

Foiled Again . . . Batman defeats claims of building copyright infringement

By: Jim Astrachan

"Holy flying copyright, Batman. You, an infringer?" wondered the Boy Wonder. "Not so fast Robin. Things aren't always what they seem," replied the Caped Crusader. Is Batman an infringer? Will his super-hero status be revoked? Is the Boy Wonder vicariously liable? You won't have to tune in next week for the answer.

Robin had good reason to question Batman after the downtown Los Angeles 801 Tower Building became the Second Bank of Gotham in the movie, Batman Forever. To get a building permit for this pre-1990 construction, the city required that the building contain many artistic elements that would qualify as art. These artistic elements were comprised of separate works intended to tell an allegorical story of the history of Los Angeles and included gates, a park and embellishments on the building's four towers.

Warner Bros. took care to film only the street wall portions of the building. Most of the many artistic elements that comprised the courtyard and other aspects of the building were not filmed by Warner Bros. A small model of portions of the building was built for filming special effects and attorneys for Warner Bros. asked for, and received permission, to film scenes from the building's owner. The artist responsible for the artistic elements and the architect were not consulted.

The artist did not write a rave review of the movie. Instead, he sued Warner Bros. for copyright infringement alleging that elements of his copyrighted work were reproduced in the film without permission.

The Ninth Circuit Court of Appeals had to wrestle with the question of whether this building was subject to copyright protection and whether Warner Bros. actions amounted to copyright infringement. Thankfully for the side of right and justice, Batman was found innocent of infringement.

Prior to 1990, the copyright law did not protect a constructed building as a "sculptural work" or anything else. Architectural plans were protected, and so were sculptures such as statues. But if a building was constructed prior to 1990, the only way infringement could occur would be if the plans or drawings for the work were reproduced. Because of the way the law was written, or not written, elevations and interiors of a building built before 1990 could be photographed and measured, and from these results, plans could be created from which a building could be legally constructed.

When the United States joined the Berne Convention for the Protection of Literary and Artistic Works, all of this changed. To comply with Berne treaty obligations, Congress passed the Architectural Works Copyright Act of 1990. The result was a new category of protectable work - a finished building. To affect this result, the Copyright Act was amended to include as an "architectural work"

The design of a building as embodied in any tangible medium of expression, including a building

The overall form, arrangement and composition of the space was also protected.

Architects and developers at last had a law they could rely on to protect their buildings from unauthorized copying.

But, still, there is an important distinction between an architectural work and a "pictorial, graphic and sculptural work," and that is that the former can be photographed while the latter cannot. So while an unauthorized photograph of a three-dimensional piece of art, such as a sculpture would infringe the author's copyright, the copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing or public display of pictures of the building, as long as the building is ordinarily visible from a public place.

This is because Congress exempted pictorial representations of architectural works from infringement for exactly the same reason that Warner Bros. wanted to place this building in its Batman movie. Architecture is a public art form and should be enjoyed as art by the millions who visit American cities every year and photograph many of the stunningly gorgeous buildings that rise from the concrete veldts. Also, many scholarly books on architecture are based on the ability to use photographs of architectural works.

Congress balanced the harm caused by photographing an architectural copyright work with what it considered an important public purpose served by these uses, and crafted the photographic exception.

Oddly, some of the same uses for which Congress created the exception would likely be a "fair use" under copyright law as it then existed. And although Congress specifically envisioned that tourists could "take back home ... posters ... of prominent works of architecture," owners of buildings such as the Rock and Roll Museum and the Chrysler Building have sued, or threatened suit, because of the commercialization of photos of their buildings.

Warner Bros.' use in Batman fell squarely within the photographic exception to the Architectural Works Copyright Act.

To prevail, the artist had to establish that the decorative elements of the 801 Tower were separate artistic embellishments, and not an individual architectural work that was allowed to be photographed. The artist failed, as the Court found that the artistic and architectural impression created by the 801 Tower as a whole is one work. On that basis, the Court concluded that the artistic elements included in the movie and claimed by the artist to be separate works of art, were a part of the design plan of the building. As such, they and the building were architectural works that could be photographed.

To me, the 801 Tower contains multiple separate works of art. For example, the bat logo on a gate to show Los Angeles as a vampire sucking the area dry of water. Carefully, the Court abstracted the most obvious separable artistic elements and pointed out that the film

avoided their inclusion. But, many of the elements which were included in the film were unique, and do not appear to be merely standard features, that would not be protected from illicit copying. Perhaps the Court was very concerned lest it create a standard that would prevent future film crews from framing the buildings along any public street when shooting a film.

What is clear, however, is that another case will likely expand this holding when a film crew shoots those elements of a building that really are separable from their inclusion as merely part of the building design. The frieze at the National Cathedral quickly comes to mind.

James B. Astrachan is a principal at the Baltimore firm of Astrachan Gunst Thomas, P.C. Mr. Astrachan is an adjunct professor of Intellectual Property Law at the University of Baltimore Law School.