



Seventh Circuit Deals Significant Blow to Copyright Trolling in Residential House Plans

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I. Introduction

In the Spring 2017 Civil Trial Journal, I wrote an article about a decision by Judge Griesbach in the Eastern District of Wisconsin, which effectively put the brakes on runaway copyright infringement cases by putting teeth back into the “access” requirement, which a claimant must establish as a prerequisite to a copyright infringement claim before the claimant can show that there was unauthorized copying of constituent elements of an “original” work.

In *Design Basics, LLC v. Lexington Homes, Inc.*, Judge Griesbach dismissed the plaintiff’s copyright infringement action on summary judgment, holding the plaintiff had insufficient evidence that defendant had access to the plaintiff’s copyrighted works. Judge Griesbach also held that instances of “striking similarity”, wherein a Court can infer access, are limited to unusual circumstances and do not typically arise in the context of copyright infringement claims involving residential house plans. However, the Eastern District Court did not further address the level of proof necessary to show “substantial similarity” between a copyrighted work and an accused work, leaving that issue open for the Court of Appeals.

In a unanimous decision dated June 6, 2017, a three-judge panel from the Seventh Circuit Court of Appeals upheld the district court’s decision. The Seventh Circuit held that the district court properly granted summary judgment to defendant on plaintiff’s copyright infringement claim because plaintiff had no evidence of access. The Court further found that no reasonable jury could find

that defendant’s accused plans bear substantial similarities to any original material in plaintiff’s plans. While the Seventh Circuit’s ruling that plaintiff failed to provide evidence of access was not unexpected, the Court surprised many by taking the lower court’s decision a step further in holding that no reasonable jury could find the accused plans were substantially similar to any original material in plaintiff’s copyrighted plans.

This decision not only represents a dramatic shift in how courts have handled copyright infringement cases at the summary judgment stage, but the decision could also have huge implications on the number and scope of copyright infringement actions going forward. Moreover, the decision raises serious doubts about the viability of any copyright infringement claims arising out of alleged infringement of single-family residential home designs, which is often colloquially referred to as “copyright trolling.”

II. How Did We Get Here?

The term “copyright troll” has entered the legal mainstream in recent years as a growing number of “systematic opportunist” litigants have enforced their own legally protectable intellectual property (e.g., patents, trademarks, copyrights) for purposes of making money through litigation. Supporters of the practice cite the importance of legally protecting creative works and the exclusive right to use those creative works as justification for copyright trolling. However, detractors and other critics deride the practice as “predatory litigation,” which exploits the unintended consequences of the high damage

remedies in intellectual property law. Moreover, many believe that this type of litigation is contrary to the intent of intellectual property laws as it tends to stifle the proliferation of creativity, new products, and ideas because actors in certain industries are fearful of intellectual property litigation.

The growth of “copyright trolls” largely stems from the rapid growth of so called “patent trolls,” a term that refers to entities that own patents that they use not to further innovation or manufacture products, but to enforce patent rights through litigation. Some companies obtain or acquire patents solely for means of litigation, or for the threat of litigation, which critics have referred to as a form of “legal extortion.” Comedian John Oliver highlighted this issue during a satirical segment on his show, “Last Week Tonight” where he likened patents to nothing more than “legally binding dibs.” However, in that same segment, he reported that patent litigation has cost investors approximately \$500 trillion since 1990.

This practice of so-called “trolling” in the patent context effectively extended to copyright law. Though copyrights differ from patents in several respects, most notably because they are generally easier to acquire and accordingly secure a lesser degree of legal protection, the practice of “trolling” applies with almost equal vigor to the copyright context. The influence of “copyright trolls” (a term which even has its own Wikipedia page) has been a source of debate and commentary. As one expert in the field described,

[t]he essence of trolling is that the plaintiff is more focused on the business of litigation than on selling a product or service or licensing their IP to third parties to sell a product or a service. The paradigmatic troll plays a numbers game in which it targets hundreds or thousands of defendants, seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim.

Design Basics, LLC, the plaintiff in the *Lexington Homes* matter, is a prime example of one of the “strategic opportunists” who have found themselves in a number of copyright infringement matters. The Nebraska-based distributor and licensor of residential home plans owns over 2,700 copyrighted house plans. Most of Design Basics’ house plans are 1-2 story, 3-4-bedroom single-family homes. Since 2009, Design Basics (and its subsidiaries) has been a plaintiff in over 100 federal lawsuits involving alleged infringement of their copyrighted house plans. Many of Design Basics’ lawsuits arise from instances where their employees conduct internet searches of “substantially similar” house plans, a practice that rewards the discovering employee with a “finder’s fee.”

Judge Griesbach’s decision at the lower court was one of the first instances where a federal court disposed of a copyright infringement case involving residential home designs via dispositive motion. The appeal to the Seventh Circuit also marked the first time the Court directly reviewed a copyright infringement claim involving residential house plans and the first decision in the Court to analyze substantial similarity in the context of residential home designs.

III. The Seventh Circuit’s Decision in *Lexington Homes*

While the Seventh Circuit’s decision to uphold the Eastern District’s decision on the issue of access was not unexpected, the Court surprised many by taking such an aggressive stance on the issue of “substantial similarity” in the context of residential home designs.

Throughout the decision, and during oral argument, the Court attacked the incredibly loose standard for “substantial similarity” that Design Basics asked the Court to apply. When asked to specifically identify what was “original” in each plan during oral argument, counsel for Design Basics cited a declaration provided by Carl Cuzzo, which stated that the plans at issue are “too similar to have been the product of independent creation” and that it was “obvious” that the accused plans had been copied

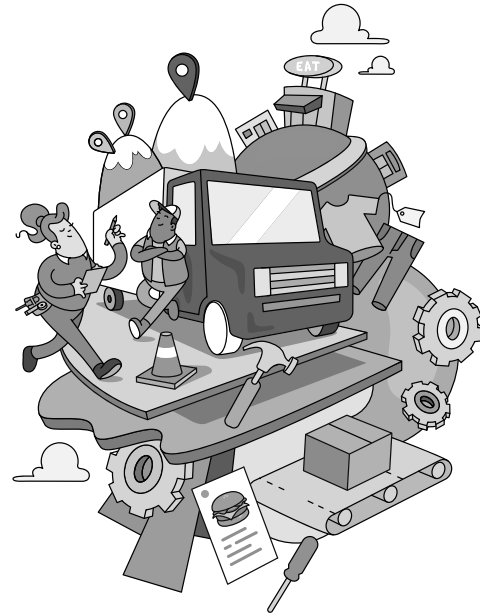


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from the Design Basics plans. As to other “original” elements in the Design Basics plans, Cuozzo cited the “overall arrangement of rooms,” and the “flow and function” of the home as a whole. The Court was unpersuaded by Cuozzo’s conclusory declaration.

To the contrary, the Court was persuaded by the defendants’ use of an architectural expert who intensively reviewed and dissected each plan and outlined countless differences in the compared plans. Specifically, when comparing the defendant’s accused plan, “Easton” to Design Basics’ “Womack,” defendant’s expert identified 62 specific differences between the plans, including differences in dimensions, spatial relationships, roofing configurations, building materials, carpentry, and décor.

The Court was also persuaded by the defendant’s argument that, to whatever extent the parties’ plans resembled one another, they likewise resembled countless other home designs in a crowded market. The market for affordable residential home designs is “crowded” because opportunities for originality in design(s) are tightly constrained by functional requirements, consumer demands, and the vast body of similar designs already available. All of which makes originality, and providing proof of substantial similarity, an incredibly difficult task in the house plan industry.

The Court cited and built on prior decisions from other Circuits; however, the Seventh Circuit went further than any prior decisions in its interpretation of “protectable expression” and its dissection of original (*i.e.*, protectable) elements and unprotectable elements. The Court noted that, in the context of a residential home design, there are only so many ways to arrange a few bedrooms, a kitchen, a common area, and an attached garage. Further, the court reasoned, since all residential home designs have virtually the same features, all of the plans are comprised of familiar configurations of spaces and features.

By their very nature, the vast majority of residential home designs are not designed with the intention of being a “one-of-a-kind” architectural masterpiece. These homes are designed, and built, with an eye toward re-sale. The practical consequence of making designs that are intended to appeal to a wide range of potential consumers is that the designs will inevitably be very similar, with little room for deviation. Under *Lexington Homes*, those minor deviations go a long way towards rebutting a claim of “substantial similarity.”

After a lengthy discussion of “substantial similarity,” the Court turned to the issue of “access.” To prove access, Design Basics relied on (1) weak circumstantial evidence that Lexington’s agents may have been aware of some of Design Basics’ other plans and (2) the mere existence of Design Basics’ website, which provides a user-friendly way to search all 2700 copyrighted plans. The Court quickly disposed of Design Basics’ first argument as far too speculative and focused on the second argument – that an internet presence alone can satisfy the “access” requirement in copyright infringement.

Despite a line of district court cases which hold that widespread dissemination via the internet can be sufficient to impute access on a defendant, the Court held that even a public and “user-friendly” website, alone, cannot raise a genuine issue of fact concerning access. Moreover, there was no evidence defendant had ever accessed the site. Further, it was shown that the plans at issue were not prominently displayed on the website. While the Court stopped short of drawing a bright-line rule as to the quantity or quality of evidence necessary to raise a genuine issue of fact with regard to access, the Court made clear that the mere existence of a copyrighted work on the internet, by itself, cannot justify an inference that a defendant accessed those plans. In only a short time since this decision was published, at least one other district court has cited this case for the proposition that the mere presence of a copyrighted work on the internet is insufficient to show access.

IV. Important Takeaways from the *Lexington Homes* Decision

While the issue of access was the primary reason the lower court decision was appealed to the Seventh Circuit, the three-judge panel disposed of that issue with little difficulty. The surprise of the decision was the extent to which it dissected the issue of substantial similarity, and its holding raises some doubt that a litigant can ever make a case that a residential home plan has enough “original” and “protectable” expression to withstand summary judgment. The Court wholly rejected Design Basics’ conclusory claims of “originality” in each plan based on generalities such as the “overall arrangement of spaces” and other terms like “look,” “feel,” and “function.” Based on the Court’s ruling, those types of vague, amorphous, and unimpeachable terms, which Design Basics’ has relied on to pass off as an objective test and/or means of comparison, will be found insufficient going forward.

The Court did not hide from the fact that the copyrighted plans and the accused plans were in fact similar and shared common elements; however, the Court correctly pointed out that those similarities are driven by external factors like customer preference and demand, as well as other practical considerations like cost, lot size, zoning codes, etc. Given that homes are largely built with re-sale in mind, it should come as no surprise that the plans are designed in a manner that is intended to appeal to the masses and, as a result, the vast majority of residential home plans have a negligible level of architectural originality.

Another unanticipated takeaway from the decision was the extent to which the Court ostensibly factored in the credibility of the respective parties as a reason for reaching the decision it did. Throughout oral argument and based on a review of the decision, the Court, in no uncertain terms, expressed skepticism about Design Basics as a litigant. First, the Court clearly took issue with the fact that litigation constituted a primary source of

Design Basics’ revenue. Moreover, the Court was not only unpersuaded by the declaration submitted by Mr. Cuozzo, which they described as conclusory and devoid of any evidentiary value, but also highlighted the fact that the testimony came from a Design Basics employee who stood to derive a direct financial benefit from the outcome of the very litigation in which he was offering an “objective” opinion.

V. Conclusions

Cases like *Lexington Homes* have become increasingly common and highlight the problem in striking a workable balance between protecting legitimate artistic expression and preventing predatory litigation and exploitation of favorable damages remedies. This decision seems to be a step in the right direction in allowing cases that fit the former description while closing the door on cases that embody the latter. At a minimum, the decision sends a message that “copyrightable” is not the same as “protectable.” It will be interesting to see whether Courts in the future follow suit and are more willing to undertake an intensive dissection of the alleged “originality” of a copyrighted work since “originality” is clearly a matter of degree. Further, vague and unimpeachable phrases like “flow and function” and “arrangement of space” will fall by the wayside as objective means by which to analyze originality.

Overall, the net effect of this decision means that similar copyright infringement actions brought by Design Basics and other similarly situated litigants will likely become extremely difficult, if not impossible, to bring in the Seventh Circuit. It remains to be seen whether it will have a chilling effect on the filing of similar cases in other Circuits. Though the number and scope of copyright infringement actions will likely decrease as a result of the decision, perhaps there will be a marked increase in the number of meritorious claims that are filed, where proof of access is not in dispute and a litigant can articulate the specific protectable elements of a copyrighted work.

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References

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- 3 *Id.* at *9.
- 4 *Id.* at *13-14 (The Eastern District Court’s discussion of “substantial similarity” was limited to ascertaining whether the plaintiff could show “striking similarity,” which would allow an inference of access).
- 5 *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1096 (7th Cir. 2017).
- 6 Joe Nocera, *The Patent Troll Smokescreen*, N.Y. TIMES (OCT. 23, 2015), <https://www.nytimes.com/2015/10/24/opinion/the-patent-troll-smokescreen.html>.
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- 9 *Id.*
- 10 See, e.g., Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015)
- 11 *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d at 1097.
- 12 *Id.*
- 13 *Id.* at 1104.
- 14 *Id.* at 1105.
- 15 *Id.* at 1103.
- 16 *Id.*
- 17 *Id.* at 1105; See *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 107 (2d Cir. 2014) (“Defendants’ houses shared Plaintiff’s general style, but took nothing from his original expression.”).
- 18 *Id.*; *Zalewski*, 754 F.3d at 107. (2d Cir. 2014) (describing a designers or architects copyright as “thin,” so that only very close copying of protected elements is actionable).
- 19 See *Zalewski*, 154 F.3d 95, see also *Home Design Services, Inc. v. Turner Heritage Homes Inc.*, 825 F.3d 1314 (11th Cir. 2016).
- 20 *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d at 1101 (citing *Home Design Services, Inc.*, 825 F.3d at 1321.
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- 26 See *Arnett v. Jackson*, No. 5:16-CV-872-D, 2017 U.S. Dist. LEXIS 128672, at *6 (E.D.N.C. Aug. 14, 2017).
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