infringing pursuant to the exemption for pictorial representations of buildings in the *AWCPA 1990*[11]. The decision was further affirmed by the appeals courts[12]. Dietz further 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. Similarly, Croatian Copyright Law Chapter II (47)(5) allows the reproduction of works of architecture by means of painting or sculpture in Croatia without the authorization of the author nor the payment of a remuneration for use.

LESSON LEARN FROM US AWCPA 1990

The passage of the *AWCPA 1990* has protected the rights and interests of the architects and engineers on both architectural plans and drawings and the constructed architectural works. Unless the work is "work for hire", or there is a contract agreeing otherwise, the copyright protection normally extends to the author of the work, the architect or the designer. Copyright owners do not need to take formal procedure to obtain copyright protection. However, to bring an infringement lawsuit, or to obtain any statutory damages and attorney fees, the copyright owner has to register with the U.S. Copyright Office. To a great extent, the 1990 Act has enhanced the copyright protection of architectural works

[11] 17 U.S.C. s 120(a).

[12] Leicester v. Warner Bros., 232 F.3d 1212 (9th Cir. 2000).

and designs as compared to before its passage. However, the 1990 Act is still very narrow, with limited protection to the authors of architectural works and design.

AWCPA 1990 legislative history suggests that if the design elements are functional, they are not copyrightable. Most of the architectural works and designs are "functional" if the interpretation is restrictive. Therefore, many of the works would fall outside the copyrightable categories. This "functionality test" would become a stumbling block if the interpretation is narrow.

In 1990 Act, copyright protection subsists in original works of authorship which include architectural works[13], giving a direct copyright protection of architectural works. However, the definition of architectural works is not extensive. It incorporates the overall form and the arrangement and composition of spaces and elements in the design, but excludes "individual standard features"[14] such as windows and doors. There is also related administrative rules which exclude the "standard configuration of spaces" which may sometimes be interpreted as a conflict to the explicitly protection for the "arrangement and composition of spaces and elements". Therefore, the 1990 Act only provides architects very limited protection.

CONCLUSION

Firstly, 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, a new test to satisfy their *sui generis* characteristics should be established rather than conceptual separability test. 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 (Mann & Denoncourt, 2009).

Secondly, the Croatian construction law should impose clear infringement standards in terms of artistic architectural works especially in terms of the degree of "originality" and "substantial similarity" required for a successful action for copyright infringement.

Thirdly, the authors' creativity on the architectural and engineering designs which are original even if they are functional shall attract appropriate rewards. They should be rewarded with legal protection against unauthorised copying.

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

[13] 17 U.S.C.A. s102(a).

[14] 17 U.S.C.A. s101.

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Copyright Law, March 1978 (formerly Yugoslavia) last amended by the Law on the Amendments of the Copyright Law, No. NN 76/99, July 1999 (Croatia)
Copyright, Law (Consolidation), (26/06/1991), (02/06/1993)
Construction Act 912/1999, 7 May 1999 (Croatia)
Architects' and Civil Engineers' Chamber Act 766/1998, 20 March 1998 (Croatia)

Endnotes

[1] U.S. Constitution Article 1 s 8(8).

[2] 458 F.2d 895 (5th Cir. 1972).

[3] Ch. 301 s 5(g) and (i).

[4] 37 C.F.R. s102.12(a)

[5] 379 F.2d 84 (6th Cir. 1967).

[6] 17 U.S.C. s 102(a)(5).

[7] H.R. Rpt. No. 94-1476, (1976).

[8] 17 U.S.C. s 101.

[9] H.R. Rep. No. 101-735, at 20 (Sept. 21, 1990).

[10] 347 U.S. 201, 213 (1954).

[11] 57 U.S.P.Q. 2d 1001 (9th Cir(US)).

[12] 17 U.S.C. s 120(a).

[13] Leicester v. Warner Bros., 232 F.3d 1212 (9th Cir. 2000).

[14] 17 U.S.C.A. s102(a).

[15] 17 U.S.C.A. s101.

International Adoption

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International adoption is a type of adoption in which the parents' citizenship differs from the citizenship of a child they wish to adopt, and they can, but don't have to live in the same country. Together with intercountry adoption, in which the child changes the country in which he or she is living, it makes the type of adoption called the adoption with a foreign element. [1]

International adoption began to be more important after the Second World War when many children were left parentless due to the effects of the War. Since then, many international conferences and legal acts were dealing with this question.

In Croatia, the question of international adoption began to be important in 1960s, when the country's international contacts with other countries and international organizations began to be more frequent. Since then, Croatian legislation considering family law makes domestic adoptions more favorable than the international ones. In the same time, it is not denying the possibility of international adoption, but only in cases in which that type of adoption is a **special advantage for the child**, which is determined by the Ministry of Social Care. That point of view is in accordance with the *Convention on the Rights of the Child* (further: the Convention).[2]

The Convention is the most important global document dealing with the rights of the child. It is the starting point for the measures that are being considered and for other legal documents dealing with the same matter. **The best interests of the child** are an important principle, accepted by many states' legislation, and it is formulated in the Convention. It needs to be considered in all actions concerning children, undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

In order for an international treaty, such as the Convention, to be applicable, the State needs to be a party to the treaty, which means that the State's Parliament ratified the treaty. Today, 194 States are parties to the Convention. It is a multilateral document, concluded among many States, but the parties can also conclude bilateral agreements with any other State, concerning the same matter. This agreements can help the States achieve better cooperation among their institutions on the field of international adoption.

Another important global document dealing with international adoption is the *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption* (further: the Hague Convention). The purpose of the Hague Convention is to ensure that the intercountry adoptions will be performed according to **the best interests of the child** and

that their basic human rights will be respected in the process. Although Croatia is not a party to the Hague Convention, its legislation acknowledges the Hague Convention principles.[3]

Croatian *Law on Solving the Conflict of Laws in Specific Relations* regulates which national legal system is applicable when international adoption is in question. If the adoptive parent and the adoptee aren't citizens of the same country, cumulatively are applicable legal rules that are regulating adoption of both countries. This ensures that the child will have the legal protection in his or her own country, country of emission, and that the effects of the adoption will be recognized in the parents' country, country of reception. If the adoptive parents don't have the same citizenship, and they are adopting a child together, applicable are the rules of both countries of which they are citizens, cumulatively with the legal rules considering adoption of the country of which the child is a citizen. In this case, adoption requirements of three legal systems have to be met.

If the national authorized bodies of any of the countries, of which the rules are applicable, find that one or more of their county's adoption requirements are missing, international adoption won't be possible.

The form of adoption follows the general rule *locus regit actum,* which means that the applicable law for the form of adoption will be the law of the country in which the adoption is being constituted. In Croatia, *Family Law Act* regulates adoption. The only form of adoption that is possible under the Croatian law is the full adoption. Full adoption constitutes a relation between adoptive parents, and their relatives, and the adoptee, and his or her children, that can not cease to exist.

Croatian *Family Law Act* regulates active and passive adoptive ability. Requirements for active adoptive ability, or the ability to adopt, are formulated negatively. Person unable to adopt a child is a person whose parental rights were terminated, or a person who was declared legally incapable to work, or a person whose behaviour and characteristics show that it would't be advisable to entrust him or her with a child. It also can not be a person who is related to an adoptee by lineal consanguinity or collateral consanguinity to the second degree. A person can not adopt his or her extramarital child and a guardian can not adopt his or her protégé. Adoptive parent has to be a Croatian citizen, except if it is a **special advantage for the child** to be adopted by a non-citizen, which is determined by the Ministry of Social Care. There are also age limits for the adoptive parent. Minimal required age is 21 years, but it can be a younger person if there are justifiable reasons, and he or she should be at least 18 years older than the adoptee. Parents can adopt together, or only one of them can adopt a child, and a person who is not married can adopt if it is a **special advantage for the child**, determined by the Social Care Center.

Passive adoptive ability is the ability of the child to be adopted. It is required that the adoptee is a legal subject, exists in both legal and biological sense. That means that Croatian law does not recognize prenatal adoption, or the adoption of an unborn child. A child does not have passive adoptive ability until the sixth week from the birth has passed. Adoptee has to be a person under the age of 18. Adoption has to be in **the best interests of the child.** Child of a parent who is a minor (person under 18 years) cannot be adopted unless one year has passed since the birth and there seem to be no chances that the child could be living with his or her relatives.

To constitute an adoption, it is necessary to have the consent of one or both parents or a guardian, except if the parent is a person whose parental rights were terminated, or a person who was declared legally incapable to work, or if a parent is a minor and uncapable to comprehend the meaning of adoption. A parent can withdraw the consent within 30 days.

The effects of international adoption according to Croatian law would be termination of parental rights for the biological parents, right to inherit from the adoptive parents and their relatives for the adoptee and his or her children, adoptee's right to a name and a right to citizenship.

Adoptive parents will be entered as parents to birth records when the adoption is constituted. After that, it is not allowed to start a procedure to determine who is the mother or the father of the child. As mentioned, under the Croatian law, adoption constitutes a relation between adoptive parents, and their relatives, and the adoptee, and his or her children, that can not cease to exist. Termination of the adoption could be considered only if there was a severe procedural error.

In the near future, Croatian legislation considering international adoption could be changed. Outlines have been made by a group of Croatian experts in the field of International Private Law for the new *International Private Law Act*, which should replace the current *Law on Solving the Conflict of Laws in Specific Relations.*

International Private Law Act predicts only one Article about international adoption. The law applicable for international adoption is the law of the country of which the adoptive parents are citizens. If they are adopting together, applicable is the law of the country which is regulating their marriage rights and duties. For the parental consent or the consent of an adoptee, applicable is the law of the country of which they are citizens. For the form of international adoption constituted in Croatia, Croatian law is applicable.[4]

However, there is one general principle that has been known to mankind since the Ancient Rome and shouldn't be forgotten: *Adoptio naturam imitatur.* In that sense, international adoption could be the image of the globalized society that we live in.

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[1] *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption*, Hague, 1993, the Hague Conventions are the result of the work of the Hague Conference for International Private Law, that has been held under the authority of the Dutch Government since 1893

[2] The United Nations General Assembly adopted the Convention and opened it for signature in 1989, it came into force in 1990, after it was ratified by the required number of nations

[3] *Harmonizacija i unifikacija europskoga obiteljskog prava (Harmonization and Unification of European Family Law),* Majstorović, Irena, University of Zagreb, Zagreb, 2009

[4] *Međunarodno posvojenje (International Adoption)*, Jakovac-Lozić, Dijana, University of Split, Split, 2006