

Copyright Protection for Architectural Works: *the U.S. perspective*

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Statutory Basis

- Prior to 1990, *plans* for architectural works protected as pictorial or graphic works
- Most buildings had no copyright protection apart from the copyright in the underlying plans
- Monuments and non-functional works of architecture protected under §102(a)(5) as sculptural works
 - Ornamentation and embellishments to a building could have copyright protection on this basis

Statutory Basis

- Architectural Works Copyright Protection Act passed in 1990
 - Established architectural works as a new category of protectable subject matter
 - *“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” 17 USC §101*
 - Not a “full” right – statute provides:
 - Building owner can freely modify or destroy, and make copy of plans for renovation/modification
 - No moral rights in architectural works
 - No right to image if in public view
 - No panorama right

Statutory Basis

- No definition of “building” in statute
 - Copyright office: *“humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos and garden pavilions.”* 37 C.F.R. §202.11(b)(2)
 - Does not extend to non-habitable structures such as dams, canals, highways and bridges
 - Caselaw:
 - Not covered:
 - Store within a shopping mall (shopping mall itself covered)
 - Kiosks for displaying items for sale within an existing structure
 - Covered:
 - Homes, condos, skyscrapers, restaurants (easy ones)
 - Parking garage, pre-fab homes

Statutory Basis

- No requirement for actual construction of building to have a protected work
- No requirement for “buildability”
 - Simplified or generalized plans and conceptual designs (beyond mere ideas) covered even if not sufficiently detailed to allow construction



Originality

- General copyright rule:
 - “Original, as the term is used in copyright, means only that the work was **independently created** by the author (as opposed to copied from other works) and that it possesses at least some **minimal degree of creativity**. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.”¹
- Rule for Architectural Works
 - Definition notes originality of design may lie in selection and arrangement of known elements
 - Similar to copyright coverage of compilations
 - Work must be original and not copied

Infringement

- Must show
 - Ownership of valid copyright
 - Copying by alleged infringer
 - Substantial similarity between copyrighted work and alleged infringing work
- Proof of copying (in order of strength)
 - Direct proof
 - Access by infringer
 - Manifest due to identity of work
- Substantial similarity
 - Lay person, not seeking to detect differences, would consider the works substantially similar
 - Existence of differences will not negate similarities unless differences so outweigh similarities that similarities are inconsequential

Typical infringement scenarios

- Building a home from a model brochure
- Paying for a license for one home and building many
- Creating a derivative work from a set of plans provided by the building owner
 - “look at all the changes we made!”
- Taking over a project from another architect
- Outright theft / dishonesty

Remedies: Monetary

- § 504 (a) IN GENERAL. ... an infringer of copyright is liable for either:
 - the copyright owner's actual damages **and** any additional profits of the infringer..., or
 - statutory damages
- Attorney's fees only if copyright registered prior to infringement

Remedies: Monetary

- Actual Damages
 - Approach #1: copyright owner's lost revenue
 - Approach #2: copyright owner's lost profits
 - Approach #3: market value of licensing fee
 - Approach #4: destruction / diminution of market for the work
- Statutory Damages
 - Available only if there was timely copyright registration
 - \$750-\$30,000 per work infringed
 - Willfulness finding allows increase of up to \$150,000 per work
 - Finding of "Innocent Infringement" allows reduction to as little as \$200 per work

Remedies: Monetary

- Infringer's profits
 - Recoverable in addition to actual damages
 - Exception: infringer profits included in actual damages computation
 - Initial burden on copyright owner to prove infringer “gross receipts”
 - Burden then shifts to defendant to prove his expenses and factors other than the infringement
 - Expenses must be actual expenses specific to that work, not estimates or margins
 - Failure of copyright owner to prove deductions **requires an award of gross revenues** as profits.
 - Law allows windfalls to copyright owners

Hewlett Custom Home Design v. Frontier Builders

- Court's Charge:

Defendants bear the burden of proving what elements of Defendant's profits are attributable to factors other than the copyrighted work. To carry this burden, Defendants must prove what profits were attributable solely to the efforts of others, exclusive of the effect of Hewlett Custom Home Design's architectural works. Moreover, if non-infringing factors are so intertwined with infringing factors that it is impossible to apportion profits, then no apportionment is allowed.

All profits from the construction, marketing, and sales of the houses in question should be deemed attributable to the infringement unless Defendants(s) proves by a preponderance of the evidence that they are not. If a defendant fails to adduce competent evidence that a portion of its profits were due solely to factors other than the infringement, you should find that all of Defendant's profits from the construction, marketing, and sales of the houses at issue are the result of copyright infringement.

- Result: Jury found 0% attributable to other factors
- Multi-million dollar jury verdict

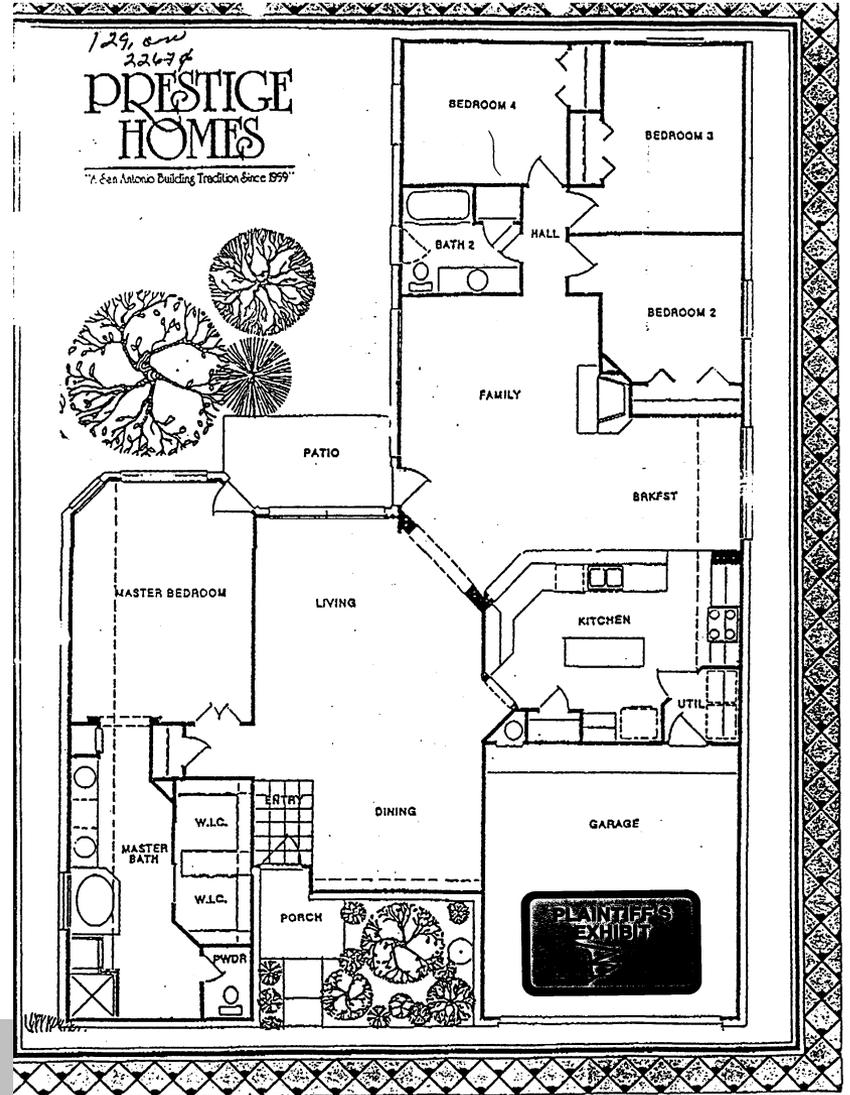
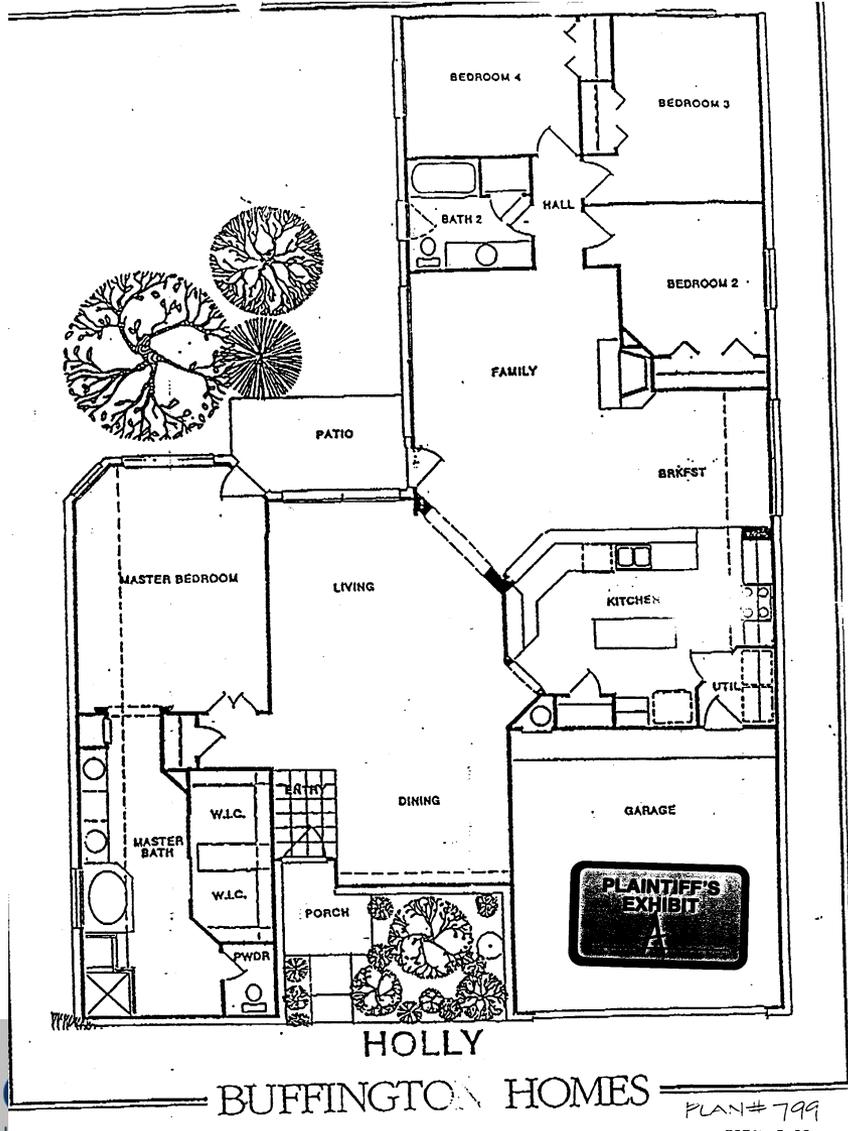
Remedies: Non-Monetary

- Injunctive Relief (§ 502)
 - No longer automatic (*eBay*)
- Impounding / Destruction / Remedial Modification (§ 503)
- Criminal Liability (§ 506)
 - Willful infringement
 - For purposes of commercial advantage / private financial gain (with certain conduct defined as such)
- Downstream liability
 - Infringing building continues to be infringing
 - Later sale by innocent purchaser is another act of infringement
 - Strong leverage against builder/infringer

Case Study: Kipp Flores & Follmer Architects v. Prestige Homes

- Customer called Kipp licensee asking permission to use plans
 - Licensee refused due to license terms
- Customer took copy of plans to another builder, who made copy of plans and built home

Case Study: Kipp Flores & Follmer Architects v. Prestige Homes



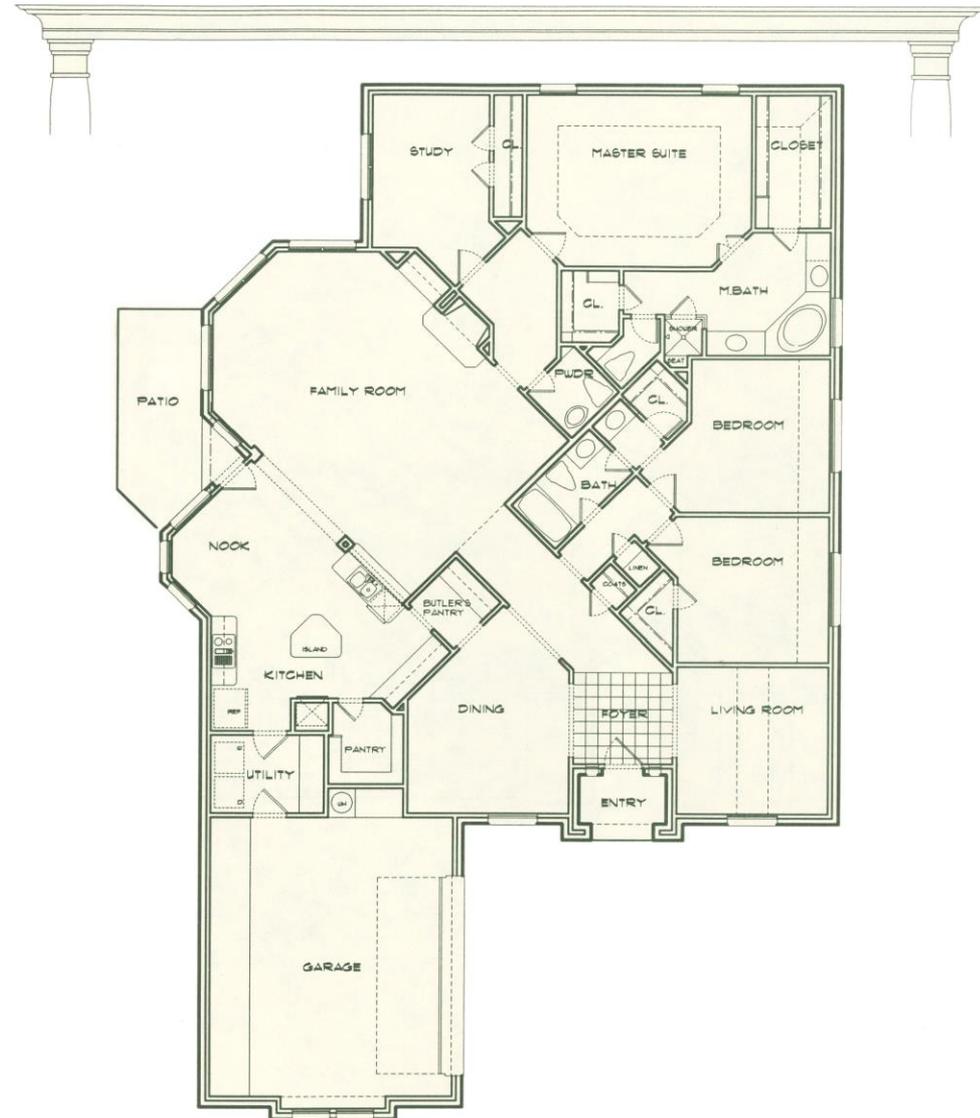
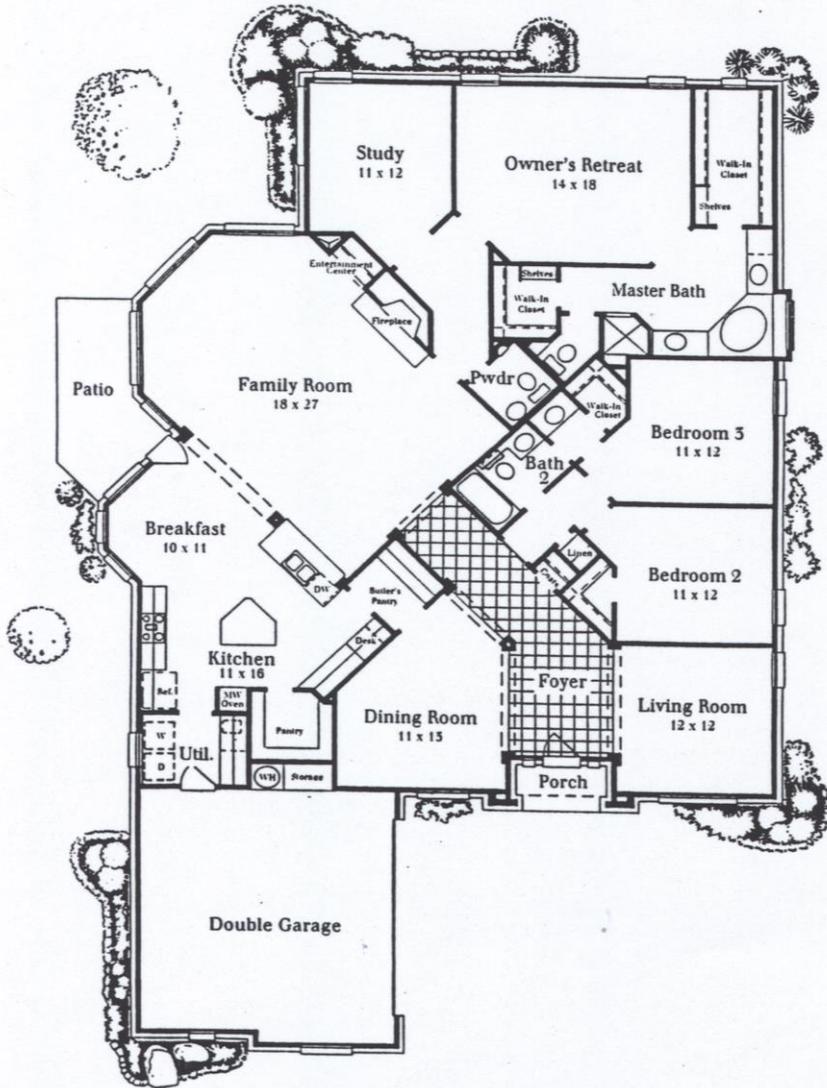
Case Study: Kipp Flores v. Signature Homes

- Kipp licensed plans to Signature for one housing development
- Signature built another development in another state
- Signature was copied by 3rd party, and sued for infringement!
- Kipp sued Signature
 - Signature offered to pay market value of license (low amount)
 - Jury verdict: \$5.4 million
 - Final settlement higher

Case Study: Humphreys & Partners Architects v. Ray Morris Homes

- Ray Morris built homes very similar to a design created by Humphreys and licensed to another builder
- Ray Morris argued their design was independently created
- What do you think?

Case Study: Humphreys & Partners Architects v. Ray Morris Homes



Case Study: William Hablinski Architecture v. Amir Construction

- Architect hired to build California mansion
- Draftsperson apparently stole a copy of the CAD files
- Another builder built similar home
- Is it substantially similar?



William Hablinski Architecture v. Amir Construction

\$4 million jury verdict

Case Study: Frank Betz Assoc. v. Jim Walter Homes

Meriwether

by Frank Betz Associates, Inc.



Chadwick

from Jim Walter Homes

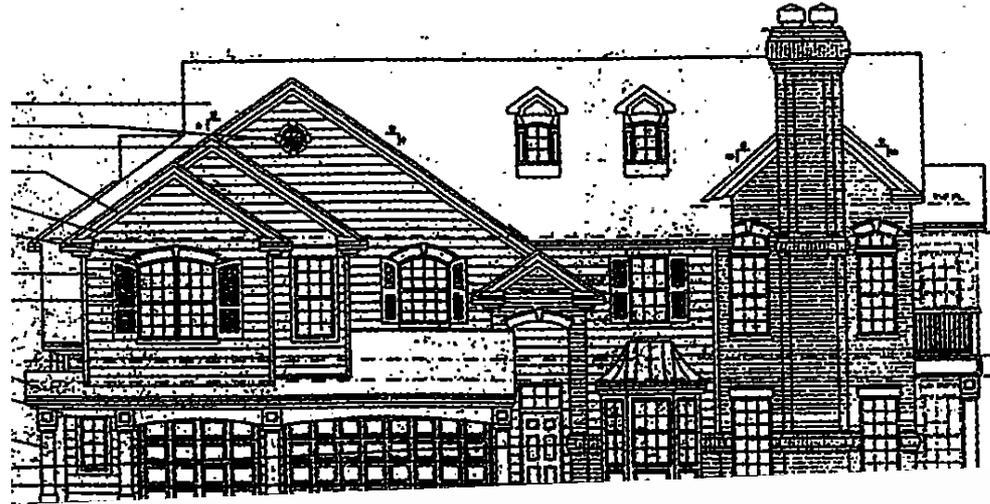


Case Study: Humphreys & Partners Architects v. Gibraltar Properties

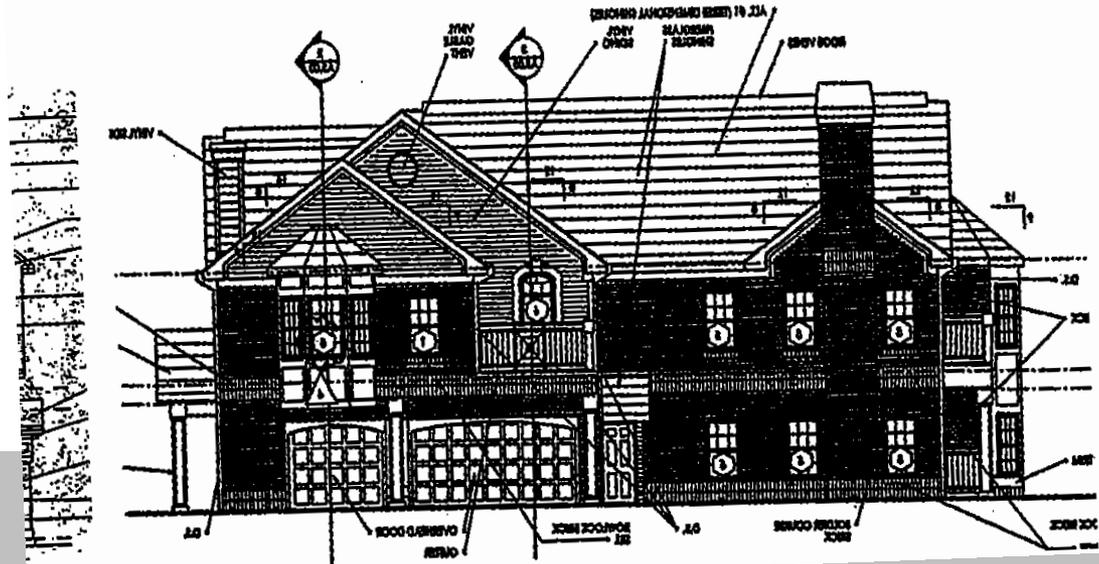
- Unique design for multi-family property that looks like large single family home
- Gibraltar approached Humphreys about possible license or partnership
 - No agreement reached
 - Original set of plans “missing” from car after meeting
- Gibraltar built similar structures in another area
 - Coincidence?
 - Substantially similar?

Case Study: Humphreys & Partners Architects v. Gibraltar Properties

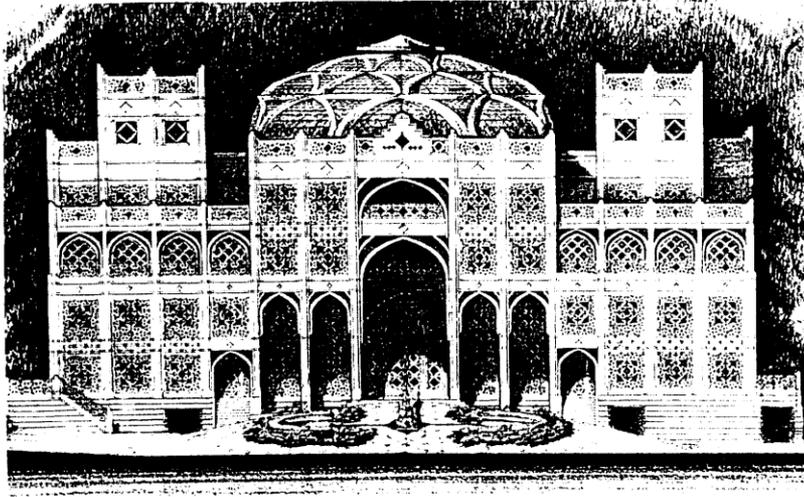
Plaintiff



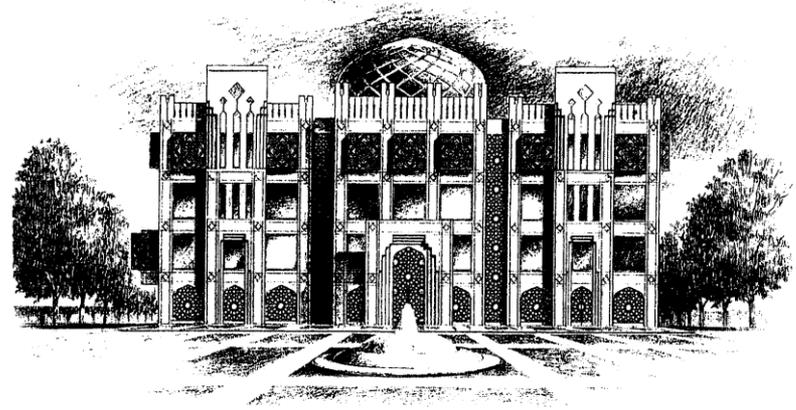
Defendant



Case Study: Sturdza v. United Arab Emirates

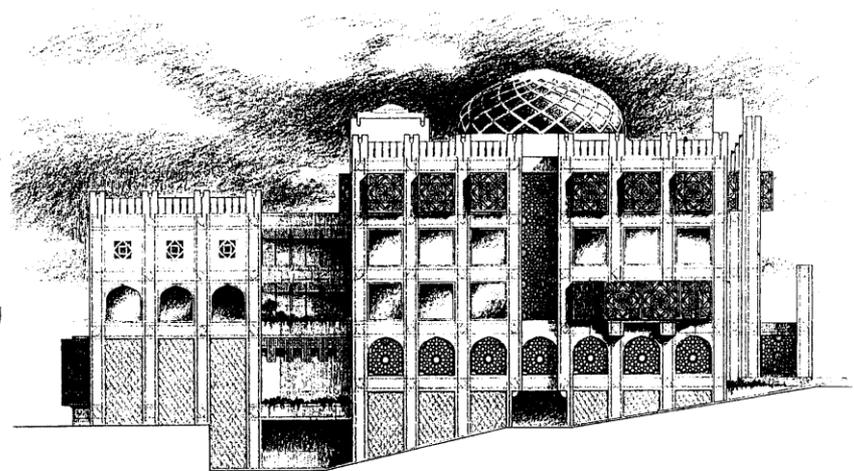


APPENDIX A
ELENA STURDZA



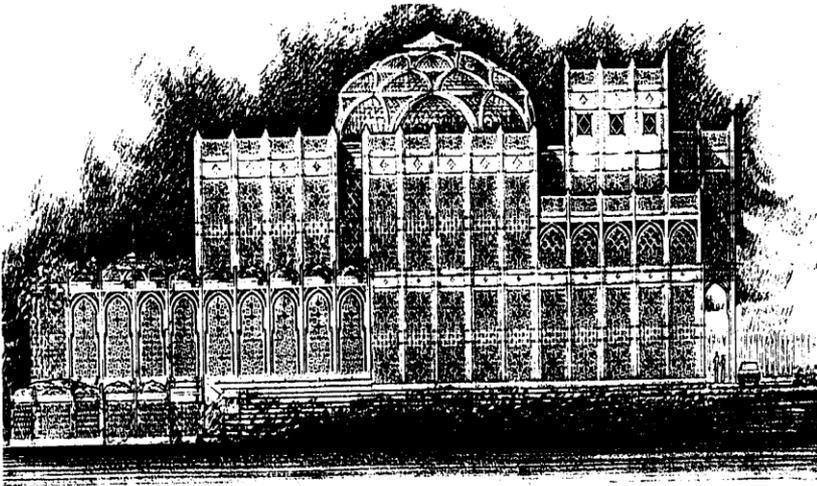
APPENDIX C
ANGELOS DEMETRIOU (1997)

FRONT ELEVATION



APPENDIX D
ANGELOS DEMETRIOU (1997)

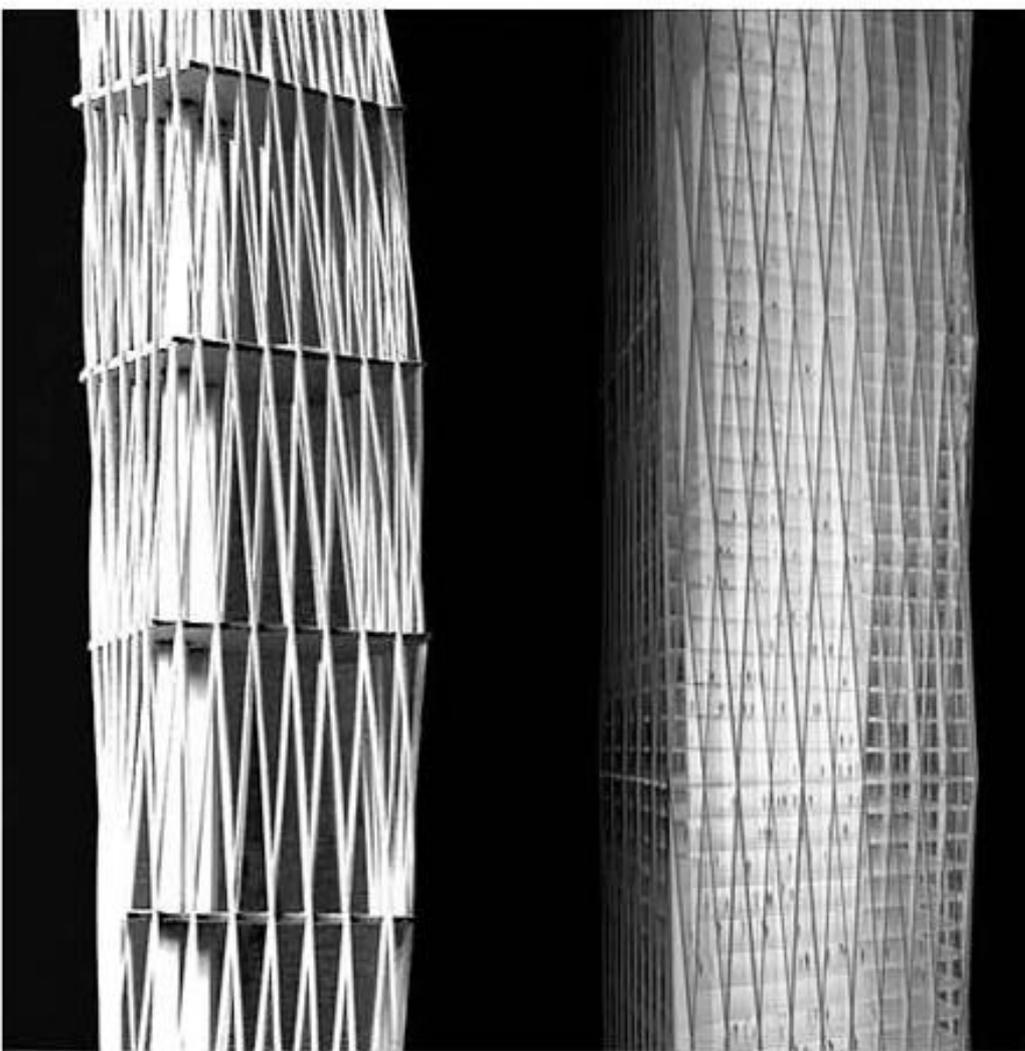
SIDE ELEVATION



SIDE ELEVATION

APPENDIX B
ELENA STURDZA

Case Study: Shine v. Childs



Visual Artists' Rights Act

- Also passed in 1990
- First U.S. copyright law to provide moral rights
 - to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
 - to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

Visual Artists' Rights Act

- Does NOT apply to architectural works, however...
- Applies to certain pictorial, graphic, and sculptural works
- Contains specific provisions addressing visual art incorporated in a building
 - Requires notice to artist of intent to modify or destroy
 - Artist has opportunity to remove or pay for removal
- So CAN be an issue for incorporated works of art (but is not often raised)

Moral Rights in Graffiti?





SUPER KICK
51

Fannin
ONE WAY

Questions?