

**INTELLECTUAL PROPERTY INFRINGEMENT OF ARCHITECTURAL WORKS  
IN ZAMBIA**

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### **ABSTRACT**

Architects and engineers depend on copyright law to protect their original works. The objective of this study is to explore how effective the Zambian copyright law regime is with regard to the protection of the rights and interests of creators of architectural works against copyright infringement. This study goes on to look at both domestic and international laws governing the rights and interests of creators of architectural works against copyright infringement. The aim of this research is to address the need for the awareness of the infringement of architectural works in Zambia against unauthorized copying. The findings of this research have also shown that there is a high level of ignorance and lack of sensitization in Zambia with respect to the issue of copyright infringement of architectural works. The solution includes the need to revise the copyright law in order to improve its enforcement and the protection of architectural works against unauthorized copying. Furthermore, there is need for proper training, education and sensitization of the rights and interests of creators of architectural works against copyright infringement among members of the public.

**Key words:** Intellectual Property Law, Copyright, Architectural Works,

**Introduction**

This chapter will build on issues previously discussed in chapters one and two in relation to the infringement of architectural works. This chapter gives a broader and detailed discussion as to what copyright infringement is. This chapter examines when copyright is infringed. Furthermore, this chapter gives an insight on the criteria for copyright protection. This chapter also looks at the primary and secondary infringement of architectural works.

**Copyright Infringement**

Before examining copyright infringement in detail, it is worth observing, that, while there has been a great deal of norm-setting in relation to the rights of the copyright owner, the question of what amounts to copyright infringement has not generally been the subject of international consideration and has only recently been regarded as a matter that has been the subject of regional harmonization. In Zambia the applicable tests for infringement have largely been developed locally and, for the most part, by the courts. Having acknowledged that the Zambian copyright law has taken its course, it is worth noting two recent developments. Firstly, the rule that copyright does not protect ideas has found its way into both regional and international arrangements, and has been interpreted as establishing an outer limit to the scope of protection that any country may grant through copyright. Secondly, regional harmonization initiatives seem to require that copyright infringement be found to occur where any part as opposed to any substantial part of work is reproduced. The second development is already transforming the fundamental principles by which infringement is analyzed. It can be opined that there is great anticipation that many of the propositions in relation to further guidance on infringement of copyright under the various directives by the courts are subject to change over the next years both locally and internationally. Copyright infringement entails taking the work without the consent of its owner, rather than any dealing with the physical object. The use of works protected by copyright law without permission infringes on certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works. The copyright holder is typically the work's creator, or a publisher or other business to whom copyright has been assigned. Copyright holders regularly invoke legal and technological measures to prevent and penalize copyright infringement. The rationale is that, the lawful owner of the physical item is free to deal with it as they wish, as long as a restricted act is not committed. In spite of the Copyright Act providing for the protection of architectural works against infringement, there is very little that creators of architectural

works can do to stop copyright infringement. Fundamentally, copyright law exists to prevent others from taking unfair advantage of a person's creative efforts. There are two types of infringement namely primary and secondary infringement.

### Criteria for Copyright Protection

According to Section 17 of the Copyright Act, the owner of a copyright shall have the exclusive right to do or authorize others to copy or reproduce the work, publish or issue copies, to perform among many other things.<sup>1</sup> On the other hand Section 21(1) of the Copyright Act provides for acts which do not constitute infringements, which include fair dealing with a work for the purposes of research other than for profit, fair dealing for the purposes of criticisms or review, provided there is sufficient acknowledgment and fair dealing for the purposes of reporting events among many other things.<sup>2</sup>

In the event of an infringement, a copyright owner is entitled to certain remedies as laid out in Section 25(2) of the Copyright Act such damages, injunctions or account of profits among many other remedies.<sup>3</sup>

The ingredients of a copyright are that it must be original, reduced in a permanent form and must be authorized by the owner. The originality requirement means that the work was independently created by the author and not copied from other works and that it possess at least some minimal degree of creativity. In the case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd*,<sup>4</sup> the court held that originality requires only that the work should not be copied but should originate from the author. Section 2(e) of the Copyright Act provides that adaptation in relation to an artistic work in two dimensions, the reproduction of that work in an object in three dimensions.<sup>138</sup> Basically originality is equated to the degree of skill, labor and judgment that went into the creation of the work as was established in the case of *LB (Plastics) Ltd v Swish Products Ltd*.<sup>5</sup>

Similarly, in the case of *British Leyland Motor Corporation v Armstrong Patents*,<sup>6</sup> the plaintiff manufactured motor vehicles with motor parts produced in accordance with detailed designs. The defendant specialised in the manufacture of spare parts which would be sold to motor

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<sup>1</sup> Section 17 of the Copyright Act

<sup>2</sup> Section 21(1) of the Copyright Act

<sup>3</sup> Section 25(2) of the Copyright Act

<sup>4</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL).

<sup>5</sup> *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551.

<sup>6</sup> *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577 (HL).

vehicle owners. In order for the replacement parts to fit, the defendant's design needed to be virtually identical to that of the original component. The plaintiff's exhaust was not eligible for copyright, patent or design protection. The court held that the defendant's conduct amounted to indirect copying of the designs under Section 48(1) of the British Copyright Act of 1956. The British Copyright Act under Section 48(1) provided that the conversion of a two-dimensional work into one of three dimensions will constitute a reproduction. However, an artist making a faithful representation of a still object such as a sofa uses more of his skill in lighting and applying paint to canvas which then earns him the copyright.

The second criteria for copyright protection is that the work must be reduced in a permanent form as provided for under Section 8 (3) of the Copyright Act.<sup>7</sup> Whilst artistic works will be in a tangible form, literally, dramatic or musical work must be recorded in a permanent form. Such fixation can be made by anyone even without permission of the author as established in the case of *Walter v Lane*.<sup>8</sup>

The last criteria for copyright protection is that a copyright must be authorized by the owner. The copyright owner can deal with his work in any way he pleases by exploiting it individually or he may choose to sell it, assign it or even license it. Basically moral rights can never be transferred and always remain with the original author of the work. Section 7 of the Copyright Act provides that copyright is a property right which subsists in the products of creativity and can be exploited in two main ways, either by means of assignment or a license.<sup>9</sup> An evaluation of the cases by the courts reveals how they have enforced intellectual property rights in relation to the infringement of architectural works. It is notable that there are very few decided cases in intellectual property law in Zambia in relation to the infringement of architectural works due to the lack of effective and vigorous awareness of the matter at hand. Nevertheless, the few cases in which the courts have decided the opportunity to adjudicate on intellectual property rights are very helpful for purposes of analyzing how the courts have fared in the enforcement of these rights.

The courts had an occasion to deal with copyrights in the case of *Performing Right Society Ltd v Francis Anthony Hickey trading as Bar-b-que Drive in Restaurant*<sup>10</sup>. In this case the plaintiff took out an action for infringement of a copyright. The defendant played three musical records

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<sup>7</sup> Section 8 (3) of the Copyright Act.<sup>7</sup>

<sup>8</sup> *Walter v Lane* [1900] AC 539 (HL).

<sup>9</sup> Section 7 of the Copyright Act

<sup>10</sup> *Performing Right Society Ltd v Francis Anthony Hickey t/a Bar-b-que Drive-in Restaurant* (1974) ZR 61.

in public without obtaining a license from the plaintiff who was the owner of the copyright. The defense raised by the defendant was that the infringement was done innocently and under a mistake. The court held that it was not disputed that there was an infringement on the part of the defendant. However, the court took into account the defense put up by the defendant and held that the plaintiff was entitled to damages but an account of profits. An injunction was also granted against the defendant.

There is need to exercise care in admitting the defense of infringement of a copyright. The Halsbury's Law of England at paragraph 938, states that a defendant does not establish that he had no reasonable grounds for suspecting the exercise of a copyright by showing that he had an honest but erroneous view of the law.<sup>11</sup> Generally emphasis is placed on the fact that the innocence as to the infringement must be reasonable. This is simply because the law trying to protect copyrights will be used to create a mischief in that any person can claim the defense of innocence of infringement and escape liability from damages.

### **Primary Infringement**

A primary infringement involves a direct infringement by the defendant. Direct copying occurs where a copyrighted work in its initial presentation is made. On the other hand indirect copying occurs when the work is presented in some form other than its initial presentation. In an action of primary infringement, the onus falls upon the claimant to show on the balance of probabilities that the defendant carried out one of the activities that falls within the copyright owner's control. The first element in proving infringement is that the defendant's work was derived from the copyright work. This entails that there must be a causal connection between the copyright work and the allegedly infringing work as established in the case of *Francis Day, & Hunter Ltd v Bron*.<sup>12</sup> In a nut shell the copyright work must be the source of the infringing work. Secondly the restricted act was carried out in relation to the work or substantial part thereof.

In terms of the first element, for work to be infringed upon, it must be derived from the copyrighted work. In other words, it must be copied. If two works created independently are found to be substantially the same, the first in time to be created will not be infringed by the second. The similarity may be coincidental or perhaps the result of the two works may have derived from a common source such as a famous building of St. Paul's Cathedral in London. If

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<sup>11</sup> The Halsbury's Law of England at paragraph 938

<sup>12</sup> *Francis Day & Hunter Ltd v Bron* [1963] Ch 587.

the second author uses the first author's work to identify the common source, there will be no infringement, since by going back to the primary source the second author will have expended his own skill and effort in his work as established in the case of *Pike v Nicholas*.<sup>13</sup> The copying of architectural plans by duplicating the original plans is a practical example of copyright infringement. A perfect replica is not necessary to prove infringement, as long as an ordinary average layman would realize that there is an appropriation from the original work. Angela Adrian suggested that "*The test is whether the plan or building was a copy of the concept or style and therefore legitimate or a copy of the author's original manifestations of that concept or style and therefore an infringement.*"

### **A Casual Connection**

It is an established legal principle that an infringing work need not be copied directly from the original work. It may very well be that the infringing author may not even know of its existence. It is important to note that it is not necessary for the defendant's work to be derived directly from the original work, however it is possible for a defendant to infringe were they base their work on a copy of the original work. It is also significant to note that it does not matter if the intermediate reproduction is itself a legitimate. A practical example of this scenario is where a person photographs a three-dimensional object such as a building. They may infringe the copyright in the drawings on which the sculpture was based, even though they have never seen those drawings. Furthermore a good example concerning the causal link element of the test for infringement is the case of *Solar Thomson Engineering Co. Ltd v Barton*.<sup>14</sup> In this case, the defendant asked a design engineer to design a spare part for a machine. In order to avoid infringing the copyright in the original design drawings of the claimant's spare part, the defendants gave the design engineer detailed instructions and the surrounding hardware, but did not show him the claimant's original drawing. The design engineer created a design drawing which was very similar to the claimant's original design drawing. The court of appeal held that the instructions given to the design engineer amounted to a sufficient causal link for copyright in the original drawings to be infringed.

### **Indirect Copying and Substantial Copying**

The second and final element that needs to be asked in an infringement action is whether the restricted act has been carried out in relation to the work or a substantial part thereof. Section

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<sup>13</sup> *Pike v Nicholas* (1869) LR 5 Ch App 251.

<sup>14</sup> *Solar Thomson Engineering Co Ltd v Barton* [1977] RPC 537.

2 of the Copyright Act provides that substantial part includes any part of a work which can be identified as part of the work of someone who is familiar with the work.<sup>15</sup> Furthermore, Section 17(7) of the Copyright Act provides that the doing of an act controlled by the copyright in a work includes the doing of that act in relation to substantial part of the work. Apart from a causal connection, in order to infringe copyright must be in relation to the work as a whole, or any substantial part of it. A substantial part is defined qualitatively and not quantitatively as established in the case of *Ladbroke (Football Ltd) v William Hill (Football Ltd)*.<sup>16</sup> It is difficult to determine what a substantial part is as there is no standard measure. The courts determine substantial by reference to the quality of what was taken and not the quantity. Even a very small part of work can be substantial if it is the most valuable or memorable piece of work.

The case of *Pearce v Ove Arup Partnership Ltd*,<sup>17</sup> illustrates the substantial part principle. Here an architectural student, Pearce, had made some drawings of a town hall in 1986. He claimed that an English civil engineering company together with the Dutch architects and builders as well as the Dutch local authority had infringed his copyright under the Dutch copyright statutes by erecting the Kunsthal in Rotterdam. Pearce claimed that features of Kunsthal's design had been copied from his Docklands plans thereby infringing upon his UK and Dutch copyrights. In this instance, the judge struck out the action on the grounds that there was insufficient similarity between the building and the claimant's drawings. It was held that Kunsthal was independently designed with a similar feature to Pearce's design hence there was no infringement incurred. In particular, the judge held that the degree of similarity between the claimant's drawings and those of the defendants was not sufficient to give rise to an inference of copying. He considered that the claim was based on speculation and accordingly ordered the claim against each of the defendants to be struck out.

The issue of subconscious copying is relevant to architectural works. The infringer need not be aware that he is copying in order to infringe another's copyright work. If an architect inspects an architectural plan, he may be influenced by the prior viewing. It is possible that he may take the architectural concept and style embodied in the plan and apply it to his own design in an original plan produced by him without any infringement.

### **Secondary Infringement**

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<sup>15</sup> Section 2 of the Copyright Act

<sup>16</sup> Section 17(7) of the Copyright Act

<sup>17</sup> *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403.

In an attempt to inhibit the negative impact that illegal acts have upon copyright owners, copyright law acknowledges that it is not enough merely to afford remedies against those who copy or perform the copyright work. Instead, copyright law recognizes that it is also necessary to provide owners with protection against those who aid and abet the primary infringer. Such accessory infringement is known as secondary infringement. There are two important differences between primary and secondary infringement. The first relates to the scope of protection, primary infringement is associated with people who are directly involved in the reproduction and performance among other things of copyright works. In contrast, secondary infringement is concerned with people in a commercial context who either deal with infringing copies, facilitate such copying, or facilitate public performance. The second difference between the two forms of infringement relates to the mental element that the defendant must exhibit in order to infringe. Generally it has been observed that, the state of mind of the defendant is not formally taken into account when deciding whether an act of primary infringement has occurred. In the case of secondary infringement, however, liability is dependent on the defendant knowing, or having reason to believe, that the activities in question are wrongful. Section 18 of the Copyright Act, provides that secondary infringement occurs where an individual facilitates primary infringement activities or deals in infringing copies for commercial gain.<sup>18</sup> Secondary infringement includes permitting a place of public entertainment to be used for an infringing performance as established in the case of *Harms Ltd & Chappell v Martians Club Ltd*.<sup>19</sup> According to the Copyright Act, secondary infringement constitutes providing apparatus for making or transmitting an infringing article. Importing, other than for private use, an infringing copy with the knowledge or belief that it infringes copyright also constitutes secondary infringement.<sup>20</sup> Possessing, hiring, selling or prejudicially distributing an infringing copy of a work according to Section 19(ii)(b) to (e) also includes secondary infringement.<sup>21</sup>

Furthermore secondary infringement includes making, letting for hire, importing or possessing an article designed or adapted for making illegal copies and having reasonable belief the article will be used to infringe copyright.

**Infringement of Architectural Works.** When it comes to the infringement of architectural works such as drawings, designs or even plans, among other architectural works, the court can find

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<sup>18</sup> Section 18 of the Copyright Act

<sup>19</sup> *Harms (Incorporated) Ltd v Martans Club Ltd* [1927] 1 Ch 526.

<sup>20</sup> Copyright Act, Section 19(ii)(b)-(e)

<sup>21</sup> Copyright Act, Section 19(ii)(b) to (e)

designs to be visually similar with the same general layout, it may nonetheless find the dissimilarities significant enough to preclude a finding of infringement. Common elements across the two floor plans may include the number of bedrooms, a two car garage, living room, dining room, family room, foyer kitchen, two bathrooms, a nook, and a porch which although substantially similar, no reasonable court could find the two floor plans at issue to be a copyright infringement, unless they are of the same dimensions. For architectural copyright infringement, a plaintiff must prove that the ownership is a valid copyright. The plaintiff must also prove that there has been copying of protectable elements. In the case of *Miller's Ale House Inc v Boynton Carolina Ale House*,<sup>22</sup> the court held that in order to establish ownership of a valid copyright, the plaintiff must prove, among other things, that the work is original which means only that the work was independently created by the author and that it possesses at least some minimal degree of creativity. To establish copying, the plaintiff must show as a factual matter that the defendant copied the protected work and that the protected expression itself was copied. On the other hand in the case of *Dream Custom Homes, Inc v Modern Day Const, Inc*,<sup>23</sup> the court held that in the absence of direct proof of copying, a plaintiff may prove copying by demonstrating that the defendants had access to the copyrighted work and that the works are substantially similar. The test for substantial similarity for architectural works is whether a reasonable court could find the competing designs are substantially similar at the level of protected expression. One of the highest profile victims of copyright infringement of architectural works is one of the world's most famous architects Zaha Hadid. The Veuve Cliquot businesswoman of the year 2018, took legal action against a Chinese construction firm that was building a design in Chongqing similar to Hadid's Wangjing Soho complex in Beijing.

## Conclusion

Copyright is a property right. Generally it provides the owner with the exclusive right to perform certain acts in relation to the work that is subject to the copy. From the fore going it is quite clear that, any one performing any of these restricted acts, in relation to the whole or substantial part of the work, without the license or consent of the copyright owner will infringe the copyright. Copyright does not give a monopoly right, unless the owner alone has access to the constituents of the work. It is clear that a key issue for architects and engineers is determining whether the line is to be drawn between the manifestation of original concepts or style contained

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<sup>22</sup> *Miller's Ale House Inc v Boynton Carolina Ale House LLC* 702 F 3d 1312 (11th Cir 2012).

<sup>23</sup> *Dream Custom Homes Inc v Modern Day Construction Inc* 773 F Supp 2d 1288 (MD Fla 2011).

in the architectural plans protected as a monopoly, and express concepts and ideas that may be legitimately used as established in the case of *Jones v London Borough of Tower Hamlets*.<sup>24</sup> If architectural works contain unique designs, copyright protection applies.

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<sup>24</sup> *Jones v London Borough of Tower Hamlets* [2001] EWCA Civ 330.

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