
No. 15-11912

In the United States Court of Appeals
For The Eleventh Circuit

HOME DESIGN SERVICES, INC.
Petitioner

v.

TURNER HERITAGE HOMES, INC., et al,
Respondents

On Appeal from the U.S. District Court
for the Northern District of Florida
No. 4:08-cv-00355-MCR-CAS

**BRIEF OF *AMICUS CURIAE*, DESIGN BASICS, LLC,
IN SUPPORT OF APPELLANT'S
PETITION FOR REHEARING *EN BANC***

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 29(c)(5), no counsel to a party authored this brief in whole or in part, nor did any party or its counsel contribute any funds directly or indirectly for this brief's preparation, and no person other than the *amicus curiae* and its counsel contributed any funding for the preparation of this brief.

Amicus curiae Design Basics, LLC is a closely held limited liability company. It does not have a parent corporation, nor is any of its stock held by any publically held corporation.

Pursuant to Federal Rule of Appellate Procedure 26.1, 11TH CIR. R. 26.1-1, and 11TH CIR. R. 29-1, on behalf of *amicus curiae* Design Basics, LLC, the undersigned certifies that the following listed attorneys, associations of persons, firms, partnerships or corporations may have an interest in the outcome of this appeal:

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24. Turner Heritage Homes of Destin, LLC, Defendant-Appellee/Respondent
25. Vision Coast Homes, LLC, Defendant-Appellee/Respondent
26. Wakulla Builders, Inc., Defendant-Appellee/Respondent

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**STATEMENT OF COUNSEL REGARDING BASIS
FOR *EN BANC* REVIEW**

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: whether this Court should continue to follow a precedent (*Intervest*) that has eviscerated protection of architectural works copyrights in this Circuit, conflicts with the legislative history of the AWCPA and the law of other circuits that have addressed the scope of architectural works copyrights, conflicts with this country's treaty obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and has been widely criticized by courts and commentators.

/s/ Louis K. Bonham
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Statement of the Issues Meriting *En Banc* Consideration

Whether this Court should revisit its decision in *Intervest Construction, Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (“*Intervest*”), and (1) give architectural works copyrights the scope of protection intended by Congress and applicable to all other categories of copyrightable works, and (2) allow properly-instructed jurors to determine whether infringement of architectural works copyrights has occurred.

Statement of the Identity and Interest of *Amicus Curiae*

Amicus curiae Design Basics, LLC is a building design firm. For over twenty five years, it has been one of the largest distributors of copyrighted residential building plans in the country. Its business is the development, creation, and marketing of “architectural works,” as that term is used in the Architectural Works Copyright Protection Act of 1990 (the “AWCPA”). For many years, amicus has had to deal with the widespread piracy of its architectural works.¹

Amicus has a strong interest in the instant Petition for Rehearing *En Banc* because that petition seeks to have this Court revisit its *Intervest* decision.

¹ See, e.g., the situation recounted by the court in *Design Basics v. ProBuild Company*, No. 10-cv-02274-REB-BNB, Docket 81, p.2.n.1 (D. Col. 2011) (copy attached as Exhibit 1), where there was evidence of widespread piracy of Design Basics’ works by a chain of lumber yards, including admissions by defendant’s employees to undercover investigators that their copying of Design Basics’ works “technically . . . is illegal. But we have done it before” and that they “do it all the time.”

Intervest has effectively eviscerated any meaningful protection of Design Basics' architectural works copyrights in the states of Alabama, Georgia, and Florida because, under that decision, even a willful infringer may escape liability by simply making nominal changes to an illegally-made copy. As detailed below, *Intervest* is contrary to settled principles of copyright law, the legislative history of the AWCPA, and this nation's international treaty obligations, and has been roundly criticized by courts and commentators. As Judge Rosenbaum cogently observed in her concurring opinion in the instant case, *Intervest* was a "wrong turn" that this Court should now correct.

Introduction and Summary

Congress passed the AWCPA in 1990 to comply with this country's treaty obligations under the Berne Convention² to extend copyright protection to "architectural works." See H.R. Rep. No. 101-735, at 4, 10; see also *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 188 n.6 (2d. Cir. 2012) (AWCPA passed to satisfy Berne Convention treaty obligations).

Since that time, architects and building designers have had a strong shield against the misappropriation of their intellectual property in building designs. With architectural works enjoying the same degree of protection as other works

² Berne Convention for the Protection of Literary and Artistic Works (text available online at http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P85_10661).

protected by copyright, and courts applying well-settled legal doctrines of copyright law in architectural copyright cases, there have been dramatic changes in industry attitudes and behavior. What had once been widespread casual attitudes, a dismissive lack of concern, or even acceptance of outright thievery has, in most places, been replaced with more diligence and respect for such intellectual property rights.

Courts in the Eleventh Circuit had been among the leaders in applying the AWCPA to combat the rampant piracy of architectural works.³ That changed dramatically in 2008, when this Court's *Intervest* decision eviscerated any meaningful protection of architectural works copyrights, and for all practical purposes immunized the piracy of such intellectual property in this Circuit.

This Court should accept Judge Rosenbaum's invitation in this case and reconsider *Intervest*. The reasoning of that decision is unsound, and conflicts with clear legislative history (which *Intervest* conveniently did not address). For such reasons, courts throughout the country (including at least three other Circuits) have refused to follow *Intervest*, and its holding is also contrary to that of other Circuits that have addressed the scope of AWCPA protection. Finally, *Intervest* is inconsistent with this country's treaty obligations under the Berne Convention and

³ See, e.g., *Cornerstone Home Builders, Inc. v. McAllister*, 303 F. Supp. 2d 1317 (M.D. Fla. 2004); *Arthur Rutenberg Homes, Inc. v. Maloney*, 891 F. Supp. 1560 (M.D. Fla. 1995).

the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).

Argument

I. *Intervest* is simply wrong.

The fundamental logic of *Intervest* is as follows:

- Architectural works are composed of “individual standard features”;
- Under the AWCPA, “individual standard features” are not themselves protected by copyright;
- Therefore, architectural works are nothing but compilations of unprotected elements,
- Therefore, architectural works are comparable to compilation works;
- Therefore, because compilation works have only “thin” copyrights, all architectural works must also have “thin” copyrights as a matter of law.

This conclusion – that as a matter of law, all architectural works copyrights are necessarily “thin” – was unprecedented, and indeed *Intervest* cited no authority for its novel conclusion that Congress intended that architectural works be given less protection than other categories of protected works.

In fact, *Intervest*’s conclusion is squarely contradicted by the legislative history of the AWCPA:

As a result of the incorporation of the general standard of originality for architectural works, determinations of

infringement of architectural works *are to be made according to the same standard applicable to all other forms of protected subject matter*. The references in the definition of "architectural work" to "overall form," and to the nonprotectibility of "individual standard features" *are not intended to indicate that a higher standard of similarity is required to prove infringement of an architectural work, or that the scope of protection of architectural works is limited to verbatim or near-verbatim copying*.

1990 U.S.C.C.A.N. at 6952 (emphasis added); *see also Zaleski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 104 n.17 (2d Cir. N.Y. 2014) (“When Congress added architectural works to the list of copyrightable subject matter, it made clear that it wanted architectural works analyzed no differently than other works *Intervest* contravenes Congress' intent by treating architectural works differently than other works and failing to determine what in architecture — beyond mere arrangement — is copyrightable”). Tellingly, *Intervest* did not even mention this contrary legislative history.

Moreover, as Judge Rosenbaum observed in her concurrence in this case, the basic logic of *Intervest* is seriously flawed. Under *Intervest*'s reasoning, almost all copyrights must similarly be “thin” as a matter of law. Music is but the selection and arrangement of the 120 notes audible to humans. Because individual notes are not protected, music is therefore “like” a compilation of unprotected elements, and thus must be given the narrowest copyright protection. Literature, poetry, and other textual works are merely the selection and arrangement of uncopyrightable

individual letters, words, and phrases, so under *Intervest*, copyrights in literary works must similarly be treated as compilations, with minor modifications negating infringement and immunizing even willful piracy. Computer code is nothing more than a series of commands taken from preexisting programming languages, so it too must be treated as just a “compilation” of preexisting elements, infringed only by works that demonstrate “near identity.” Such is, of course, not the law, and it elucidates the fundamental flaw in *Intervest*. See *Zalewski*, 754 F.3d at 104.

Courts have long rejected such arguments in copyright cases. *E.g.*, *Knitwaves v. Lollytogs, Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995) (refusing defendant’s argument to subtract individual preexisting elements before conducting a similarity analysis, noting that under such an approach “we might have to decide that there can be no originality in a painting because all colors of paint have been used somewhere in the past”); *Rottlund v. Pinnacle Corp.*, 2004 U.S. Dist. LEXIS 16723, *49 (D. Minn. 2004) (architectural works case; rejecting similar argument, noting “Defendants would have the Court find that nothing protectable remains after filtering the individual elements, the drawings merely being sheets of paper shareable amongst architects and builders to copy at will”).

Moreover, *Intervest* sweeps with an incredibly broad brush. The rule of *Intervest* is categorical: *all* architectural works – not just those a court might

consider “ordinary” – are treated as having “thin” copyrights, based on the unsupported and illogical dicta that architectural works must be treated as compilations. Such a *per se* rule treats even the most exquisite examples of architectural design (e.g., a new work by I.M. Pei or Frank Gehry) as the equivalent of a telephone directory: a compilation protected from verbatim reproduction but not much else. As noted above, this is at odds with the entire thrust of the AWCPA: to extend to architectural works the same degree of protection as enjoyed by other protected categories of works.

II. *Intervest* Has Been Rejected By Other Courts.

A. Cases Rejecting *Intervest*.

To the best of *amicus*' research, since *Intervest* three circuits have been asked to follow it. None have done so.

In *Zalewski*, the Second Circuit explicitly refused to follow *Intervest*, noting that its approach contravened the legislative history of the AWCPA and that its reasoning was flawed. 754 F.3d at 103-05.

The Fourth Circuit has similarly refused to follow *Intervest*. In *Charles W. Ross Builders v. Olsen Fine Home Building*, 496 Fed. Appx. 314 (4th Cir. 2012), the Fourth Circuit reversed a summary judgment that relied on *Intervest*. The Court ruled that because the district court failed to employ the Fourth Circuit's established two-part “extrinsic / intrinsic” test of substantial similarity, the case

had to be reversed for consideration under that test. *Id.* at 319. Further, the Fourth Circuit uses the “ordinary observer” test in determining the “intrinsic” part of the analysis – and that approach differs fundamentally from *Intervest*. *See also Bldg. Graphics, Inc. v. Lennar Corp.*, 708 F.3d 573, 580 n.3 (4th Cir. 2013) (declining to endorse another district court’s reliance on *Intervest*, holding that the standard two-part test for substantial similarity set forth in *Charles W. Ross Builders* and earlier cases governed architectural works cases in that Circuit).

The Fifth Circuit has also declined to follow *Intervest*. In *Hewlett Custom Home Design v. Frontier Custom Builders*, 588 Fed. Appx. 359 (5th Cir. 2014), the defendants sought to reverse a judgment based on a jury’s finding of infringement, arguing that the Court should follow *Intervest* to do so. *Hewlett Custom Home Design v. Frontier Custom Builders*, No. 13-20464 (5th Cir.) (Appellants’ Brief at pp.28-30); *see also id.*, Appellees’s Brief at pp. 30-39 (arguing against following *Intervest*). The court affirmed, rejecting *sub silentio* defendants’ invitation to follow *Intervest*.

District courts across the country have similarly rejected *Intervest*, noting that not only did its logic misunderstand the nature of a “compilation,” it also ignored the legislative history of the AWCPA. For example:

Defendants allege that Plaintiff's house plans are compilations, entitled to only "thin" copyright protection. This is not so, and Defendants are not entitled to summary judgment on this issue.

According to the Copyright Act, "A 'compilation' is a work formed by the collection and assembling of *preexisting* materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitute an original work of authorship." *17 U.S.C. § 101* (emphasis added). In this case, Plaintiff did not start with preformed bedrooms, kitchens, and hallways and then assembled them as one would a jigsaw puzzle. Plaintiff had to first create those elements, and then arrange them. This is not the type of preexisting material or data the Copyright Act describes as a compilation.

The Copyright Act maintains that architectural works, as a whole, are worthy of copyright protection. The legislative history shows that in extending this protection to architectural works, ***Congress did not intent*** [sic] ***to require a heightened level of similarity***. [citing and quoting AWCPA legislative history quoted *supra*]

Design Basics LLC v. DeShano Companies, 2012 U.S. Dist. LEXIS 135387, *32-33 (E.D. Mi. 2012) (emphasis added). That court went on to decline to follow *Intervest*, noting that to grant architectural works only “thin” protection would limit infringement claims to essentially only instances of verbatim copying – which, as detailed above, the legislative history of the AWCPA explicitly disclaimed any intent to do so. *Id.* at *34.

Other district courts have similarly refused to follow *Intervest*. *E.g.*, *Frank Betz Associates v. J.O. Clark Construction*, No. 3:08-cv-159, op. at p.8 n.5 (M.D. Tenn. 2010) (declining to follow *Intervest*, finding that it was not supported by the AWCPA or any Sixth Circuit opinion, and describing it as “somewhat of an outlier even within the Eleventh Circuit”); *Plan Pros v. Zych*, 2009 U.S. Dist. LEXIS 124671, op. at *13-14 n.5 (D. Neb. 2009) (declining to follow *Intervest*).

B. Earlier Circuit Cases Also Conflict With *Intervest*.

Nor are the Second, Fourth, and Fifth Circuits the only circuits that conflict with *Intervest*. Other circuit cases predating *Intervest* are plainly inconsistent with its finding that architectural works copyrights are necessarily “thin” as a matter of law.

In *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1299 (D.C. Cir. 2002), the Court reversed a summary judgment that found that no reasonable jury could find that protectable aspects of the works were substantially similar. In contrast to *Intervest*, the court found that while there were significant differences between the works, there was still a question of fact for the jury as to whether the overall look and feel of the two works was similar. Nor did that court treat architectural works as “compilations” or find that the existence of dissimilarities could preclude a finding of infringement.

Similarly, in *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97 (1st Cir. 2006), the First Circuit reversed a summary judgment that no reasonable jury could find that the architectural works at issue were substantially similar. The court ruled that the “ordinary observer” test applied in that case, and that while “[d]ifferences between the works have some effect on the inquiry. . . . the mere existence of differences is insufficient to end the matter in the defendant's favor.” 459 F.3d 97 at 112. The court did not treat architectural works as “compilations”

nor otherwise find that the copyright in architectural works was “thin,” nor did it treat architectural works differently from other categories of copyrightable works.

In *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726 (8th Cir. 2006), the Eighth Circuit reversed a judgment for defendants and remanded for a new trial, ruling that its two-part “extrinsic / intrinsic” test for substantial similarity applicable in other copyright cases applied in an architectural works case. 452 F.3d 726 at 731. Critical to court’s decision in that case was that the second prong of this test required application of the “ordinary observer” test. *Id.* Because that test focuses on similarities rather than differences, and does from the perspective of the “ordinary observer,” it is antithetical to the *Intervest* approach.

III. *Intervest* Is Inconsistent With This Nation’s International Treaty Obligations.

When this country joined the Berne Convention in 1988, it was obligated by that treaty to extend copyright protection to architectural designs. Specifically, Article 2(1) of the Berne Convention mandates copyright protection for works of architecture and works related to architectural designs.⁴ To comply with this provision, Congress passed the AWCPA, which explicitly extended U.S. copyright protection to “architectural works.” *See* H.R. Rep. No. 101-735, at 4, 10; *see also Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 188 n.6 (2d. Cir. 2012).

⁴ http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P85_10661

Since the AWCPA was passed, this country also became a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). TRIPS was negotiated as part of the Uruguay Round of multilateral trade negotiations that created the World Trade Organization (“WTO”), and obligates member nations to enact and maintain certain protections of intellectual property as a condition of WTO membership. *See generally Golan v. Holder*, 132 S.Ct. 873, 879-81 (2012); WORLD TRADE ORGANIZATION, “Overview: the TRIPS Agreement” (WTO 2016).⁵ Regarding copyrights, TRIPS requires member states to comply with Articles 1 through 21 of the Berne Convention. *See* TRIPS Art. 9.⁶ Because Article 2(1) of the Berne Convention covers works of architecture and related works, TRIPS thus also obligates the United States to protect copyrights in architectural works.

In its rush to declare that architectural works did not deserve the protections afforded other categories of protected works, *Intervest* did not consider or address the obligations created by either the Berne Convention or TRIPS to extend copyright protection to architectural works – just as it did not consider or address the AWCPA legislative history that contradicted its conclusion. This Court should take this opportunity to remedy that failing by rehearing this case *en banc*.

⁵ https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

⁶ https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1

Conclusion

Put simply, *Intervest* was a mistake. It is inconsistent with basic principles of copyright law, the legislative history of the AWCPA, and this nation's international treaty obligations. This Court should heed the criticism that decision has received. *Amicus* respectfully urges this Court to grant the petition for rehearing en banc and revisit *Intervest*.

Respectfully submitted,

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Certificate of Compliance

The undersigned certifies that this brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B)(ii) and 11TH CIR. R. 35-6 because the brief, exclusive of the Cover Page, Certificate of Interested Parties and Corporate Disclosure Statement, Statement of Counsel, Table of Contents, Table of Authorities, and the Certificate of Service, does not exceed 15 pages, and is printed in 14 point Times New Roman proportionally spaced typeface.

/s/ Louis K. Bonham
Louis K. Bonham

Certificate of Service

This is to certify that Louis K. Bonham, counsel for Amicus Curiae, did cause copies of the Brief of Amici Curiae to be served on counsel of record through the Court's ECF system and by regular U.S. mail on July __, 2016.

Louis K. Bonham