

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: February 23, 2012 Decided: August 15, 2012)

Docket No. 11-3298

Scholz Design, Inc.,

Plaintiff-Appellant,

- v -

Sard Custom Homes, LLC, Prudential Connecticut Realty,* &
Coldwell Banker Residential Real Estate, LLC,

Defendants-Appellees.

Before: LEVAL, SACK, and HALL, Circuit Judges.

Appeal from a judgment of the United States District
Court for the District of Connecticut (Janet Bond Arterton,
Judge) granting defendants' motion to dismiss. We conclude that
the district court erred in deciding that because the
architectural drawings at issue did not contain a level of detail

* By letter dated October 25, 2011, counsel for Prudential filed a letter with the Clerk of Court informing the Court that "the issues being pursued in the appeal do not involve matters that were litigated by Prudential before the District Court." Letter dated October 25, 2011, from Patrick M. Fahey, Esq. to Office of the Clerk, at 1. Prudential has thereafter not participated in this appeal, although it remains technically a party to it listed as a defendant-appellee in the caption.

1 sufficient to enable construction of homes based on them, they
2 were not protected by the Copyright Act. We also conclude that
3 the drawings are sufficiently original to receive protection as
4 "pictorial, graphic, [or] sculptural works," 17 U.S.C.

5 § 102(a)(5), under the Copyright Act, and we reverse the judgment
6 of the district court insofar as it held otherwise. Because the
7 court dismissed the plaintiff's claims for breach of contract and
8 violations of the Digital Millennium Copyright Act based on its
9 conclusion that the drawings were not protected by copyright, we
10 vacate its dismissal of those claims and to that extent remand
11 the case to the district court.

12 Reversed in part; vacated and remanded in part.

13 Appearances:

14 LOUIS K. BONHAM, Osha Liang, LLP,
15 Austin, TX (Holly M. Polglase, Hermes,
16 Netburn, O'Connor & Spearing, P.C.,
17 Boston, MA, on the brief) for Plaintiff-
Appellant.

18 JOHN J. ROBACYNISKI, Alan J. Rome, Rome,
19 Clifford, Katz & Koerner, LLP, Hartford,
20 CT, for Defendant-Appellee Sard Custom
21 Homes, LLC.

22 THOMAS J. FINN, Paula Cruz Cedillo,
23 McCarter & English LLP, Hartford, CT,
24 for Defendant-Appellee Coldwell Banker
25 Residential Real Estate, LLC.

1 SACK, Circuit Judge:

2 **BACKGROUND**

3 The plaintiff-appellant, Scholz Design, Inc.
4 ("Scholz"), alleges that three front-elevation¹ architectural
5 drawings of homes it designed in the late 1980s were copied and
6 posted on various websites by the defendants in violation of
7 Scholz's copyrights. The plaintiff also makes related claims for
8 breach of contract and violations of the Digital Millennium
9 Copyright Act, 17 U.S.C. § 1201, et seq.

10 Scholz created technical drawings, or blueprints, for
11 three homes -- which it called the "Springvalley A,"
12 "Wethersfield B," and "Breckinridge A" -- and submitted them to
13 the Copyright Office in 1988 and 1989 together with the front
14 elevation drawings that are the subject of this suit, each
15 showing the appearance of the front of the houses surrounded by
16 lawn, bushes, and trees. See Scholz Design, Inc. v. Sard Custom
17 Homes, LLC, No. 11-3298, Joint Appendix ("J.A.") at 73, 76, 87
18 (2d Cir. Oct. 11, 2011).² Scholz was granted registration of
19 copyrights based on all these submissions.

¹ An "elevation" is a "scale drawing of the side, front, or rear of a structure." Am. Heritage Dictionary 580 (4th ed. 2006).

² These images and the allegedly infringing uses at issue may be viewed at <http://www.ca2.uscourts.gov/scholzdesign.htm>.

1 In February 1992, Scholz and Sard Custom Homes ("Sard")
2 entered into an agreement (the "Builder Agreement I") permitting
3 Sard to construct homes using Scholz's home plans, including
4 these three designs. See Builder Agreement I at 1-2, J.A. 97-98.
5 The three-year contract required Sard to pay Scholz \$1 per square
6 foot of each home constructed using its plans, up to a maximum of
7 \$50,000 a year. Id. at §§ 5,9,10. Scholz and Sard renewed the
8 contract for another three-year term in 1995 (the "Builder
9 Agreement II"). Builder Agreement II at 1-2, J.A. 100-101. Both
10 agreements required that Sard not "copy or duplicate any of the
11 [Scholz] materials nor . . . [use them] in any manner to
12 advertise or build a [Scholz Design] or derivative except under
13 the terms and conditions of the agreement." Builder Agreement I
14 at 1; Builder Agreement II at 1.

15 Scholz alleges that, after the termination of Scholz's
16 agreement with Sard and in a manner not permitted by the
17 agreement, Sard and co-defendant Prudential Connecticut Realty
18 ("Prudential") posted copies of Scholz's copyrighted drawings of
19 the Springvalley and Wethersfield homes on two different websites
20 to advertise Sard's "ability" to build the homes. Am. Compl.
21 ¶ 15. Scholz also alleges that Sard and co-defendant Coldwell
22 Banker Residential Real Estate, Inc. ("Coldwell Banker") copied
23 Scholz's copyrighted image of the Breckinridge design on Coldwell
24 Banker's website for the same unpermitted purpose. Scholz

1 further alleges that Sard, Prudential, and Coldwell Banker "may
2 have used, reproduced, displayed, distributed, marketed or
3 advertised" those designs through other means in addition to the
4 websites identified. Am. Compl. ¶¶ 18,33.

5 In October 2010, Scholz brought suit against the three
6 defendants in the United States District Court for the District
7 of Connecticut. The February 1, 2011, amended complaint alleges
8 two counts of copyright infringement, two violations of the
9 Lanham Act, 15 U.S.C. § 1051 et seq., breach of contract, and
10 violations of the Digital Millennium Copyright Act ("DMCA"), 17
11 U.S.C. § 1201 et seq. Am. Compl. ¶¶ 9-72.

12 The defendants moved to dismiss the complaint, arguing
13 inter alia that the pictures "could not have been copyrighted as
14 architectural works because, the copyrights having been granted
15 in 1988 and 1989, they predate the [Architectural Works Copyright
16 Protection Act ("AWCPA"), Pub. L. No. 101-650, tit. VII (1990)]
17 and that the conceptual nature of these depictions means that
18 they are not protected by Scholz's copyright because they contain
19 insufficient detail from which a building could be constructed."
20 Scholz Design, Inc. v. Sard Custom Homes, LLC, No. 10-cv-1681,
21 2011 WL 2899093, at *2, 2011 U.S. Dist. LEXIS 76663, at *6 (D.
22 Conn. July 15, 2011). The district court (Janet Bond Arterton,
23 Judge) agreed. The court, in its "Ruling on Motions to Dismiss,"
24 reasoned that "copyright protection extends to the component

1 images of architectural designs to the extent that those images
2 allow a copier to construct the protected design," and therefore
3 "the copied images do not fulfill the intrinsic function of an
4 architectural plan and thus the act of copying them does not
5 violate any right protected by a copyright for architectural
6 technical drawings." Id. at *3, 2011 U.S. Dist. LEXIS 76663, at
7 *9.

8 Because it concluded that the plaintiff's amended
9 complaint did not state a claim for copyright infringement, the
10 district court also granted defendants' motion to dismiss claims
11 alleging violations of the DMCA and breach of contract, which, in
12 the district court's view, required that the plaintiff have a
13 valid copyright infringement claim.³ Id. at *4, 2011 U.S. Dist.
14 LEXIS 76663, at *14.

15 The plaintiff appeals.

³ The district court also dismissed two claims brought under the Lanham Act. See Scholz Design, 2011 WL 2899093, at *3-*4, 2011 U.S. Dist. LEXIS 76663, at *6-*8. The plaintiff does not appeal the dismissal of those claims, which were brought against all defendants. This accounts for Prudential's withdrawal from these proceedings -- Prudential had only filed a motion to dismiss in the district court with regard to the Lanham Act claims, and did not ask for dismissal of the copyright infringement, breach of contract, or DMCA claims against it. See note *, supra.

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I. Standard of Review

We review a district court's grant of a motion to dismiss de novo, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. Flagler v. Trainor, 663 F.3d 543, 546 n.2 (2d Cir. 2011); Fed. R. Civ. P. 12(b)(6).

II. Copyright Infringement

In order to demonstrate copyright infringement, a plaintiff must show ownership of a valid copyright and copying of the protectable elements of the copyrighted work.⁴ See Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d 98, 109 (2d Cir. 2002). A certificate of copyright registration is prima facie evidence of ownership of a valid copyright, but the alleged infringer may rebut that presumption. MyWebGrocer, LLC v. Hometown Info, Inc., 375 F.3d 190, 192 (2d Cir. 2004) (citing 17 U.S.C. § 410(c)). To qualify for copyright protection, a work must be original -- that is, it must be independently created by

⁴ This appeal and the district court's decision focus on whether the drawings at issue are properly subject to copyright protection, rather than whether they have been copied. Indeed, during the oral argument on the motion to dismiss before the district court, the court assumed that the defendants "just cut and pasted [the drawings] on to the[] website[s] for purposes of this motion." Transcript of Oral Argument on Mot. to Dismiss, Scholz Design, Inc. v. Sard Custom Homes LLC, No. 10-cv-1681, at 21 (D. Conn. Sept. 12, 2011), ECF No. 78.

1 the author and possess "at least some minimal degree of
2 creativity." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499
3 U.S. 340, 345 (1991). The work need not be "particularly novel
4 or unusual." Mattel, Inc. v. Goldberger Doll Mfg. Co., 365 F.3d
5 133, 135 (2d Cir. 2004). "[T]he requisite level of creativity is
6 extremely low; even a slight amount will suffice. The vast
7 majority of works make the grade quite easily, as they possess
8 some creative spark, no matter how crude, humble or obvious it
9 might be." Feist, 499 U.S. at 345 (citation and internal
10 quotation marks omitted).

11 The defendants' principal argument, with which the
12 district court agreed, was that the allegedly infringed drawings
13 were not entitled to copyright protection because they lacked
14 sufficient detail to allow for construction of the homes
15 depicted. We disagree. Copyright protection of a pictorial
16 work, whether depicting a house, or a flower, or a donkey, or an
17 abstract design, does not depend on any degree of detail. The
18 rights Scholz claims in this suit derive from the general
19 copyright law and not from the AWCPA, which has no relevance to
20 the suit.

21 A. Copyright for Pictorial Works

22 Scholz's copyright allegations are straightforward: It
23 created three separate original drawings (depicting homes),
24 registered them with the Copyright Office, and the defendants

1 without authorization made exact copies of those drawings on
2 their websites. Nothing more is required for a copyright claim.

3 The district court apparently was of the view that,
4 because the drawings were architectural, something more was
5 required for their copyright protection. It is black-letter law,
6 however, that courts accept as protected "any work which by the
7 most generous standard may arguably be said to evince
8 creativity." 1-2 Melville B. Nimmer & David Nimmer, Nimmer on
9 Copyright § 2.08 (2012). Justice Holmes explained more than a
10 century ago that "[i]t would be a dangerous undertaking for
11 persons trained only to the law to constitute themselves the
12 final judges of the worth of pictorial illustrations." Bleistein
13 v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). As
14 noted above, the only requirement for copyrightability of a work
15 is that it "possesses at least some minimal degree of creativity
16 . . . no matter how crude, humble or obvious it might be."
17 Feist, 499 U.S. at 345.

18 While we have not had occasion to consider a case
19 presenting precisely the same issue as does this one,⁵ we have

⁵ Most cases examining alleged infringement deal with thornier issues than whether a work is sufficiently creative to be protected by copyright, such as whether an "inexact copy" is substantially similar enough to constitute infringement, see Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2d Cir. 2003) ("[T]he defendant may infringe on the plaintiff's work not only through literal copying of a portion of it, but also by parroting properties that are apparent

1 said in affirming summary judgment for the defendants based on
2 alleged copying of certain conceptual elements of an
3 architectural sketch that, although the copying of "ideas" at
4 issue there did not constitute infringement, "we do not mean to
5 suggest that, in the domain of copyrighted architectural
6 depictions, only final construction drawings can contain
7 protected expression." Attia v. Soc. of N.Y. Hosp., 201 F.3d 50,
8 57 (2d Cir. 1999).

9 We see no reason why Scholz's drawings depicting the
10 appearance of houses it had designed should be treated
11 differently from any other pictorial work for copyright purposes.
12 Andrew Wyeth and Edward Hopper were famous for their paintings of
13 houses, and Claude Monet for paintings of the Houses of
14 Parliament and of Rouen Cathedral. None of these depictions of
15 buildings were sufficiently detailed to guide construction of the
16 buildings depicted, but that would surely not justify denying

only when numerous aesthetic decisions embodied in the plaintiff's work of art . . . are considered in relation to one another."), or whether elements of an allegedly infringed work that have been appropriated are facts or ideas not amenable to copyright, see Sparaco v. Lawler, Matusky, Skelly Engineers LLP, 303 F.3d 460, 467 (2d Cir. 2002) ("To the extent that the site plan sets forth the existing physical characteristics of the site . . . it sets forth facts; copyright does not bar the copying of such facts."); Attia v. Soc. of N.Y. Hosp., 201 F.3d 50, 56 (2d Cir. 1999) ("We may assume with Plaintiff that the ideas taken, or at least some of them, are powerful, dynamic ideas of immense value Under the law of copyright, however, the power of an idea does not improve the creator's right to prevent copying."). Those issues are not presented by this appeal.

1 them copyright protection. If an exact copy of Scholz's drawings
2 was made by the defendant, as alleged, and as appears to be the
3 case based on the evidence submitted with the complaint, that
4 would appear to constitute infringement.

5 B. Copyright Registration

6 The defendants argue that Scholz's pictorial
7 representations of the houses are not entitled to copyright
8 protection because its certificates of registration referred to
9 "architectural technical drawings" as the "nature of authorship,"
10 and in the "nature of work" sections referred to "blueprints."
11 See, e.g., Certificate of Copyright at 1, J.A. 42. This was
12 significant, according to the defendants, because regulations
13 promulgated under the AWCPA, governing the copyright extended to
14 buildings based on copyrighted architectural plans, provide that
15 "[w]here dual copyright claims exist in technical drawings and
16 the architectural work depicted in the drawings, any claims with
17 respect to the technical drawings and architectural work must be
18 registered separately." 37 C.F.R. § 202.11(c)(4).

19 Scholz's registration of the subject drawings under
20 section 102(a)(5) occurred prior to passage of the AWCPA. Scholz
21 accordingly was not seeking, and did not receive, registration
22 under that later expansion of the copyright law. Its
23 registration of its drawings did not become invalid as the result

1 of the subsequent passage of the AWCPA. That later expansion of
2 the copyright law is not involved in this suit.

3 C. The Architectural Works Copyright Protection Act

4 We think that the district court's ruling likely
5 stemmed from a misunderstanding regarding the relationship both
6 before and after enactment of the AWCPA between the scope of
7 protection for pictorial works such as these drawings under the
8 Copyright Act, and that afforded architectural works under the
9 Copyright Act.

10 While we think this to be a straightforward case of
11 infringement, the district court did not. The defendants
12 contended, and the district court agreed, that because the
13 drawings at issue were "architectural drawings," something more
14 was required of them for copyright protection than would be
15 required for any other "pictorial, graphic, or sculptural work"
16 under section 102(a)(5). Indeed, architectural works are
17 currently afforded special status under the law. That special
18 status is, however, irrelevant for purposes of this case because
19 Scholz is not alleging infringement under the AWCPA, but under
20 the pre-existing protection of the Copyright Act for pictorial
21 works. The fact that Scholz's drawings might or might not be
22 protected under the AWCPA, depending on various factors, does not
23 deprive them of the protection they have as pictorial works
24 regardless of those factors.

1 Prior to the enactment of the AWCPA, while
2 architectural structures themselves did not receive copyright
3 protection, architectural plans, blueprints, and technical
4 drawings, as well as original, creative sketches of the type at
5 issue here, were indeed covered under the Copyright Act's
6 protection of "pictorial, graphic, and sculptural works." 17
7 U.S.C. § 102(a)(5).⁶

8 Scholz contends that the drawings are protected under
9 section 102(a)(5), and not under section 102(8), which, as part
10 of the AWCPA, added protection for "architectural works."⁷
11 According to Scholz, the AWCPA is therefore inapplicable. We
12 agree. The AWCPA did not affect the copyright protection that
13 section 102(a)(5) has long extended to architectural plans,
14 drawings, and blueprints.

15 Historically, copyright law provided limited
16 protection to works of architecture.

⁶ In or about 1990 the United States became a signatory to the Berne Convention, which required copyright protection for constructed buildings. The AWCPA fulfilled this obligation. See Leceister v. Warner Bros., 232 F.3d 1212, 1226 (9th Cir. 2000) (Fisher, J., dissenting) ("The sole purpose of legislating at this time is to place the United States unequivocally in compliance with its Berne Convention obligations." (quoting H.R. Rep. No. 101-735, at 20)).

⁷ As the defendants acknowledge, because the Breckinridge drawings and plans were published two years prior to the passage of the AWCPA, the home itself would not have even been subject to protection as an architectural work. 37 C.F.R. § 202.11(d)(3)(i). The record does not reflect whether the other homes were ever registered under section 102(8).

1 Architectural plans, while not explicitly
2 mentioned in the Copyright Act of 1976, were
3 covered under a provision affording
4 protection to "pictorial, graphic, and
5 sculptural works." But architectural
6 structures themselves were afforded virtually
7 no protection.

8 . . .

9 [After the AWCPA,] the holder of a copyright
10 in an architectural plan . . . has two forms
11 of protection, one under the provision for an
12 "architectural work" under 17 U.S.C. §
13 102(a)(8), and another under the provision
14 for a "pictorial, graphical, or sculptural
15 work" under 17 U.S.C. § 102(a)(5).

16 T-Peg, Inc. v. VT. Timber Works, Inc., 459 F.3d 97, 109-10 (1st
17 Cir. 2006) (citations omitted); see also Oravec v. Sunny Isles
18 Luxury Ventures, L.C., 527 F.3d 1218, 1228 n.8 (11th Cir. 2008)
19 ("[T]he scope of copyright protection for architectural plans
20 registered under § 102(a)(5) was unaffected by the AWCPA."); H.R.
21 Rep. No. 101-735 (1990), reprinted in 1990 U.S.C.C.A.N. 6935,
22 6950-51. ("Protection for architectural plans, drawings, and
23 models as pictorial, graphic, or sculptural works under section
24 102(a)(5) . . . is unaffected by this bill. . . . The bill's
25 intention is to keep [the copyright in the architectural work and
26 the copyright in plans and drawings] separate. An individual
27 creating an architectural work by depicting that work in plans or
28 drawing will have two separate copyrights, one in the
29 architectural work (section 102(a)(8)), the other in the plans or
30 drawings (section 102(a)(5)).").

1 Thus, prior to passage of the AWCPA courts had held
2 that use of copyrighted architectural plans to construct a
3 building would not constitute infringement, but then as now,
4 copying those plans would. See Nat'l Med. Care, Inc. v.
5 Espiritu, 284 F. Supp. 2d 424, 435 (S.D. W.Va. 2003) (explaining
6 that prior to the passage of the AWCPA "most courts agree[d] that
7 copying a structure depicted in plans, without copying the plans
8 themselves, [was] not copyright infringement," but that "an
9 unauthorized copy of an architectural plan infringes on a
10 technical drawing copyright"); see also Imperial Homes Corp. v.
11 Lamont, 458 F.2d 895, 899 (5th Cir. 1972) (copyrighted
12 architectural plans do not confer exclusive right to reproduce
13 the depicted building); Nat'l Med. Care, 284 F. Supp. 2d at 435
14 ("[A]n as-built structure or feature cannot be an infringing copy
15 of a technical drawing."). The district court summarized this
16 case law correctly when it explained that "[t]he rule which
17 emerges from [the pre-AWCPA] cases is that one may construct a
18 house which is identical to a house depicted in copyrighted
19 architectural plans, but one may not directly copy those plans
20 and then use the infringing copy to construct the house." Scholz
21 Design, 2011 WL 2899093, at *2, 2011 U.S. Dist. LEXIS 76663, at
22 *8 (internal quotation marks and emphasis omitted). As a
23 commentator recently explained:

1 Even though our copyright statutes were
2 silent about architecture until 1990, it was
3 well established that plans, blueprints and
4 models were copyrightable writings under the
5 1909 Act's category of "drawings or plastic
6 works of a scientific or technical
7 character," and then as "pictorial, graphic,
8 and sculptural works" under the 1976 Act.
9 The scope of an architect's copyright
10 protection was, however, quite limited. The
11 unauthorized copying of plans or blueprints
12 constituted infringement, but most
13 authorities concluded that plans were not
14 infringed by using them, without the
15 architect's permission, to construct the
16 building they depicted. Moreover, the
17 prevailing view was that an architect's
18 rights did not extend to the actual building
19 derived from his or her plans. A building,
20 as a useful article, could be protected by
21 copyright only to the extent it had artistic
22 features that could be identified separately
23 from, and were capable of existing
24 independently of, the structure's utilitarian
25 aspects.

26 David E. Shipley, The Architectural Works Copyright Protection
27 Act at Twenty: Has Full Protection Made a Difference? 18 J.

28 Intell. Prop. L. 1, 3 (2010) (footnotes omitted); see also Daniel
29 Su, Note, Substantial Similarity and Architectural Works:
30 Filtering Out "Total Concept and Feel," 101 Nw. U. L. Rev. 1851,
31 1861, 1863 (2007) ("[A]rchitectural plans and drawings were
32 protected under the Copyright Act of 1976. They fit comfortably
33 within the definition of 'pictorial, graphic and sculptural
34 works' However, copyrighted plans did not give the
35 authoring architect the exclusive right to build the structure

1 depicted within the plans. . . . [T]he AWCPA extend[ed]
2 copyright protection to physical buildings.").

3 D. The District Court Opinion

4 Sketches or drawings such as those allegedly infringed
5 here, therefore, did receive protection before enactment of the
6 AWCPA, although the architectural works they depicted did not.
7 The district court seems to have misunderstood the import and
8 relevance of this distinction in concluding that under section
9 102(a)(5), architectural sketches or drawings are required to
10 include a certain level of detail to receive protection. Where
11 the complaint alleges unlawful copying of a pictorial work
12 registered under section 102(a)(5), there is no requirement of
13 any level of detail.

14 The district court relied principally on three other
15 cases in determining that the drawings at issue were not
16 copyrightable. See Scholz, 2011 WL 2899093, at *3, 2011 U.S.
17 Dist. LEXIS 76663, at *9 ("Under Attia, as well as Jones, and
18 Lamont, copyright protection extends to the component images of
19 architectural designs to the extent that those images allow a
20 copier to construct the protected design." (citations omitted)).
21 First, the court looked to Attia, which examined whether the
22 defendants had infringed the plaintiff's drawings of a proposed
23 expansion of New York Hospital. 201 F.3d at 57. The plaintiff
24 had submitted a plan for the hospital's modernization. He

1 prepared a series of preliminary drawings and sketches
2 illustrating his plan, which would have expanded the hospital
3 through a new building constructed in the airspace over the FDR
4 Drive in New York City. Id. at 52. The plaintiff and his firm
5 were not selected to be the architects for the plan. Eli Attia
6 later saw a New York Times article discussing a similar design.
7 He brought a copyright infringement suit against the architect
8 who had created that plan alleging infringement of his drawings.
9 Id. The district court granted summary judgment to the
10 defendants after concluding that their design and plaintiff's
11 design could not be considered "substantially similar" as a
12 matter of law. 201 F.3d at 53.

13 For purposes of that appeal, we assumed that the
14 similarities between the plaintiff's and defendants' drawings
15 were indeed attributable to copying.

16 The problem underlying Plaintiff's claim of
17 copyright infringement, however, is that not
18 all copying from copyrighted material is
19 necessarily an infringement of copyright.
20 There are elements of a copyrighted work that
21 are not protected even against intentional
22 copying. It is a fundamental principle of
23 our copyright doctrine that ideas, concepts,
24 and processes are not protected from copying.
25 . . . A copyright thus protects not the
26 author's ideas, but only her expression of
27 them.

28 Id. at 53-54.

1 "The problem of distinguishing an idea from its
2 expression is particularly acute when the work of 'authorship' is
3 of a functional nature, as is a plan for the accomplishment of an
4 architectural or engineering project." Id. at 55. For example,
5 "generalized notions of where to place functional elements, how
6 to route the flow of traffic, and what methods of construction
7 and principles of engineering to rely on" are ideas, and can be
8 appropriated by others without infringing on a copyright. Id.
9 We determined that the alleged similarities of the allegedly
10 protected work to the allegedly infringing work, were "concepts
11 and ideas," and "barely a first step toward the realization of a
12 plan." Id. at 55-56. While many of the ideas and placements
13 were similar, overall, "Defendants' design has very little in
14 common with Plaintiff's." Id. at 57.

15 The district court in the case before us concluded that
16 the Attia court's reference to preliminary concepts and ideas
17 meant that non-detailed drawings could not be subject to
18 copyright protection. But Attia never alleged that his sketches
19 themselves were unlawfully copied. Instead he contended that
20 certain elements of his sketches were incorporated into the
21 allegedly infringing plans, such as placement of the hospital
22 expansion above the FDR Drive. We in no way suggested that the
23 plaintiff's drawings in Attia did not enjoy copyright protection.
24 Our ruling was merely that, assuming the defendant copied

1 something from the plaintiff's drawings, what was copied was only
2 unprotected ideas, and not the plaintiff's protected expression
3 of those ideas. That ruling simply does not support the district
4 court's analysis here.

5 The plaintiff here does not allege, as did Attia, that
6 some "concept" or "idea" reflected in his sketches was
7 appropriated -- he alleges that the entire sketch was copied.
8 Attia therefore has little relevance to the case before us. It
9 does not suggest that in the domain of architectural drawings
10 protection cannot be afforded to preliminary or conceptual
11 renderings.

12 The district court also relied on Robert R. Jones
13 Assocs. v. Nino Homes, 858 F.2d 274, 280 (6th Cir. 1988), which
14 examined under pre-AWCPA law the alleged infringement of
15 architectural plans effected by copying those plans and then
16 constructing a building based on them. "The rule which emerges
17 . . . is that one may construct a house which is identical to a
18 house depicted in copyrighted architectural plans, but one may
19 not directly copy those plans and then use the infringing copy to
20 construct the house." Id. at 280.

21 The circuit court ruled: "[O]ne may construct a house
22 which is identical to a house depicted in copyrighted
23 architectural plans, but one may not directly copy those plans
24 and then use the infringing copy to construct the house." Id.

1 The district court in the case before us appears to
2 have understood Robert R. Jones to stand for the proposition that
3 there is an infringement only when a plan is (1) copied and (2)
4 used to construct a home. We disagree.

5 Robert R. Jones does not stand for the proposition that
6 no infringement can occur without construction. The last ten
7 words of the sentence quoted above (about using the infringing
8 copies to construct) were surplusage. What the court seems to
9 have meant was that, while the construction of the home based on
10 copyrighted plans is not an infringement (under the pre-AWCPA
11 law), the copying of the plans is an infringement. The copying
12 of the drawings constituted infringement regardless of whether
13 one goes on to construct the house.

14 Finally, in Lamont, upon which the district court also
15 relied, the court concluded that the copying of the floorplan of
16 a home from copyrighted drawings in a promotional brochure would
17 be an infringement.

18 [N]o copyrighted architectural plans . . .
19 may clothe their author with the exclusive
20 right to reproduce the dwelling pictured.
21 However, nothing . . . prevents such a
22 copyright from vesting the law's grant of an
23 exclusive right to make copies of the
24 copyrighted plans so as to instruct a would-
25 be builder on how to proceed to construct the
26 dwelling pictured.

27 458 F.2d at 898-99. In remanding the case to the district court,
28 the court of appeals explained that "[t]he exclusive right to

1 copy what is copyrighted belongs to the architect, even though
2 the plans give him no unique claim on any feature of the
3 structure they detail. If it is determined . . . that the
4 [defendants] copied the floor plan set forth in the promotional
5 booklet distributed by [the plaintiff], then this copying would
6 constitute an infringement of [the plaintiff's] copyright
7 privileges." Id. at 899 (emphasis in original).

8 The district court in the case before us inferred that
9 infringement could only occur if the plans were sufficiently
10 detailed to allow for construction, perhaps because in Lamont the
11 "floor plan" was allegedly detailed enough to do so. That court,
12 however, like the court in Robert S. Jones, did not indicate that
13 a less-detailed plan or drawing would not be entitled to
14 copyright protection.

15 In sum, the district court concluded that architectural
16 drawings were required to contain sufficient detail to allow for
17 construction in order to receive Copyright Act protection. There
18 is no such requirement, however, when the claim of copyright is
19 for a "pictorial, graphic, or sculptural work[]" under section
20 102(a)(5). All that is required is independent creation and
21 originality. See John Wieland Homes & Neighborhoods, Inc. v.
22 Poovey, No. 3:03CV168-H, 2004 WL 2108675, at *5, 2004 U.S. Dist.
23 LEXIS 21730, at *14 (W.D.N.C. Aug. 2, 2004) (stating that
24 "copyright protection extends to simplified floor plans, that is,

1 promotional cut sheets, of copyrighted architectural plans," and
2 therefore concluding that the defendant was liable when a
3 draftsman he hired essentially copied the cut-sheet in preparing
4 plans for a home); see also Donald Frederick Evans and Assocs. v.
5 Cont'l Homes, Inc., 785 F.2d 897, 904-05 (11th Cir. 1986)
6 ("[C]onstruction of a substantially identical residential
7 dwelling is not prohibited by the existence of a copyright in the
8 architectural drawings for the original dwelling, but . . . if
9 the builders of the substantially identical structure copied the
10 floor plan set forth in a promotional booklet distributed by the
11 builder of the original, then this copying would constitute
12 infringement of the original builder's copyright privileges."
13 (citation and footnote omitted)); Lamont, 458 F.2d at 899 ("If it
14 is determined upon remand that the [defendants] copied the floor
15 plan set forth in the promotional booklet distributed by [the
16 plaintiffs], then this copying would constitute an infringement
17 of [the plaintiff's] copyright privileges."); Arthur Rutenburg
18 Corp. v. Parrino, 664 F. Supp. 479, 481 (M.D. Fla. 1987) (ruling
19 that the copying of a floor plan constituted copyright
20 infringement).

21 Although we have not directly addressed the question
22 with which the district court grappled here, we have twice
23 explained that architectural technical drawings might be subject
24 to copyright protection even if they are not sufficiently

1 detailed to allow for construction. See Attia, 201 F.3d at 57
2 ("[W]e do not mean to suggest that, in the domain of copyrighted
3 architectural depictions, only final construction drawings can
4 contain protected expression."); Sparaco, 303 F.3d at 469 ("We do
5 not mean to imply that technical drawings cannot achieve
6 protected status unless they are sufficiently complete and
7 detailed to support actual construction.").

8 We see this, then, as a straightforward case of
9 copyright infringement. The plaintiff created original drawings
10 which were properly registered with the copyright office. The
11 defendants allegedly used exact copies of those drawings without
12 permission. Nothing more is required in order to state a claim
13 for copyright infringement. The district court's grant of a
14 motion to dismiss these claims is therefore reversed.

15 **III. Fair Use**

16 The defendants contend that even if Scholz had a valid
17 copyright in the drawings, the defendants are not liable for
18 infringement because their usage of the images constituted fair
19 use. "[T]he fair use of a copyrighted work . . . for purposes
20 such as criticism, comment, news reporting, teaching (including
21 multiple copies for classroom use), scholarship, or research, is
22 not an infringement of copyright." 17 U.S.C. § 107. Four
23 factors must be considered in deciding whether a particular use
24 is "fair": "(1) the purpose and character of the use, including

1 whether such use is of a commercial nature or is for nonprofit
2 educational purposes; (2) the nature of the copyrighted work; (3)
3 the amount and substantiality of the portion used in relation to
4 the copyrighted work as a whole; and (4) the effect of the use
5 upon the potential market for or value of the copyrighted work."
6 17 U.S.C. § 107.

7 The district court declined to address this argument,
8 having concluded that in any event Scholz had not stated a valid
9 copyright infringement claim. Scholz Design, 2011 WL 2899093, at
10 *3 n.2, 2011 U.S. Dist. LEXIS 76663, at *10 n.2. "It is our
11 settled practice to allow the district court to address arguments
12 in the first instance." Fulton v. Goord, 591 F.3d 37, 45 (2d
13 Cir. 2009) (internal quotation marks omitted). On remand, the
14 defendants may choose to raise this defense again. We intimate
15 no views as to the proper outcome of such an inquiry.

16 **IV. DMCA and Breach of Contract Claims**

17 The district court dismissed both of these claims after
18 concluding that they required Scholz to "have a valid copyright
19 claim." Scholz Design, 2011 WL 2899093, at *4, 2011 U.S. Dist.
20 LEXIS 76663, at *14. The dismissal of the breach of contract
21 claim was error. Scholz alleged that Sard used Scholz's drawings
22 in unauthorized ways long after their agreements had expired.
23 This breach of contract claim did not depend on Scholz's
24 possession of a valid copyright. We therefore vacate the

1 district court's dismissal of the breach of contract claim. In
2 addition, because we vacate the district court's dismissal of the
3 copyright claim, we also vacate its dismissal of the DMCA claim.
4 Again, we suggest no views on our part as to the proper outcome
5 of such an inquiry.

6 **CONCLUSION**

7 For the foregoing reasons, the judgment of the district
8 court is reversed in part, and vacated and remanded in part for
9 further proceedings. Costs to Scholz against Sard and Coldwell
10 Banker.