

The Practitioner Entertainment Law

Gotham City

Representing Architectural Works in Motion Pictures

by David Halberstadter

A group of international terrorists puts in motion their plan to wreak havoc on American capitalism. They seek the destruction of key buildings in all of the major U.S. cities. In New York, they place explosives in a skyscraper occupied by Fortune 500 corporations. In Washington, D.C., the Federal Trade Commission's offices are the target. In Boston, Los Angeles and Chicago, some of the most distinctive business landmarks are slated for obliteration. Thankfully, a team of government agents foils the plan with a minimum of property damage and lost lives.

Any number of motion pictures or television projects make use of some variation of this fictional theme. Some replace terrorists with aliens from another galaxy or change corporate headquarters to places of worship. To make the final product as visually appealing as possible, location scouts look at hundreds of photographs of distinctive buildings and visit the best choices before making a final selection.

The production's ability to photograph buildings and make miniature models (to be blown up) depends upon myriad factors, including the type of structure, the age of the structure, whether distinctive artistic features are affixed to the structure, and who controls the copyrights to any protectible aspects of the structure.

And, even after the production thinks it has everything figured out and proceeds with filming, someone inevitably emerges to claim that his or her rights have been violated.

Prior to 1990, the rules were fairly simple. U.S. copyright law did not accord protection to utilitarian architectural structures, such as office buildings, homes and apartments. An architect's plans and drawings were

protected as "pictorial, graphic, and sculptural works." But the constructed structures themselves were protected by copyright "only if, and only to the extent that, such design incorporates pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. Section 101.

As a result, copyright historically could be claimed in "artistic sculpture or decorative ornamentation or embellishment added to a structure" but not in the structure itself. See *Donald Frederick Evans & Ass'n v. Continental Homes Inc.*, 785 F.2d 897 (11th Cir. 1986). Purely nonfunctional or monumental structures (statues and towers, for example) enjoyed full copyright protection.

If the appellate court could not agree on what Warner Bros. could film without permission, how is a production company to know what to do?

Much of this changed in 1990, when the United States became a signatory to the Berne Convention. To bring the United States into compliance with the Berne Convention, which protected works of architecture, U.S. copyright law was amended.

The Architectural Works Copyright Protection Act applies to "architectural works" created on or after December 1, 1990, the date on which the act was enacted. An architectural work is defined as the "design of a building as embodied in any tangible media 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." 17 U.S.C. Section 101.

The legislative history of the act refines this definition. It states that "the term building encompasses habitable structures such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions." The history also makes clear that certain other structures do not constitute "buildings," including bridges, highways, cloverleaves, dams and walkways. H.R. Rep. No. 735, 101st Cong., 2d Sess. 20 (1990).

As a general matter, architectural works are subject to the same standards and protections that apply to other copyrightable works. But architectural works are also subject to several unique

limitations. Once an architectural work has been built, for example, the copyright owner may not prevent "the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located

in, or ordinarily visible from, a public place." 17 U.S.C. Section 120(a).

In exempting from copyright infringement the making of pictorial representations of architectural works, Congress observed that architecture is "an art form that performs a very public, social purpose." Given that important public purpose, Congress chose to provide an exemption for pictorial representations rather than rely on the ad hoc determinations required by the fair-use doctrine. H.R. Rep. No. 735, 101st Cong., 2d Sess. 12 (1990).

So, where does all of this leave a film company? If the building was constructed before 1990, the company needs

no permission to film it or build a model of it, unless it contains sculptural or pictorial features (gargoyles, for example, or a unique stained-glass window) that can exist separately and independently of the utilitarian aspects of the building.

If the building was constructed after 1990, the production company is free to film the building as long as it is ordinarily visible from a public place. The company may no longer make miniature models without permission from the copyright holder, whoever that may be.

And what about buildings that were built after 1990 but which contain pictorial or sculptural features that are separate from, and capable of existing independently of, the utilitarian aspects of the building? Did Congress intend to apply the "pictorial representation" exception to such features or to perpetuate the historical protections for such features?

The 9th U.S. Circuit Court of Appeals recently attempted to answer this question in *Leicester v. Warner Brothers*, 232 F.3d 1212 (9th Cir. 2000). The court's split decision illustrates just how difficult it can be under the act to ascertain which structures may be filmed without permission and whose permission may be required.

In *Leicester*, an artist known for his large-scale public art collaborated with an architect in deigning the 801 Tower in downtown Los Angeles. The complex comprised the building itself, a "streetwall" that would give the Tower the feeling of a traditional downtown building that touches its neighbor and a courtyard sculpture.

In the courtyard, the artist designed a fountain sculpture designed to tell an allegorical story of the history of Los Angeles. Also inside the courtyard were two sets of two towers representing the city. Five additional towers and gates formed the streetwall and the entrance to both the court-

yard and the 801 Tower. The sculpture, the streetwall and the 801 Tower all contain similar and complementary design elements.

Warner Bros. obtained written permission from the developer of the 801 Tower to use the premises for filming the motion picture "Batman Forever." The 801 Tower and the towers comprising the streetwall appear as background in a few scenes in the film. (The building serves a Gotham City bank.) With the developer's permission, Warner Bros. also built a miniature model of the 801 Tower for use in a special-effects shot.

The artist, who had not been consulted or given his approval to any of the filming, sued Warner Bros. for copyright infringement. The trial court concluded that the developer had the exclusive right to license three-dimensional reproductions to Warner Bros. According to the trial court, the developer did not have the right to grant Warner Bros. the right to make photographic or pictorial copies of the artwork.

But the various towers comprising a portion of the artwork also had functional aspects designed to be part of the building plan and were, therefore, part of the "architectural work," which Warner Bros. was permitted to copy because 17 U.S.C. Section 120(a) expressly exempts pictorial representations of architectural works from copyright infringement.

The 9th Circuit affirmed the trial court's ruling in a split decision. The majority rejected the artist's contention that the towers and the courtyard sculpture comprised a "unitary sculptural work" that the trial court "effectively mutilated" by treating them as part of the building. It found that the 801 Tower's streetwall "seems plainly covered" by the act's inclusion of "the arrangement and composition of spaces and elements in the design" within the definition of an architectural work.

The *Leicester* court specifically rejected the notion that the Copyright Act continues to accord separate copyright protection against the photographing of pictorial and sculptural works attached to buildings. If that were the case, the majority contended, "Section 120(a)'s exemption for pictorial representation of buildings would make no sense," and "it would be counterintuitive to suppose that Congress meant to restrict pictorial copying to some, but not all of, a unitary architectural work."

The dissenting judge was of the view that even if the streetwall could be considered part of the larger architectural work, it nevertheless could also be considered conceptually separate from the building and, therefore, entitled to full copyright protection.

The dissent concluded that neither the statute nor its legislative history definitively answers the question whether pictorial and sculptural works that are incorporated into buildings (such as gargoyles and stained glass) may be freely photographed, or whether they continue to enjoy their former protection against unauthorized pictorial copying. In such a situation, the dissent argued, any doubts should be resolved in favor of protection.

The 9th Circuit engaged in a detailed examination of the complex design features of the 801 Tower and related artwork and a thorough review of the act and its legislative history. If the appellate court judges could not agree on what Warner Bros. could film without permission, how is a production company to know what to do in any given situation? It could be frustrating enough to make someone explode — with or without the fictional terrorists.

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