

# Golf Course Copyright Bill Implications Go Beyond The Green

By **Danner Kline, Jake Neu and Jonathan Wohlwend** (March 12, 2024)

In the ever-evolving landscape of intellectual property law, a new federal bill has emerged to address the unique challenges faced by golf course designers and architects.

The Bolstering Intellectual Rights against Digital Infringement Enhancement, or BIRDIE, Act would extend copyright protection to golf course designs, acknowledging the creative and intellectual effort involved in crafting these intricate and aesthetically pleasing spaces.

This bipartisan legislation — introduced by U.S. Reps. Brian Fitzpatrick, R-Pa., and Jimmy Panetta, D-Calif., in February — seeks to align the rights of golf course architects with those afforded to other creative professions, ensuring that their works are protected from unauthorized use or replication.

"Each artist, creator, or designer deserves the full protection of our copyright law, and golf course architects should be no different," Fitzpatrick told Sportico in February.[1]

"Piracy and unauthorized replication of golf course designs in digital or virtual simulations threaten the livelihoods of the profession," Fitzpatrick said.[2]

## Background

Copyright law in the U.S., rooted in the U.S. Constitution, serves to protect "original works of authorship fixed in any tangible medium of expression," according to Title 17 of the U.S. Code, Section 102(a).

This broad definition encompasses a wide array of creative works, including literature, music and photographs.

In 1990, an amendment to the Copyright Act extended copyright protection to the design of buildings, recognizing the artistic and intellectual endeavors of architects and the importance of safeguarding their creations.

## The BIRDIE Act's Provisions

The BIRDIE Act seeks to build upon this foundation by further expanding the scope of copyright protection to include golf course designs.

Specifically, the bill proposes to amend Section 101 to include golf course designs within the definition of "architectural works." This amendment would cover not only the overall layout and design of a golf course but also its various components, such as landscaping, irrigation systems, paths, greens, tees, practice facilities, bunkers, lakes and topographic features.

By explicitly including these elements within the definition of architectural works, the BIRDIE Act seeks to provide comprehensive protection for golf course designs, ensuring that



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the creative efforts of designers and architects are respected and safeguarded.

The provisions of the act would apply to works created on or after Dec. 1, 1990, as well as to unconstructed works embodied in unpublished plans or drawings as of that date. This retroactive application is significant, as it means that a wide array of existing golf course designs could potentially benefit from copyright protection under the new legislation.

While some of the most renowned golf courses in the U.S. — such as Augusta National and Pebble Beach — were established well before 1990, many courses have undergone updates or redesigns in the intervening years that could qualify for protection under the BIRDIE Act.

As a result, the bill has the potential to affect a substantial portion of the golf industry, providing designers and architects with enhanced control over the use and reproduction of their works.

### **Implications for Golf Course Designers**

The passage of the BIRDIE Act would have far-reaching implications for golf course designers, architects and the industry as a whole.

By extending copyright protection to golf course designs, the bill would provide creators with enhanced control over the use and reproduction of their works, safeguarding their interests against unauthorized use or replication.

This protection is particularly relevant in light of the growing golf simulator industry, which has raised concerns about the ease of digital recreations of golf courses.

With the ability to create highly detailed and accurate digital replicas of existing courses, golf simulators have the potential to infringe upon the intellectual property rights of designers and architects, undermining their ability to control the use and distribution of their works.

Under the BIRDIE Act, golf course designers and architects would have the legal tools necessary to protect their creations from unauthorized use or replication, whether in the physical world or the digital realm.

This protection would not only help to ensure that designers and architects are fairly compensated for their work but may also encourage innovation and creativity within the industry.

Moreover, the BIRDIE Act could potentially open up new revenue streams for golf course designers.

By granting creators exclusive rights over the use and reproduction of their works, the bill would enable them to enter into licensing agreements with third parties, such as golf simulator manufacturers or video game developers, who wish to use their designs in their products.

### **Broader Implications**

While the BIRDIE Act is focused on extending copyright protection to golf course designs, its passage could have broader implications for the scope of copyright law and the nature of authorship.

In the 2011 case of *Kelley v. Chicago Park District*, the U.S. Court of Appeals for the Seventh Circuit held that a living garden, even if arranged in an aesthetically pleasing manner, was not entitled to copyright protection because it lacked the necessary elements of human authorship and fixation.[3]

The court's reasoning in *Kelley* emphasized that "authorship is an entirely human endeavor" and that "works owing their form to the forces of nature cannot be copyrighted." [4]

Golf course designs, like gardens, often involve a combination of inanimate objects and living flora. This raises questions about the BIRDIE Act's relevance for the *Kelley* decision.

Passage of the act would potentially undercut the reasoning in *Kelley* because the recognition of authorship in a golf course design would seem to concern similar facts that the court found relevant in *Kelley* for holding that the living garden was not copyrightable. This could open the door for copyright protection to be extended to other works that involve living elements, such as gardens or landscape designs.

This expansion of copyright law could have implications for the horticulture and landscape architecture industries, as well as for the broader understanding of what constitutes a copyrightable work.

Furthermore, the *Kelley* decision has been relied upon by the Copyright Review Board in recent decisions restricting copyright protection for works with nonhuman authorship, including works prepared by generative artificial intelligence. The board has stated that "the Office will refuse to register a [copyright] claim if it determines that a human being did not create the work." [5]

In analyzing artificial intelligence-generated material, the board considers whether the traditional elements of authorship in the work were conceived and executed by a human or by a machine.

If the passage of the BIRDIE Act were to undermine the reasoning in *Kelley*, it could also call into question these recent decisions about AI authorship, raising broader doctrinal questions about the nature of authorship and the role of human creativity in the creation of copyrightable works.

The act could be seen as a step toward recognizing a broader scope of authorship that encompasses works created with the assistance of AI or other nonhuman entities.

## **Conclusion**

The BIRDIE Act potentially represents a significant step forward in the evolution of copyright law, acknowledging the creative and intellectual efforts of golf course designers and architects, and seeking to provide them with the same level of protection afforded to other creative professionals.

However, the implications of the act may extend far beyond the golf industry.

The bill's passage could potentially undercut existing case law and raise broader questions about the scope of copyright protection for works that involve living elements or nonhuman authorship.

Regardless of the ultimate fate of the act, its introduction serves as a reminder of the ongoing need to adapt copyright law to the changing landscape of creative works and intellectual property.

As new technologies and forms of expression emerge, will the law keep pace, ensuring that creators are properly protected and incentivized to continue creating original works?

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[1] <https://www.sportico.com/law/analysis/2024/birdie-bill-golf-courses-copyright-law-1234767246/>.

[2] Id.

[3] Kelley v. Chicago Park Dist., 635 F.3d 290, 304–06 (7th Cir. 2011).

[4] Id. at 304.

[5] See, e.g., <https://copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf>.