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# Putting the House Back Together Again: The Scope of Copyright Protection for Architectural Works

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# Putting the House Back Together Again: The Scope of Copyright Protection for Architectural Works

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## INTRODUCTION

The Taliesin estate in Spring Green, Wisconsin is an extraordinary design by famed architect Frank Lloyd Wright.<sup>1</sup> The house is anything but expected with its unique roof line, use of natural materials, incorporation into the topography, and revolutionary overall look and feel. The house features red doors that stand in contrast to the earthy tones of the house, as well as exceptional window shapes and patterns that cause the eye to linger. The house is built on multiple levels to be in harmony with the hilly terrain. Sculptures and looking ponds adorn the grounds in expertly selected locations. The most eye-catching feature of the house is undoubtedly the roof line with its distinctive angles that create striking shapes.

Architectural works such as the Taliesin create the backdrop to human life and are an integral piece of society's cultural experience.<sup>2</sup> As phones with camera capabilities and scanners become more sophisticated and the ease with which material can be downloaded from the internet becomes increasingly simple, however, architects face the increasingly difficult task of trying "to prevent unauthorized copying of their work."<sup>3</sup> The Taliesin—or perhaps more precisely, Wright—deserves protection against unauthorized, unlawful copiers.<sup>4</sup> The protections against unlawful copying of architectural

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1. Frank Lloyd Wright was a visionary in the field of architecture favoring a new, American spirit in architecture over the historic, imported European styles. *See, e.g., Frank Lloyd Wright's Taliesin Celebrates 100 Years*, ARCHITECTURAL REC. (April 22, 2011), <http://archrecord.construction.com/news/2011/04/110422-Taliesin.asp>. For this discussion, it might be useful to view pictures of Taliesin, Wright's self-designed home in Wisconsin, which are available on a variety of websites. *See, e.g., Travel United States: Taliesin Residence*, D. HOLMES CHAMBERLIN JR. ARCHITECT LLC, <http://www.dchamberlinarchitect.com/travel-north%20america-united%20states-wisconsin-spring%20green-taliesin-FLW%20HOME.htm> [<http://perma.cc/62H3-9Y6U>] (last revised July 2011).

2. *See* H.R. REP. NO. 101-735, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6943 (quoting Frank Lloyd Wright as saying: "Buildings will always remain the most valuable aspect in a people's environment, the one most capable of cultural reaction"); *see also* MARIAN MOFFETT, MICHAEL W. FAZIO & LAWRENCE WODEHOUSE, *A WORLD HISTORY OF ARCHITECTURE* 1 (2003) ("[T]he best of [architecture] expresses the tastes and aspirations of the entire society.").

3. Richard M. McDermott & Jason M. Sneed, *What Every Architect Should Know About Copyright Law: Practice Matters*, ARCHITECTURAL REC., <https://archrecord.construction.com/practice/pdfs/0401copyrightlaw.pdf> (last visited Aug. 19, 2015) ("[P]eople are more disrespectful than ever of laws intended to protect intellectual property.").

4. The infringement analysis and scope of the protection analysis are intertwined. The threshold question for infringement includes whether the work is within the scope of protection dictated by the Copyright Act. *See* Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC, 827 F. Supp. 2d 607, 618 (E.D. Va. 2011) ("The threshold questions with respect to the substantial

works are found in the 1990 Architectural Works Copyright Protection Act (“AWCPA”).<sup>5</sup> The AWCPA amended the section of the Copyright Act on subject matter to include “architectural works” within its scope,<sup>6</sup> and it also added an expansive definition of those works.<sup>7</sup> The definition supplied in the AWCPA states that “[a]n ‘architectural work’ is the design of a building . . . includ[ing] the overall form as well as the arrangement and composition of spaces and elements in the design.”<sup>8</sup> With such a broad definition of an architectural work, it seems obvious that a home as original as the Taliesin estate would receive protection from unlawful copying. Neither Congress nor the courts, however, have proffered a test that would offer copyright protection to the Taliesin for fear of hindering progress and competition in the field.<sup>9</sup>

This Comment examines the three most widely recognized tests for the scope of architectural copyright protection: Congress’s “non-functionality” test, the Eleventh Circuit’s “categorization” test, and the Second Circuit’s “dissection test.” The House Report on the AWCPA explains the congressional test.<sup>10</sup> This Comment labels that test as the “non-functionality test.” The non-functionality test determines whether design elements of an architectural work are functional or aesthetic<sup>11</sup> and is difficult to apply to a complex work like the Taliesin, which has intrinsic utilitarian value and intertwines artful design with the functional aspects

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similarity inquiry are, therefore, twofold: first, what is the nature and extent of protection, if any, owed to Plaintiff under the Copyright Act; and second, which components, if any, of Plaintiff’s work are original and thereby entitled to protection under the Act?”). This Comment focuses on the initial question of whether the work is protected under the Copyright Act but necessarily discusses the infringement standard for a full analysis of the scope of protection.

5. Congress added protection for architectural works to comply with Berne Convention standards, a World Intellectual Property Organization (“WIPO”) administered treaty. H.R. REP. NO. 101-735, at 20–21, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951–52. Copyright protection gives the owner the exclusive right to reproduce the copyrighted work, to prepare derivative works, and to distribute copies of the copyrighted work for a limited period of time. 17 U.S.C. § 106 (2012).

6. 17 U.S.C. § 102(a)(8) (2012).

7. *Id.*

8. 17 U.S.C. § 101 (2012).

9. Despite the expansive definition in the AWCPA, the overall trend in the courts is to provide buildings with “thin” protection. David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made A Difference?*, 18 J. INTELL. PROP. L. 1, 6 (2010); *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (“‘[T]hin’ copyright[s] . . . protect[] against only virtually identical copying.”).

10. H.R. REP. NO. 101-735, at 20–21, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951–52.

11. *Id.* (“If [original] design elements are present, a second step is reached to examine whether the design elements are functionally required.”).

of its elements. The Eleventh Circuit's test categorically defines the scope of protection by labeling all architectural works as "compilations."<sup>12</sup> This Comment refers to the Eleventh Circuit's test as the "categorical test," which may often produce agreeable results—especially in the case of mundane or unoriginal buildings—but could also cause a court to overlook original aspects of a sophisticated work for copyright protection.<sup>13</sup> Finally, this Comment labels the Second Circuit's test as the "dissection test." The dissection test requires mental dissection of the elements of the work and separate analysis of each element for copyright protection.<sup>14</sup> This test best avoids over-protecting unoriginal works and rests on established principles of copyright law, such as *scènes-à-faire* and the merger doctrine. However, the test is not without flaws and may produce unwanted results if not applied carefully.

For instance, a haphazard application of the dissection test to complex works such as the Taliesin could leave its most defining features, including its overall form, unprotected. If strictly applied, the dissection test would not protect the unique doors and windows of the home. Because all houses have doors and windows, the dissection analysis would place all doors and windows in the public domain.<sup>15</sup> Wright's use of varying levels would not qualify for protection for the same reason that makes this technique unique—the topography dictated the varying levels.<sup>16</sup> The pond designs and placements could be denied protection as merely a preference of the consumer.<sup>17</sup> Even the roof line, the most stunning feature of the house, is likely to be unprotected under a mechanical application of the dissection test because engineering design constraints dictated the specific angles of the

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12. See *Intervest Constr., Inc. v. Canterbury Estates Homes, Inc.*, 554 F.3d 914, 919 (11th Cir. 2008).

13. Originality is a core requirement for copyright. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality.").

14. *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 106 (2d Cir. 2014).

15. See *id.* ("Plaintiff can get no credit for putting a closet in every bedroom, a fireplace in the middle of an exterior wall, and kitchen counters against the kitchen walls."). "The concept of the public domain is another import from the realm of real property. In the intellectual property context, the term describes a true commons comprising elements of intellectual property that are ineligible for private ownership." Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 (1990) (internal citations omitted). The lay understanding of the public domain in the copyright context is "that it contains works free from copyright." *Id.* (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1836 (1986)).

16. See, e.g., *Sparaco v. Lawler, Matusky, Skelly, Eng'rs LLP*, 303 F.3d 460, 467 (2d Cir. 2002).

17. See, e.g., *Zalewski*, 754 F.3d at 106 ("Constraints placed on an architect by the way her client plans to use the building do not originate with the architect.").

roof.<sup>18</sup> Missing throughout this entire process is protection of the overall form.<sup>19</sup> Despite relying on sound copyright doctrine, the Second Circuit's dissection method could lead to these undesirable results if inattentively applied.

Although unauthorized copiers may be rejoicing, the underpinnings of copyright are being neglected by all three of the tests. Blindly categorizing or dissecting architecture leaves the judge with a heap of mangled doors, windows, columns, and walls with no protection, ignoring the expansive definition of architecture. Courts should put the house back together again by examining the work as a whole first, instead of as dissected solitary features. Courts should then apply a careful dissection analysis to protect any individual, original elements of the design. Otherwise, the courts will deny protection in a categorical fashion for architectural works and allow unlawful copying to occur.

Part I of this Comment presents the background of the AWCPA and the current judicial treatment of AWCPA claims. Part II explores the inadequacies of the congressional and judicial tests for scope of copyright protection for architectural works. Part III examines *sui generis* protection for other inherently functional works and the judicial treatment when determining the scope of protection in those areas. Finally, Part IV proposes a workable test that courts can use to determine the scope of copyright protection for architectural works. This test uses a modified version of the Second Circuit's dissection test to ensure that courts do not pass over original large-scale groupings of elements and original overall form for copyright protection.

#### I. PRE-AWCPA COPYRIGHT PROTECTION FOR ARCHITECTURAL WORKS

Some of the most extraordinary cities in the world have become synonymous with the architectural works they house—Dubai's Khalifa Tower, Rome's Colosseum, and Washington D.C.'s Capitol building, to name a few. Architecture does not merely conjure images for the back of a postcard;

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18. *See, e.g.,* *Harvester, Inc. v. Rule Joy Trammell Rubio, LLC*, 716 F. Supp. 2d 428, 441 (E.D. Va. 2010) (“Therefore, any decisions on arrangement and coordination made . . . that were dictated by the building code and manufacturers’ clearance directives cannot be protected expression, as they would not be original . . .”).

19. The “overall form,” as used in this Comment, is in contrast to individual standard features. It is meant to include the arrangement and composition of spaces and elements that create the complete look and feel of the building. *See* 17 U.S.C. § 101 (2012).

rather, architecture can define entire eras and cultures.<sup>20</sup> Despite being a cultural backbone of society, architectural works did not receive protection under federal copyright law until 1990 when Congress passed the AWCPA.<sup>21</sup>

*A. The Standard for Copyright Protection is an Exceedingly Easy Hurdle to Overcome*

Long before the AWCPA amended the Copyright Act to protect architectural works, copyright law developed with a standard of protection that flowed from the Constitution.<sup>22</sup> The Constitution grants Congress broad powers to create copyright law, stating that Congress may “secur[e] for limited times to authors . . . the exclusive right to their respective Writings” to “promote the progress of science and useful arts.”<sup>23</sup> The constitutional provision itself does not expressly articulate a specific standard for when courts should give a writing by an author exclusive rights, but two decisions from the Supreme Court in the late nineteenth century held that the constitutional standard for copyright protection required some degree of originality.<sup>24</sup> The originality requirement articulated in these two early cases remains the touchstone of copyright law today.<sup>25</sup> The Supreme Court elaborated upon this standard by requiring “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.”<sup>26</sup> The Court emphasized that originality is

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20. See H.R. REP. NO. 101-735, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6943; MOFFETT ET AL., *supra* note 2, at 1.

21. Compare 17 U.S.C. §§ 101, 102 (1976), with 17 U.S.C. §§ 101, 102(a)(8) (1990); see also H.R. REP. NO. 101-735, at 20, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951 (“This provision . . . create[s] a new category of protected subject matter: ‘architectural works.’”). Congress added protection for architectural works to comply with Berne Convention standards, a WIPO administered treaty. *Id.* at 6937.

22. Copyright law was discussed in cases as early as 1789. See, e.g., *Hudson v. Patten*, 1 Root 133 (Conn. 1789). One of the earliest discussions of copyright by the Supreme Court was in 1834. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

23. U.S. CONST. art. I, § 8, cl. 8; see also *Mazer v. Stein*, 347 U.S. 201, 206 (1954). The comments to the House Report state that “the design of a work of architecture is a ‘writing’ under the Constitution and fully deserves protection under the Copyright Act.” H.R. REP. NO. 101-735, at 13, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6944.

24. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (discussing the Trade-Mark Cases, 100 U.S. 82 (1879) and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)).

25. *Id.* at 347 (“[Originality] is the very ‘premise of copyright law.’” (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981))).

26. *Id.* at 345. *Feist* condensed and reinforced the originality standard jurisprudence and was decided, coincidentally, a year after Congress passed the

an exceedingly low bar and requires only a “spark” of creativity.<sup>27</sup> Even if two works are substantially similar to one another, as long as the similarities are fortuitous and each author independently creates his or her own work demonstrating a spark of creativity, then copyright protection is not barred under originality for either work.<sup>28</sup> Most works clear the low bar of originality without much difficulty.

In addition to being original, the work must be of a subject matter that Congress has deemed suitable for copyright protection.<sup>29</sup> The Copyright Act defines copyright subject matter in two ways: by listing certain categories of works that could be protected by copyright and by expressly precluding certain categories of works from copyright protection.<sup>30</sup> According to Congress, the types of works that are eligible for copyright protection include the following: literary, musical, dramatic, choreographic, pictorial, graphic, and sculptural works; motion pictures; sound recordings; and architecture.<sup>31</sup> Conversely, Congress stated that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>32</sup> Protection for these items falls under patent law, if protected at all.<sup>33</sup> This subject matter distinction is generally known as the “idea/expression dichotomy,” and is a difficult line to draw.<sup>34</sup>

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AWCPA. *Id.* The Court also banished the “sweat of the brow” doctrine that some lower courts had used to award copyrights when an author expended large amounts of effort. *Id.* at 359–60. The Court rejected this doctrine, emphasizing again that the standard for copyright protection is originality—not level of effort. See *Feist* for a further discussion on the flaws of the “sweat of the brow” doctrine. *Id.* at 353–56.

27. See *id.* at 345 (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.” (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08(C)(1) (1990))).

28. See *id.* at 345–46 (“Originality does not signify novelty . . . . [A]ssume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”).

29. See 17 U.S.C. § 102 (2012).

30. *Id.*

31. *Id.*

32. *Id.* § 102(b); see also *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Kunycia v. Melville Realty Co.*, 755 F. Supp. 566, 570 (S.D.N.Y. 1990) (“[T]he specific means chosen by an author to express certain ideas or facts may be copyrighted, as opposed to the idea itself.”).

33. See *Baker v. Selden*, 101 U.S. 99, 102–03 (1880) (holding that copyright protection is given only to the expression of the idea, not the idea itself).

34. See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a



Two judicially-created doctrines based on the idea/expression dichotomy—*scènes-à-faire* and merger—have become accepted in copyright law.<sup>35</sup> The doctrine of *scènes-à-faire* is applicable if an element of a design is so associated with a particular type of work that it becomes indispensable or standard in the treatment of that work.<sup>36</sup> Therefore, the element would not receive copyright protection.<sup>37</sup> For example, cowboys, bank robbers, and shootouts in a Western movie would get no protection because the work would be incomplete without those elements.<sup>38</sup> Relatedly, the merger doctrine recognizes that “some ideas can only be expressed in a limited number of ways—single words or colors for example. When expression is so limited, idea and expression ‘merge.’”<sup>39</sup> An author cannot own the idea itself, and thus courts cannot protect the expression.<sup>40</sup> The courts applied the *scènes-à-faire* and merger doctrines to expand the copyright analysis to new categories as Congress expanded the list of copyrightable subject matter.<sup>41</sup>

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work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.” (internal citation omitted)); *see also* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*.”).

35. Several examples of courts making use of the copyright doctrines *scènes-à-faire* and merger exist. *See, e.g.*, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 535 (6th Cir. 2004); *Assessment Techs. of Wis., LLC v. WIREdata, Inc.*, 350 F.3d 640, 643 (7th Cir. 2003); *Ets-Hokin v. Sky Spirit, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000); *Kregos v. Associated Press*, 937 F.2d 700, 705–07 (2d Cir. 1991); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005); *see also* Adam T. Mow, Architect, *Building with Style: Testing the Boundaries of Architectural Works Copyright Protection Act*, 2004 UTAH L. REV. 853, 868 (discussing *scènes-à-faire* and its application in architecture).

36. *See, e.g.*, *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (“Because it is virtually impossible to write about a particular . . . theme without employing certain ‘stock’ or standard literary devices, we have held that *scenes a faire* [sic] are not copyrightable as a matter of law.”); *see generally* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(B)(4) (1998) (discussing the doctrine of *scènes-à-faire* and its application to architecture).

37. *See supra* note 36.

38. *See Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014).

39. *Id.* at 102–03; *see Assessment Techs. of Wis.*, 350 F.3d at 643; *Ets-Hokin*, 225 F.3d at 1082; *Kregos*, 937 F.2d at 705–07.

40. *Zalewski*, 754 F.3d at 102–03; *see also* *Baker v. Seldon*, 101 U.S. 99 (1880).

41. The Supreme Court recognized the legislative intent to expand the definition of a copyrightable work when the words were reduced from “work of fine art” to “work of art” in the copyright statute. *Mazer v. Stein*, 347 U.S. 201, 213 (1954). The Court noted that this change suggested that “there is subject-matter (for instance, of applied design, not yet within the province of design

*B. Pre-AWCPA Architectural Works Were Only Protected as Non-Utilitarian Sculptures that Passed the Conceptual Separability Test*

Congress did not include architecture in the list of approved subject matters for copyright protection until 1990, when Congress passed the AWCPA.<sup>42</sup> Before 1990, Congress afforded architectural plans copyright under the pictorial or graphic work categories but did not plainly protect the physical product of those plans, such as buildings, under a subject matter category.<sup>43</sup> Although not explicit in the Act, architectural works most aptly fit under the “sculptural work” category. According to the Copyright Act, if a sculptural work has a specific function or use that is not “merely to portray the appearance of the article or to convey information,” that work is designated as a “useful article.”<sup>44</sup> Architectural works seem to fit under the category of a sculptural work designed for a specific function—sheltering people or things—and courts often categorized these works as useful articles under the pre-AWCPA regime.<sup>45</sup>

The Copyright Act excludes useful articles from copyright protection because excessively lengthy monopolies over functional works can halt progress in the sciences and fair competition.<sup>46</sup> To ensure that no functional

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patents), which may properly be entitled to protection under the copyright law.” *Id.* at 213 (quoting *To Amend and Consolidate the Acts Respecting Copyright: Hearing on S. 6330 and H.R. 19853 Before Committees on Patents of the Senate and House of Representatives*, 59 CONG. REC. 11 (1906) (statement by Herbert Putnam, Librarian of Congress)).

42. See H.R. REP. NO. 101-735, at 19 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951 (“This provision . . . create[s] a new category of protected subject matter: ‘architectural works.’”).

43. See *Zalewski*, 754 F.3d at 100 (“When Congress passed the Copyright Act of 1976, architectural works were not among the listed categories . . .”).

44. 17 U.S.C. § 101 (2012). Congress lumped pictorial, graphic, or sculptural works (“PGS works”) together in the Copyright Act. The Act specifically states that:

“Pictorial, graphic, and sculptural works” . . . shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

*Id.* Examples of useful articles include cars, food processors, and television sets. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1217 (9th Cir. 2000).

45. See *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1143 (2d Cir. 1987) (discussing the then-current view of architecture as a “pictorial, sculpture, or graphic” work).

46. This reason is why the duration of a patent is often five times shorter than the duration for a copyright—to ensure fair competition and to promote progress.

work is inadvertently covered under copyright, the courts apply the so called “separability test” to useful articles, including sculptural works.<sup>47</sup> The separability test states that “[u]nless the shape of an . . . industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted.”<sup>48</sup> This test is simple to apply if the art can be physically separated from the useful article. For example, in *Mazer v. Stein*,<sup>49</sup> the artist fitted a statue of a dancer with a light bulb and lampshade, creating a lamp.<sup>50</sup> The Court held that the statues themselves were copyrightable works of art: “The patentability of the statue[s], fitted as lamps or unfitted, [did] not bar copyright as works of art.”<sup>51</sup> The more difficult question is whether the art can be conceptually separated from the useful article.

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*Compare* 17 U.S.C. § 302 (life of the author and 70 years after the author’s death for copyright), *with* 35 U.S.C. § 154 (2012) (20 years from the filing date for utility patents); *see generally* David E. Shipley, *Copyright Protection for Architectural Works*, 37 S.C. L. REV. 393, 396 n.9 (1986) (“[A] tension in copyright law results from the attempt to balance two competing policies: providing incentives for authors to create and protecting the public’s interest in access to and use of intellectual creations.”).

47. H.R. REP. NO. 101-735, at 11, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6942. The report states:

The current U.S. Copyright Act expressly includes diagrams, models, and technical drawings, including architectural plans as a species of protected pictorial, graphic, and sculptural work. It does not, however, expressly protect works of architecture, although this Committee’s Report accompanying the 1976 Copyright Act contemplated that at least selected works of architecture—those containing elements physically or conceptually separable from their utilitarian function—would be protected to the extent of their separability.

*Id.* (internal quotations and citations omitted); *see also*, *Brandir Int’l*, 834 F.2d at 1145 (discussing the separability test as applied to a useful article: “If design elements reflect merger of aesthetic and functional considerations, the artistic aspects of work cannot be said to be conceptually separable from utilitarian elements, and thus the work is not copyrightable. But where design elements can be identified as reflecting designer’s artistic judgment exercised independently of functional influences, the work may be copyrightable.”).

48. H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668 (“[C]opyright protection would extend only to [separable works of art], and would not cover the over-all configuration of the utilitarian article as such.”); *see also* 17 U.S.C. § 101 (“[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”).

49. 347 U.S. 201 (1954).

50. *Id.* at 203.

51. *Id.* at 217.

One court described the conceptual separability test as an inquiry into the design constraints placed on the author.<sup>52</sup> If utilitarian concerns significantly influenced the conception of the article, the aesthetic elements are so interwoven within the useful article as to become conceptually inseparable from the utilitarian aspects, which are not afforded copyright protection.<sup>53</sup>

Under the pre-AWCPA regime, because architectural works were considered under the sculptural works category and necessarily labeled as useful articles based on their intrinsic functionality, courts could only protect those works if the design passed the conceptual separability test.<sup>54</sup> Although Congress meant to draw a bright line between copyrightable art and non-copyrightable functional works with the separability test, courts have had difficulty determining conceptual separability.<sup>55</sup> Conceptual separability is

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52. *Brandir Int'l*, 834 F.2d at 1143. Other circuits have followed this approach. See *Pivot Point Int'l, Inc. v. Charlene Prods.*, 372 F.3d 913 (7th Cir. 2004); *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417 (4th Cir. 2010).

53. *Brandir Int'l*, 834 F.2d at 1147. *Brandir* involved a bike rack that consisted of a curved pipe resembling a sound wave. *Id.* at 1146 (“[T]he original design . . . stemmed from wire sculptures . . . , each formed from one continuous undulating piece of wire.”). The court held that although “the rack may have been derived in part from one of more ‘works of art,’ it is in its final form essentially a product of industrial design.” *Id.* The designer “clearly adapted the original aesthetic elements to accommodate and further a utilitarian purpose.” *Id.*

54. See *supra* note 48.

55. H.R. REP. NO. 94-1476, at 55, reprinted in 1976 U.S.C.C.A.N. 5659, 5668; *Brandir Int'l*, 834 F.2d at 1143 (“[T]he line Congress attempted to draw between copyrightable art and noncopyrightable design ‘was neither clear nor new.’” (quoting Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741 (1983))). For an example, see *Kieselstein-Cord v. Accessories by Pearl, Inc.*, applying the test to belt buckles as a utilitarian article and finding that the ornamental surfaces of buckles were not required for their function. 632 F.2d 989, 994 (2d Cir. 1980) (“It will, so long as the statute remains in its present form, always be necessary to determine whether in a given case there is a physically or conceptually separable artistic sculpture or carving capable of *existing independently as a work of art.* (emphasis added)”). The dissent summarized the effects of the separability test, stating that, although the belt buckles were “admirable aesthetically pleasing examples of modern design” and that the judges were “offended by the flagrant copying of another’s work,” the buckles remained “inseparable from the important function they serve—helping to keep the tops of trousers at waist level” and until the law was changed, the court should not “twist the law in order to achieve a result Congress has denied.” *Id.* at 994 (Weinstien, J., dissenting); see also *Norris Indus. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983) (automobile wire wheel covers not conceptually separable); *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411 (2d Cir. 1985) (the form of anatomically correct human torsos “inextricably intertwined with the utilitarian feature” of displaying clothes); *Animal Fair, Inc. v. Amfesco Indus., Inc.*, 620 F. Supp. 175, 186–88 (D. Minn. 1985) (bear-paw design conceptually separable from utilitarian feature of a slipper).

especially difficult to apply in the case of architecture, which presents complex works with intrinsic utilitarian value.<sup>56</sup> As a practical matter, the separability test would not protect the most sophisticated architectural works. Attempting to define a building as “purely non-functional” or “separable” is illogical, because buildings are designed to shelter people or things. Defining a building as purely non-functional would deny copyright protection to architects who infuse artistic expression into functional building designs as an inseparable aspect of the design, while granting protection to those “who attach their independent representational art, or even their trite gimmickry, to a useful object for purposes of enhancement.”<sup>57</sup>

When Congress passed the AWCPA, it noted the courts’ difficulties in applying the conceptual separability test and the injustice its application to architectural works presented.<sup>58</sup> Congress cited the judicial disagreement over the precise test for separability and concerns over “entangling architectural works in [the] disagreement” as reason enough for providing architecture with its own category of copyrightable subject matter.<sup>59</sup> This new protection for architectural works replaced the previous protection sometimes provided under the conceptual separability test for non-utilitarian sculptures incorporated into a work of architecture. Congress stated in the House Report that:

By creating a new category of protect[able] subject matter in new section 102(a)(8), and, therefore, by deliberately not encompassing architectural works as pictorial, graphic, or sculptural works in existing section 102(a)(5), the copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles.<sup>60</sup>

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56. The House report to the 1976 Copyright Act noted that architectural works presented a “special situation” in that plans and drawings would be protected as pictorial, graphic, or sculpture works, “but the extent to which that protection would extend to the structure depicted would depend on the circumstances.” H.R. REP. NO. 94-1476, at 55, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668. Therefore, under the separability test, the only “circumstances” that allowed protection for architectural works included “[p]urely non-functional or monumental structures” that were either conceptually or physically separable from the architectural structure itself. *Id.* A gargoyle on the ledge of a building is an apt example.

57. *Kieselstein-Cord*, 632 F.2d at 994.

58. H.R. REP. NO. 101-735, at 19 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951; *see* NIMMER & NIMMER, *supra* note 36, § 2.08(D)(2)(b); Shipley, *supra* note 46, at 422–23 (discussing the pitfalls of the separability test as applied to architecture).

59. H.R. REP. NO. 101-735, at 20, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951.

60. *Id.*

Thus, the AWCPA expressly excludes the concept of separability from the copyright analysis for architectural works.

## II. THE AWCPA, CONGRESSIONAL INTENT, AND COURTS' TREATMENT

Congress included architectural works as a copyrightable subject matter in the AWCPA.<sup>61</sup> When enacting the statute, it formulated a test that would ensure that no functional aspects of an architectural work were protected.<sup>62</sup> Subsequently, two federal circuit courts—the Eleventh and Second Circuits—developed tests that are similar to Congress's non-functionality test, but that diverge on the scope of copyright protection for architectural works.<sup>63</sup>

### *A. The AWCPA and the Broad Definition of Architectural Works*

In 1990, Congress enacted the AWCPA in response to standards set forth in the Berne Convention, an international treaty that the United States had recently signed to extend copyright protection beyond the separable elements of an architectural work.<sup>64</sup> Congress then requested the Copyright Office to conduct a report on the then-current status of copyright protection for architecture compared to Berne standards.<sup>65</sup> The office's report stated that "while architectural blueprints, plans, drawings, and models relating to works of architecture [were] adequately protected by U[nited] S[tates] copyright law," the protection for the actual design product—the constructed structure—was "in doubt."<sup>66</sup> As a response to these findings, and in an attempt to "stimulate excellence in [architectural] design, thereby enriching [the] public environment in keeping with the constitutional goal," Congress

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61. See *infra* Part II.A.

62. See *infra* Part II.A.

63. See *infra* Part II.B.

64. H.R. REP. NO. 101-735, at 19, reprinted in 1990 U.S.C.C.A.N. 6935, 6951 ("The sole purpose of legislating at this time is to place the United States unequivocally in compliance with its Berne Convention obligations."); see also *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 100 (2d Cir. 2014) ("In the 1980s, however, Congress started the lengthy process of updating the Copyright Act in order to join the Berne Convention, an international agreement that governs copyright protection."). The Berne Convention for the Protection of Literary and Artistic Works is a World Intellectual Property Organization administered treaty. See World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, arts. 2, 4, Sept. 18, 1979, 828 U.N.T.S. 221, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P105\\_16290](http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P105_16290) [<http://perma.cc/YH2E-44EL>]. The treaty states that certain literary and artistic works, including "works of architecture," must enjoy protection in participating countries. *Id.*

65. H.R. REP. NO. 101-735, at 6, reprinted in 1990 U.S.C.C.A.N. 6935, 6937.

66. See *id.*

extended protection to architectural works.<sup>67</sup> An “architectural work,” a new category of copyrightable subject matter, “includes the overall form as well as the arrangement and composition of spaces and elements in the design.”<sup>68</sup> The Act does not define the word “building,”<sup>69</sup> but the House Report stated that the term “encompassed habitable structures such as houses and office buildings” and “structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions.”<sup>70</sup> The Act also does not define “overall form” and leaves it to the courts to decipher the exact meaning.<sup>71</sup> Finally, Congress included the phrase “arrangement and composition of spaces and elements” in the definition of an architectural work, because “creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotect[able] elements into an original, protect[able] whole.”<sup>72</sup>

To limit copyright protection for architectural works, Congress expressly precluded “standard features” as copyrightable subject matter under the AWCPA, which mirrors the copyright doctrine of *scènes-à-faire*.<sup>73</sup> The House Report gave the following examples of standard

67. *Id.* at 6951; *see also* 17 U.S.C. §§ 101, 102(a)(8) (1990). Congress created this new category specifically removing architecture from the separability test that defines pictorial, graphic, or sculptural works. *See supra* Part I.B.

68. 17 U.S.C. § 101 (2012). “The definition provides three exemplars of such a tangible medium of expression—a building, architectural plans, or drawings—although these are not the only possible media of expression.” *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97, 109 (1st Cir. 2006) (quoting 17 U.S.C. § 101).

69. *See* 17 U.S.C. § 101.

70. H.R. REP. NO. 101-735, at 20, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951. In litigation, “buildings” have taken multiple forms. *See Miller’s Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312 (11th Cir. 2012) (restaurant); *Intervest Constr., Inc. v. Canterbury Estates Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (house); *Shine v. Childs*, 382 F. Supp. 2d 602 (S.D.N.Y. 2005) (skyscraper); *Chirco v. Rosewood Vill., LLC*, 03-CV-72145-DT, 2005 U.S. Dist. LEXIS 43748 (E.D. Mich. 2005) (condominiums).

71. *See* 17 U.S.C. § 101; *Oravec v. Sunny Isles Luxury Ventures L.C.*, 469 F. Supp. 2d 1148, 1170 (S.D. Fla. 2006) (comparing the overall forms of buildings).

72. H.R. REP. NO. 101-735, at 18, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6949 (“[A]n architect may incorporate new, protect[able] design elements into otherwise standard, unprotect[able] building features. . .”).

73. 17 U.S.C. § 101 (“An ‘architectural work’ . . . does not include individual standard features.”); *see also* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). For an example of the court denying protection for “standard features” *see Oravec*, 527 F.3d at 1227 (“[T]he use of rounded building ends, a constant radius on individual floor plans . . . a central fountain, and a rooftop pool with landscape elements—are best characterized as either individual standard features or ideas.”).

features: “common windows, doors, and other staple building components.”<sup>74</sup> The courts have augmented the range of standard features to include architectural elements dictated by consumer preferences,<sup>75</sup> industry standards,<sup>76</sup> or existing features of the building or land.<sup>77</sup> The House Report does point out that the exclusion of standard features does not automatically exclude *all* individual features.<sup>78</sup> Courts are free to find protection for individual features “that reflect the architect’s [sic] creativity.”<sup>79</sup> Congress sought, in adopting the AWCPA, to protect only those features of architectural works “that reflect the architect’s creativity, while excluding from the Copyright Act any unoriginal features, the protection of which would impede, rather than promote, the progress of architectural innovation.”<sup>80</sup>

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74. H.R. REP. NO. 101-735, at 18, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6949.

75. Examples of elements-based consumer preferences may include the following: “separation of master suite from secondary bedrooms; minimum 2-car garage; four total bedrooms and three total bathrooms; laundry or mud room convenient to garage; pre-fabricated fireplace; . . . all-brick exterior.” *Homes v. Ala. Heritage Homes, Inc.*, 929 F. Supp. 2d 1231, 1249 (N.D. Ala. 2013) (numbering omitted); *see also* *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 106 (2d Cir. 2014); *Harvester, Inc. v. Rule Joy Trammell Rubio, LLC*, 716 F. Supp. 2d 428, 441 (E.D. Va. 2010) (“Such market demands in the instant case might include the expectations and design tastes of the prospective consumers . . . particularly with respect to the chosen amenities and size and number of rooms in each space.”).

76. Examples of elements based on industry standards include: “relatively square plan to reduce material and labor costs; relatively few French doors, in favor of more economical fixed or sash windows; room dimensions that require standard, economical lumber spans and stud heights; simple, centralized roof geometry; [and] consistent, standard window sizes and head heights.” *Homes*, 929 F. Supp. 2d at 1237–38 (numbering omitted); *see also* *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 68 (2d Cir. 2010) (“[B]ecause plaintiff’s architectural plans ‘consisted only of generalized ideas and concepts pertaining to the placement of elements, traffic flow, and engineering strategies’ . . . no copyright infringement had occurred.” (quoting *Attia v. Soc’y of the N.Y. Hosp.*, 201 F.3d 50, 57 (2d Cir. 1999))); *Harvester*, 716 F. Supp. 2d at 441 (“Therefore, any decisions on arrangement and coordination . . . that were dictated by the building code and manufacturers’ clearance directives cannot be protected expression . . .”).

77. *See Harvester*, 716 F. Supp. 2d at 442 (“Thus, any selection, coordination, and arrangement decisions that were dictated solely by existing building conditions cannot be protected expression . . .”); *see also Zalewski*, 754 F.3d at 105 (“Topography is an un-copyrightable ‘fact.’”).

78. H.R. REP. NO. 101-735, at 18, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6949.

79. *Id.*

80. *Savant Homes, Inc. v. Collins*, No. 13-CV-2049-WJM-MEH, 2015 WL 899302, at \*3 (D. Colo. Feb. 27, 2015) (internal citations omitted).



*B. Applying the Abstract Standards for Scope of Protection in Infringement Claim Cases*

The AWCPA creates the outer boundaries for the scope of protection for architectural works by ensuring application of the originality standard and removing architecture out from under the separability analysis. Practical application of copyright protection to architectural works is difficult, however. Rather than being determined in a vacuum, infringement claims cases jurisprudentially define questions of scope. The standard for infringement is the practical check for the wide scope of protection offered under the AWCPA. Copyright infringement requires (1) ownership of a valid copyright and (2) copying of original elements of the work.<sup>81</sup> Because actual copying is, in many cases, difficult to prove, a plaintiff may establish copying indirectly by showing (1) that the defendant had access to the copyrighted work and (2) that substantial similarity exists between the copyrighted work and the infringing work.<sup>82</sup> To prove access, the plaintiff must show that the defendant had an opportunity to view or copy the work.<sup>83</sup> To prove substantial similarity, the plaintiff must establish that “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”<sup>84</sup> Congress and two federal circuit courts have created three alternative tests that attempt to apply the abstract standard to copyright infringement cases involving architectural works.

*1. Congress’s Non-Functionality Test*

In an effort to clearly define the line between unlawful copying and permissible copying, Congress proffered a two-step test for determining the copyrightability of an architectural work<sup>85</sup>—the “non-functionality” test. First, the test asks “whether there are original design elements present, including overall shape and interior architecture.”<sup>86</sup> Originality is a prerequisite for copyright protection; if either an individual element or the

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81. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

82. See, e.g., Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC, 827 F. Supp. 2d 607, 617 (E.D. Va. 2011).

83. See Bldg. Graphics, Inc. v. Lennar Corp., 708 F.3d 573, 577–78 (4th Cir. 2013) (“The mere possibility of such an opportunity is not enough. It must be reasonably possible that the defendant had access to the copyrighted work.”).

84. Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 829 (11th Cir. 1982) (quoting Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 911 (2d Cir. 1980)).

85. H.R. REP. NO. 101-735, at 19 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6951.

86. *Id.* at 20.

overall design of the work is original to the architect, protection may exist for the original element or design.<sup>87</sup> The second question is whether those original design elements “are functionally required.”<sup>88</sup> If the design elements are not functionally required, the work is protectable “without regard to physical or conceptual separability.”<sup>89</sup> The House Report does not expressly provide for the result if the elements are functional; whether the elements, and thus the entire work, are precluded from copyright protection or whether some other test should apply is unclear.<sup>90</sup>

The real question of scope falls in the hands of the courts.<sup>91</sup> Despite the guiding definitions in the AWCPA and the non-functionality test from Congress, courts have struggled with creating a workable test for the scope of protection for architectural works. The proper analysis of architectural works has created a split in the federal appellate courts between the “categorical test” and the “dissection test.”<sup>92</sup>

## 2. *The Eleventh Circuit’s Categorical Test*

The Eleventh Circuit created the categorical test in *Intervest Construction, Inc. v. Canterbury Estate Homes, Inc.*, which plainly limits copyright protection for architecture by stamping a “compilation” designation

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87. See *supra* Part I.A.

88. H.R. REP. NO. 101-735, at 20–21, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951–52 (“The Committee does not suggest, though, that in evaluating the copyrightability or scope of protection for architectural works, the Copyright Office or the courts should ignore functionality.”). Some examples of functional elements in architectural design may include the following: “structural members, spatial volumes, circulation, mechanical and electrical systems, and construction methods.” Gregory B. Hancks, Comment, *Copyright Protection for Architectural Design: A Conceptual and Practical Criticism*, 71 WASH. L. REV. 177, 192 (1996).

89. H.R. REP. NO. 101-735, at 21, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6952.

90. See *id.* at 6952. The Report states that “[i]f the design elements are not functionally required, the work is protect[able] without regard to physical or conceptual separability.” *Id.* This statement is not clear. According to this sentence, Congress might apply the separability test to functional elements, which is in conflict with its ban on the use of separability in the analysis for architectural works.

91. See *id.* (“[T]he Copyright Office should issue a certificate of registration, letting the courts determine the scope of protection. In each case, the courts must be free to decide the issue upon the facts presented, free of the separability conundrum presented by the useful articles doctrine applicable for pictorial, graphic, and sculptural works.”); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 34 n.5 (1st Cir. 2001) (“The extent to which the [copyrighted work] contain[s] protected expression is a matter of law, determined by the court.”).

92. Compare *Intervest Constr., Inc. v. Canterbury Estates Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008), with *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95 (2d Cir. 2014).

on all architectural works.<sup>93</sup> 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 constitutes an original work of authorship.”<sup>94</sup> Some examples of compilations include a directory compiled with information taken from the white pages,<sup>95</sup> a book of poems,<sup>96</sup> and a software company database.<sup>97</sup>

The dispute in *Intervest* arose over an infringement claim by a builder that held a copyright in the design of a four-bedroom home.<sup>98</sup> The builder claimed that another similarly arranged four-bedroom home design infringed on his copyright.<sup>99</sup> The court began its analysis by proffering that all copyrightable works should be assigned to one of three categories: creative works, derivative works, or compiled works.<sup>100</sup> The court categorized architectural works as compilations, relying on similarities between the statutory definitions of an architectural work and a compilation as well as the fact that the elements the *Intervest* plaintiff attempted to protect were all “common elements.”<sup>101</sup> After finding that architectural works should be considered compilations, the court cited the Supreme Court case *Feist Publications, Inc. v. Rural Telephone Services Co.*<sup>102</sup> for the proposition that compilations are afforded “thin”

93. *Intervest Constr.*, 554 F.3d at 919.

94. 17 U.S.C. § 101 (2012).

95. *See, e.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

96. *See, e.g.*, *Silverstien v. Penguin Putnam, Inc.*, 368 F.3d 77 (2d Cir. 2004).

97. *See, e.g.*, *Maddison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 387 F. Supp. 2d 521 (M.D.N.C. 2005).

98. *Intervest Constr.*, 554 F.3d at 916.

99. *Id.* The court went into painstaking detail to describe the differences and similarities between the two houses. For example:

Each floor-plan depicts a four-bedroom house, with one bedroom being denominated as a ‘master’ bedroom or suite. Each floor plan includes a: two-car garage; living room; dining room; ‘family’ room; foyer; ‘master’ bathroom; kitchen; second bathroom; nook; and porch/patio. Each floor-plan also reflects certain ‘elements’ common to most houses . . . .

*Id.*

100. *Id.* at 919 n.3 (“An example of a creative work is a novel. An example of a derivative work is a screenplay based on a novel . . . . An example of a compilation is [the floor plans at issue in this case].” (quoting *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1515 n.16 (11th Cir. 1997))).

101. *Id.* at 919. The court treated the “common elements” like “standard features” as defined by the statute and labeled rooms, windows, doors, and “other staple building components” as standard elements. *Id.*

102. 499 U.S. 340 (1991). In *Feist*, the plaintiff asserted copyright protection for a telephone book. *Id.* at 344. The Supreme Court found that protection could be afforded to the telephone book as a compilation, but only if the arrangement of the un-copyrightable elements was original. *Id.* at 358. The Court held that the arrangement was a standard alphabetical listing that furnished no protection under copyright. *Id.* at 358.

protection.<sup>103</sup> A “thin” copyright “protects against only virtually identical copying,” which means that a modest dissimilarity is more significant than it would be for another, more robustly protected work.<sup>104</sup> Thus, the court reasoned that the scope of copyright protection for all architectural works is exceedingly small, holding that protection should be “viewed through the narrow lens of compilation analysis.”<sup>105</sup>

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103. *Intervest Constr.*, 554 F.3d at 919. “Thin” protection is an infringement term that the Eleventh Circuit uses to define the scope of protection. *Id.* “Thin” in this context refers to the original contribution by the creator as being minimal. The Second Circuit equates “thin” protection to a slight contribution from the author. *See Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 107 (2d Cir. 2014) (“[The architect’s] original contribution was slight—his copyright very thin.”). Other circuits have also used “thin” to describe the scope of protection. *See, e.g., Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (“[Plaintiff’s] copyright on these original elements (or their combination) is ‘thin,’ however, comprising no more than his original contribution to ideas already in the public domain.”).

104. *See, e.g., Satava*, 323 F.3d at 812. The *Intervest* court does not define “thin” protection. *See Intervest Constr.*, 554 F.3d at 921. *Fiest* also neglects to define “thin” protection but explains in the context of compilations it means that “[n]otwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.” *Feist*, 499 U.S. at 349; *see also Transwestern Publ’g Co. v. Multimedia Mktg. Assoc.*, 133 F.3d 773, 776 (10th Cir. 1998) (“[I]f substantial similarity is the normal measure required to demonstrate infringement, ‘supersubstantial’ similarity must pertain when dealing with ‘thin’ works.” (quoting *NIMMER & NIMMER*, *supra* note 36, at § 13.03(A)); *see also, Honeywell Int’l, Inc. v. W. Support Grp., Inc.*, 947 F. Supp. 2d 1077, 1082 (D. Ariz. 2013) (A “thin” copyright “protects against only virtually identical copying.”).

For example, in *Dream Custom Homes, Inc. v. Modern Day Construction, Inc.*, the court held that because architecture is only afforded “thin” protection, the architectural plans in question were not unique enough in overall design to outweigh the differences between the two plans. 773 F. Supp. 2d 1288 (M.D. Fla. 2011). Similarly in *Miller’s Ale House, Inc. v. Boynton Carolina Ale House, LLC*, the Eleventh Circuit applied its compilation analysis stating that the differences between two restaurant designs were dramatic and overwhelming while the similarities were only broad and conceptual and included common features of a sports bar or restaurant. 702 F.3d 1312, 1326 (11th Cir. 2012).

105. *Intervest Constr.*, 554 F.3d at 919. Other cases have also followed this line of reasoning. *See, e.g., Miller’s Ale House, Inc.*, 702 F.3d at 1326; *Jeff Benton Homes v. Ala. Heritage Homes, Inc.*, 929 F. Supp. 2d 1231, 1252 (N.D. Ala. 2013); *Dream Custom Homes, Inc.*, 773 F. Supp. 2d at 1290; *Harvester, Inc. v. Rule Joy Trammell Rubio, LLC*, 716 F. Supp. 2d 428, 441 (E.D. Va. 2010).

### 3. *The Second Circuit's Dissection Test*

The Second Circuit criticized the Eleventh Circuit's categorical test in *Zaleski v. Cicero Builder Development, Inc.*,<sup>106</sup> another single-family-home copyright-infringement case.<sup>107</sup> The court dismissed the plaintiff-architect's copyright infringement claim against builders for continued use of his colonial home designs after the licenses granted had expired.<sup>108</sup> The *Zaleski* plaintiff alleged that the defendants copied the "overall size, shape, and silhouette of his designs as well as the placement of rooms, windows, doors, closets, stairs, and other architectural features."<sup>109</sup>

The court asserted that not all artistic works are suited to categorical definitions and that the categories chosen by the Eleventh Circuit were inadequate for analyzing the scope of copyright protection.<sup>110</sup> The court emphasized that at some level, all works of art are compilations of uncopyrightable individual elements—a painting is a compilation of uncopyrightable colors, a song is a compilation of uncopyrightable notes, and a book is a compilation of uncopyrightable words.<sup>111</sup> The court further explained that the Eleventh Circuit's analogy between the statutory definitions of a compilation and an architectural work was unsupported.<sup>112</sup> Although both definitions speak of a work including the joining of uncopyrightable features, many of the other categories protected under the Copyright Act—such as literary works, sound recordings, motion pictures, and audio visual works—do as well.<sup>113</sup> According to the Second Circuit, by labeling architectural works as

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106. 754 F.3d at 103–04.

107. *Id.* at 109. Although the court announced a sweeping decision on the scope of copyright protection for architectural works, *Zaleski* provided a unique factual situation. The plaintiff filed four amended complaints and included numerous defendants in addition to the defendant architect firm (such as engineers, real estate agents, the owners of the alleged infringing home, etc.) then subsequently dismissed most defendants. *Id.* at 99. The *Zaleski* plaintiff's actions may have pushed the court to apply a more rigorous application of the dissection test than the court would have in another factual circumstance. Nonetheless, *Zaleski* remains the law in the Second Circuit.

108. *Id.* at 102.

109. *Id.* at 99.

110. *Id.* at 103–04.

111. *Id.* at 103.

112. *Id.* at 104.

113. *Id.* at 103–04 (“[T]he statute defines ‘Literary works’ as ‘words, numbers, or other . . . symbols’ arranged in ‘books, periodicals’ or other media; ‘Sound Recordings’ as ‘a series of musical, spoken, or other sounds’; a ‘computer program’ as ‘a set of statements or instructions’; and ‘Motion Pictures’ and ‘Audio Visual works’ as ‘series of related images.’” (quoting 17 U.S.C. § 101 (2012))).

compilations, the Eleventh Circuit dodged the real issue—creating a true scope of protection for architectural works.<sup>114</sup>

The *Zalewski* court concluded that the central issue was whether the defendant's copying was wrongful—whether the defendant copied protected elements of the plaintiff's work.<sup>115</sup> To answer this question and thus establish the scope of protection for the architectural works, the court focused on what is not afforded copyright protection: elements that either have utilitarian function or are unprotectable based on the *scènes-à-faire* or merger doctrines.<sup>116</sup> The court determined that many of the similarities between the two home designs at issue in the case were “a function of consumer expectations and standard house design” or were features of all colonial homes and lacked originality.<sup>117</sup> The court, therefore, excluded the designs from protection on the basis of utilitarian function or *scènes-à-faire*.<sup>118</sup> The court pointed out that the plaintiff did not “distinguish those aspects of his designs that were original to him from those dictated by the [the colonial style] in which he worked.”<sup>119</sup> The court concluded, therefore, that none of the elements copied by the defendants were within the scope of copyright protection.<sup>120</sup>

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114. *Id.* (“The challenge . . . is not to determine whether a work is a creative work, a derivative work, or a compilation, but to determine what in it originated with the author and what did not.”). The court also noted that *Intervest* offered no definition of what made a feature “common.” *Id.* at 104. However, it is likely that by “common features,” the *Intervest* court was referring to “standard features.”

115. *Id.* at 100–02 (“[I]n many cases *any* copying of a work is wrongful, [but]. . . [n]ot every portion or aspect of a copyrighted work is given copyright law’s protection. Copying these aspects of a work is not wrongful, and thus not *all* copying is wrongful.”). See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 813 (1st Cir. 1995). The court uses the infringement standard as a starting point for determining the scope of copyright protection. *Zalewski*, 754 F.3d at 100. Wrongful copying occurs only if the element in question was protected by copyright in the first place. *Id.*

116. *Zalewski*, 754 F.3d at 105–06. The court explained that when designing a home in a certain style, such as colonial style, the architect is bound by certain conventions. *Id.* at 106. The architect may not copyright those conventions because they are not original to the architect. *Id.* The court also gave the following example: “Great artists often express themselves through the vocabulary of existing forms. Shakespeare wrote his *Sonnets*; Brahms composed his *Hungarian Dances*; and Plaintiff designed his colonial houses. Because we must preserve these forms for future artists, neither iambic pentameter, nor European folk motifs, nor clapboard siding are copyrightable.” *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 106.

120. *Id.*

### III. FUNCTIONALITY, CATEGORIZATION, AND DISSECTION AND THEIR UNWARRANTED RIGOROUS APPLICATION

Each of the three tests that a court may use to determine the scope of protection of an architectural work—non-functionality, categorical, and dissection—may produce acceptable results in the case of commonplace or “cookie-cutter” buildings in that they are unlikely to result in a finding of infringement short of exact copying.<sup>121</sup> These types of buildings arguably deserve little to no protection because they are largely or entirely unoriginal in a copyright sense. However, inattentive application of these tests will lead to inadequate copyright protection for more creative and complex architecture. Inadequate protection, in turn, will undermine the constitutional aims of intellectual property law.<sup>122</sup> Application of each of these tests may so limit the scope of protection for architectural works that architects are no longer encouraged to create works.<sup>123</sup> The congressional non-functionality test incorporates the banished separability analysis, the Eleventh Circuit’s categorical test inappropriately categorizes architecture, and the Second Circuit’s dissection test requires careful attention to avoid overlooking original design aspects.

#### *A. Congress’s Non-Functionality Test: The Separability Test by a Different Name*

Congress adamantly renounced application of the separability test for architectural works yet inserted in the AWCPA House Report a non-functionality requirement that is remarkably similar to the separability test. The first part of the test, which asks “whether there are original design elements present, including overall shape and interior architecture” is appropriate,<sup>124</sup> originality is the cornerstone of copyright law, and without originality, protection cannot exist.<sup>125</sup> The difficulty arises with the second part of the test—the non-functionality requirement—when it is applied to the overall form of a work. All architectural works have some inherent functionality. Congress acknowledged as much by stating that its use of the word

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121. See, e.g., *Intervest Constr., Inc. v. Canterbury Estates Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008); *Zalewski*, 754 F.3d 95.

122. See *supra* Part I.A.

123. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“[Copyright] is intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.” (quoting *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 36 (1939)) (internal quotation marks omitted)).

124. H.R. REP. NO. 101-735, at 19 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951.

125. See *supra* Part I.A.

“building” encompasses “*habitable* structures such as houses and office buildings” and “structures that *are used*, but not inhabited, by human beings.”<sup>126</sup> Practically speaking, a court finding that a building’s overall form meets the non-functionality requirement would seem inconceivable, even if that form is original, because the overall form of most buildings is impossible to conceptually separate from its utilitarian function.<sup>127</sup>

Under Congress’s non-functionality test, protection for buildings will only include protection of certain individual elements except in some extreme circumstances.<sup>128</sup> For example, although a roof is functionally required because it keeps the inhabitants and interior safe from the elements, shaping a roof like a sheet of curved metal fabric is not required to functionally shield inhabitants from the elements. As a result, this sort of element design could pass the non-functionality test.<sup>129</sup> A specific, original curved metal roof is a design choice not highly constrained by functional considerations. Instead, the architect likely chose that shape strictly for its aesthetic appeal. Although Congress’s test would provide copyright protection for the creative roof in this example, the underlying logic is, in essence, the conceptual separability test.<sup>130</sup> The conceptual separability

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126. H.R. REP. NO. 101-735, at 20, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951 (emphasis added). Some examples of buildings provided by the House Report include: “churches, pergolas, gazebos, and garden pavilions.” *Id.*

127. *See* Shipley, *supra* note 46, at 426 (“[A]esthetic elements of some articles are so inextricably interwoven with the item’s utilitarian aspects that there are no features that can be separated conceptually, let alone physically, to stand alone as copyrightable works.”); *see also* James Bingham Bucher, Comment, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 39 EMORY L.J. 1261, 1273–74 (1990) (“[M]ost works of architecture serve some definite utilitarian purpose, such as providing places to live, work, learn, and play. Yet these works often possess distinct aesthetic qualities as well.”).

128. For example, the Guggenheim, a well-known art museum located on the Upper East Side of Manhattan in New York City, is a design that could possibly pass Congress’s non-functionality requirement for overall form. The form has no functional value, as the building resembles a piece of art instead of a building. *See Check Out These Interesting Photos of the Guggenheim Museum in New York*, BOOMSBEAT, <http://www.boomsbeat.com/articles/2161/20140415/check-out-these-interesting-photos-of-the-guggenheim-museum-in-new-york.htm> [<http://perma.cc/K74R-ND6X>] (last visited March 28, 2015).

129. *See Fisher Center for the Performing Arts*, ABOUT, <http://architecture.about.com/od/greatbuildings/ig/Buildings-by-Frank-Gehry/Fisher-Center.htm> [<http://perma.cc/T3Y2-7M7J>] (last visited Nov. 3, 2014). In fact, roofs are generally at triangular angles and shingled. Therefore, a creative roof design such as one inspired by fabric, passes both parts of Congress’s test—it demonstrates a spark of creativity by the architect and is therefore original and is not functionally required.

130. *See, e.g., Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (holding that application of the separability test “ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations”).



test is simple when applied to this specific fabric-shaped roof; however, in other circumstances this test can be a difficult concept to apply.<sup>131</sup> Application is especially burdensome when, as in much of architecture, creative design elements are deeply intertwined with the functionality of the work.<sup>132</sup> Furthermore, Congress expressly stated that the separability test should not be a part of the copyright protection analysis for architecture.<sup>133</sup> Application of the non-functionality requirement of Congress's two-step test is essentially the banned separability test and will deny protection for overall form in almost all cases. Thus, courts should not rely on its logic in analyzing the scope of copyright protection for architectural works.

*B. Eleventh Circuit Categorical Test: Against the Intent of Congress and Generalized Notions of Copyright Law*

The Eleventh Circuit did not rely on Congress's logic in developing its analysis; rather, the court created an alternative test that may be even less suitable for defining the scope of copyright protection than Congress's non-functionality test.<sup>134</sup> By labeling architectural works as compilations, the Eleventh Circuit declined to answer the real question—how to adequately define the scope of copyright protection.<sup>135</sup> Instead, the court only provided “thin” protection to architectural works without deciding what features should

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131. See, e.g., *Leicester v. Warner Bros.*, 232 F.3d 1212, 1223 (9th Cir. 2000) (labeling the test as “the quagmire of conceptual separability [sic]”).

132. The House Report acknowledges the intertwining of function and aesthetics in architecture stating: “The key to the art of architecture is the conviction and sensitivity with which technology and function are interpreted aesthetically, in solutions of a practical social purpose.” H.R. REP. NO. 101-735, at 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6949 (quoting ADA LOUISE HUXTABLE, *ARCHITECTURE, ANYONE?: CAUTIONARY TALES OF THE BUILDING ART* (1986)).

133. Congress was clear on its intent to remove architecture from the separability test:

By creating a new category of protect[able] subject matter in new section 102(a)(8), and, therefore, by deliberately not encompassing architectural works as pictorial, graphic, or sculptural works in existing section 102(a)(5), the copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles. . . . There is considerable scholarly and judicial disagreement over how to apply the separability test, and the principal reason for not treating architectural works as pictorial, graphic, or sculptural works is to avoid entangling architectural works in this disagreement.

H.R. REP. NO. 101-735, at 20, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951 (internal citations omitted).

134. See *supra* Part II.A.2 (discussing the *Zalewski* opinion's thorough explanation of the flaws in the Eleventh Circuit's analysis).

135. *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 104 (2d Cir. 2014).

or should not be protected.<sup>136</sup> Despite being easier to apply, the Eleventh Circuit's categorical approach is not consistent with the AWCPA. The definition of an architectural work specifically includes "the arrangement and composition of spaces and elements" but does not refer to architecture as a "compilation" as defined in the Copyright Act.<sup>137</sup> The only way an architectural work could be considered a compilation is if an architect took two previously-designed or pre-fabricated homes that were intended to stand alone and connected them side-by-side. The compilation label should be reserved for actual compilations and not used to simplify the analysis for architectural works.

Further, by categorically defining the protection of all architectural works as "thin," the courts are requiring a finding of "super substantial similarity" or near exact copying for all architectural works.<sup>138</sup> This type of "across-the-board" categorization is inappropriate for architecture, because the field of design varies greatly. By adopting this standard, a court would examine a complex and creative design, like the Taliesen, in the same manner as a more common design, like a four-bedroom colonial home. Under a thin protection regime, an unlawful copier could avoid infringement by simply changing window shapes or shutter colors or tweaking the floor plan of Taliesin. This result discourages creation and innovation in the field of architecture by limiting the scope of copyright protection.

### *C. Second Circuit Dissection Method: Best Choice, but Still Not Perfect*

Compared to the Eleventh Circuit's categorization, the Second Circuit stays true to the purpose of copyright protection through its dissection test.<sup>139</sup> The test employs a process of elimination—elements not discarded based on the doctrines of *scènes-à-faire* and merger, functionality, or other public domain arguments are considered original to the architect and create the scope of protection.<sup>140</sup> If an element does not pass the dissection test, that element is not original and the court does not consider that

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136. *Id.*

137. 17 U.S.C. § 101 (2012).

138. *See supra* note 103.

139. Copyright is contingent on originality of expression. 17 U.S.C. § 102 ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression."). The Second Circuit focused on protection for elements that were original to the architect. *Zalewski*, 754 F.3d at 104 ("The challenge in adjudicating copyright cases is not to determine whether a work is a creative work, a derivative work, or a compilation, but to determine what in it originated with the author and what did not.")

140. *See supra* Part I.A (discussing the copyright doctrines).

element under the infringement analysis.<sup>141</sup> For more common designs such as ordinary colonial homes—as was the case in *Zalewski*—this process alleviates the issue of standard features being available for future architects because the process places an emphasis on scrutinizing each individual element.<sup>142</sup> This important and useful feature of the dissection test ensures progress in the field of architecture by leaving standard building blocks available for use in future designs. Further, the dissection test is aligned with the AWCPA, which specifically excludes standard features from copyright protection.<sup>143</sup>

However, in many cases, mechanically following the dissection test will result in a premature elements analysis that ignores the originality of large-scale groupings of elements<sup>144</sup> and overall form.<sup>145</sup> As one commentator suggests, “[t]he risk of a rigorous application of the subtractive [or dissection] approach is in missing the protectable forest for the unprotect[able] trees.”<sup>146</sup> In *Zalewski*, the Second Circuit ignored some potentially original aspects of the overall design of the home in favor of a simpler test: the work is categorically not protectable if some of the elements are based on a pre-established style, which makes the work unoriginal to the author.<sup>147</sup> Not only is this sort of categorical analysis reminiscent of the Eleventh Circuit’s

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141. See *supra* note 116.

142. *Zalewski*, 754 F.3d at 97.

143. 17 U.S.C. § 102(b).

144. Large scale groupings of elements are features of the building that are made up of many other elements and when taken as a whole could be considered original. See, e.g., John Morris Dixon, *The Broad*, ARCHITECT (Feb. 1, 2014), [http://www.architectmagazine.com/cultural-projects/the-broad\\_o.aspx?dfpzone=awards\\_pa\\_a\\_wards](http://www.architectmagazine.com/cultural-projects/the-broad_o.aspx?dfpzone=awards_pa_a_wards) [<http://perma.cc/7TFS-WQK9>] (an entryway); *Brooklyn Botanic Garden Visitor Center*, ARCHITECT (Sept. 15, 2012), <http://www.architectmagazine.com/projects/view/brooklyn-botanic-garden-visitor-center/528/> [<http://perma.cc/3MDE-QM4Q>] (a roof overhand); John Gendall, *Cloverdale749*, ARCHITECT (Dec. 18, 2013), [http://www.architectmagazine.com/multifamily/cloverdale749\\_o.aspx?dfpzone=general](http://www.architectmagazine.com/multifamily/cloverdale749_o.aspx?dfpzone=general) [<http://perma.cc/ZA7W-SCK2>] (a façade). One can further break down each of these features into elements that may or may not be protectable. When taken as a whole to form a large scale feature of the building, however, copyright protection may be appropriate.

145. See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979–80 (2d Cir. 1980) (“By factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author’s expression.”); see also Shipley, *supra* note 9, at 41.

146. Shipley, *supra* note 9, at 41.

147. See *Zalewski*, 754 F.3d at 107 (“Although he undoubtedly spent many hours on his designs, and although there is certainly something of Plaintiff’s own expression in his work, as long as Plaintiff adhered to a pre-existing style his original contribution was slight—his copyright very thin. Only very close copying would have taken whatever actually belonged to Plaintiff.”).

flawed categorical test, but the analysis reaches an incorrect conclusion.<sup>148</sup> If the work is based on an established style, many design aspects are likely copies of that style, and, therefore, the overall form may not contain the requisite originality. The fact that a work is based on an established style, however, should not render the work categorically unprotectable. If originality is present in the work, the court should protect the work regardless of the source of the inspiration.<sup>149</sup>

Although the court's rigorous application of the dissection test may have produced acceptable results in the *Zalewski* case, the same rigorous application can produce unwanted results in complex cases. The Second Circuit's dissection test ensures that courts do not remove standard features from the public domain for future architects and does not allow a monopoly over an established style. The courts need to apply the test flexibly, or else they will unintentionally leave unprotected the overall form of original works or large-scale groupings of original.<sup>150</sup> A careful application of the dissection test can be informed by the court's treatment of other works that weave functionality into creative design.

#### IV. SIMILAR COMPLEX WORKS OFFER INSIGHT INTO THE SCOPE OF PROTECTION FOR ARCHITECTURE

Determining the boundaries of copyright protection in non-traditional areas of creative expression is not unique to architecture.<sup>151</sup> Subject matters exist—especially in applied design—that Congress did not include in the original copyright acts but could aptly protect through copyright.<sup>152</sup> The Second Circuit has developed a specific dissection test for computer programs, which have similar inherent-functionality concerns as architectural works.<sup>153</sup> In other areas that deal with inherently functional

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148. A court does not categorically deny a colonial style home protection. Just because a certain style inspires an architect, does not preclude originality and to allow another to copy original expression of that style is against the principles of copyright law. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249–52 (1903) (“Others are free to copy the original. They are not free to copy the copy.”).

149. *Zalewski*, 754 F.3d at 104 (“Courts should treat architectural copyrights no differently than other copyrights.”). The statute does not state whether courts should treat architectural works, as a subcategory of section 102, any differently than any of the other subcategories. *See* 17 U.S.C. § 102 (2012). The language is broad and inclusive. *Id.* (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”).

150. See the Taliesin discussion in the Introduction for an example of the risk of original elements of a unique work being left unprotected.

151. *See* *Mazer v. Stein*, 347 U.S. 201, 213 (1954).

152. *Id.*

153. *See infra* Part V.A.

works, such as with computer programs and industrial design, Congress has designed unique protection regimes that courts can tailor to avoid allowing overreaching copyrights that hinder progress and competition.<sup>154</sup>

#### A. Computer Programs

Computer programs enjoy the same copyright statutory protections as architecture under the “literary works” category.<sup>155</sup> Computer programs consist of literal and non-literal components, both of which can be the subject of copyright protection.<sup>156</sup> The code’s interaction with the computer hardware and operating system generates non-literal components.<sup>157</sup> Examples of nonliteral elements of a computer program include its screen displays and the main menu.<sup>158</sup> Literal elements are the object or binary code that the computer reads and the source code that a human creates and can read.<sup>159</sup>

Like all copyrightable subject matter, protection for a computer program requires originality and does not include standard features.<sup>160</sup> Computer

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154. See *infra* Part V.B.

155. 17 U.S.C. § 102 (2012).

156. *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476 (10th Cir. 1993); *Computer Assocs. Int’l v. Altai*, 982 F.2d 693, 702 (2d Cir. 1992) (“[I]f the non-literal structures of literary works are protected by copyright; and if computer programs are literary works, as we are told by the legislature; then the non-literal structures of computer programs are protected by copyright.”); *Johnson Controls, Inc. v. Phx. Control Sys., Inc.*, 886 F.2d 1173, 1177 (9th Cir. 1989) (“Nonliteral components of computer software [such as structure, sequence and organization and user interface] may be protected by copyright where they constitute expression, rather than ideas.”); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) (computer code expressed in object code or embedded in an electronic read-only memory device can be the subject of a copyright).

157. *MiTek Holdings v. Arce Eng’g Co.*, 89 F.3d 1548, 1555 n.15 (11th Cir. 1996).

158. *Id.*

159. See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 533 (6th Cir. 2004).

160. *ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700 (6th Cir. 2005) (holding that automobile parts cataloging program was not copyrightable as the sole way of expressing those ideas, invoking the merger doctrine); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923 (7th Cir. 2003) (holding that tables in computer program were copyrightable because configuration was avoidable and many other options remained); *Montgomery v. Noga*, 168 F.3d 1282 (11th Cir. 1999) (holding that computer program improving features of earlier versions was sufficiently original to obtain protection); *MiTek Holdings*, 89 F.3d at 1557 (holding that drafting program’s command structure was not copyrightable because it was a basic industry standard process equally performable as hand calculation); *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807 (1st Cir. 1995) (holding that computer menu command hierarchy was not a copyrightable subject matter as a “method of operation”); *Apple Computer Inc. v.*

programs, like architectural works, are inherently functional and blur the line between idea and expression.<sup>161</sup> When analyzing the copyrightability of computer programs, courts rule out features dictated by outside forces.<sup>162</sup> For architecture, the external forces are consumer preferences and engineering standards, although for computer programs, external factors include hardware standards and mechanical specifications.<sup>163</sup> In determining the scope of protection for computer programs, courts utilize the familiar doctrines of *scènes-à-faire* and merger.<sup>164</sup> Courts have also held, like

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Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994) (holding that graphic user interface consisting only of basic ideas and their obvious expressions was not copyrightable); Eng'g Dynamics v. Structural Software, 26 F.3d 1335 (5th Cir. 1994) (holding that engineering problem-solving program requiring large amounts of user input was copyrightable based on uniqueness, originality, and existence of other dissimilar products on the market designed for the same function); Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 525 (9th Cir. 1984) (holding that operating system was copyrightable, because the idea it expressed was capable of other modes of expression).

161. *Computer Assocs. Int'l*, 982 F.2d at 704 (“The essentially utilitarian nature of a computer program further complicates the task of distilling its idea from its expression. In order to describe both computational processes and abstract ideas, its content ‘combines creative and technical expression.’ . . . [C]ompared to aesthetic works, computer programs hover even more closely to the elusive boundary line described in § 102(b).” (internal quotations omitted)); see also H.R. REP. NO. 94-1476, at 57 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670 (“Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.”); Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering Out “Total Concept and Feel”*, 101 NW. U. L. REV. 1851, 1876–79 (2007) (providing an extensive discussion of the similarities between architecture and user-interface designs).

162. See, e.g., *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 838 (10th Cir. 1993) (“In the area of computer programs these external factors may include: hardware standards and mechanical specification.”).

163. *Id.*

164. See, e.g., *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1015 (7th Cir. 2005) (“In presenting a realistic video golf game, one would, by definition, need golf courses, clubs, a selection menu, a golfer, a wind meter, etc. Sand traps and water hazards are a fact of life for golfers, real and virtual. . . . As such, the video display is afforded protection only from virtually identical copying.”); *Lexmark Int'l*, 387 F.3d at 535 (“For computer programs, ‘if the patentable process is embodied inextricably in the line-by-line instructions of the computer program . . . then the process merges with the expression and precludes copyright protection.’” (quoting *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 839–40 (Fed. Cir. 1992))); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982) (“The maze and scoring table are standard game devices, and the tunnel exits are nothing more than the commonly used ‘wrap around’ concept adapted to a maze-chase game.”).

architecture, that even if the whole program is not protectable, pieces of the program may be.<sup>165</sup>

Also similar to architecture, the federal appellate courts have developed two alternative tests for the scope of protection for computer programs.<sup>166</sup> The first test, known as the structure, sequence, and organization test arose in the Third Circuit.<sup>167</sup> The first step of this test is to determine the purpose of the program.<sup>168</sup> The purpose or function of the work is analogous to the work's idea, and courts consider all elements that are not necessary to that purpose the protectable expression.<sup>169</sup> Stated differently, if other means of reaching the defined purpose exist, then the chosen method is expression, not idea, and thus is copyrightable.<sup>170</sup> Some courts have followed this method,<sup>171</sup> but courts more often criticize than adopt this test.<sup>172</sup> Critics claim that a structure, sequence, and organization analysis "casts too broad a net" by assuming that there is only one idea that underlies a program and that the one purpose will be easily identified.<sup>173</sup>

Applied to architecture, this test may become useful when a work is created under an established style, such as a colonial-styled home.<sup>174</sup> The identified purpose would be the colonial style. Anything in the design that courts do not consider part of the colonial style would be copyrightable as long as the design element met the originality requirement. Outside of this context, this test does not have merit in the analysis for architectural

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165. *Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118 F.3d 955, 964 (2d Cir. 1997); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129 (11th Cir. 2007).

166. *Compare Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), with *Computer Assocs. Int'l*, 982 F.2d 693.

167. *Whelan Assocs.*, 797 F.2d at 1224.

168. *Id.* at 1236.

169. *Id.*

170. *Micro Consulting, Inc. v. Zubeldia*, 813 F. Supp. 1514, 1526 (W.D. Okla. 1990).

171. *Bull HN Info. Sys., Inc. v. Am. Express Bank Ltd.*, No. 88 CIV. 2103 (SWK), 1990 WL 48098, at \*3 (S.D.N.Y. Apr. 6, 1990); *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127, 1133 (N.D. Cal. 1986); see also *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 535 (5th Cir. 1994) (referring to the test with approval); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 832-33 (10th Cir. 1993) (finding the test to be useful, but instead employing the alternative test).

172. *Computer Assocs. Int'l v. Altai*, 982 F.2d 693, 705 (2d Cir. 1992) (providing a summary of the discontent over the test in the academic community).

173. *Id.* ("[A] computer program's ultimate function or purpose is the composite result of interacting subroutines. Since each subroutine is itself a program, and thus, may be said to have its own 'idea,' *Whelan's* general formulation that a program's overall purpose equates with the program's idea is descriptively inadequate.")

174. Many single-family homes are based on some traditional style. Because most litigation occurs over single-family homes, this test could have far reaching effects if adopted. See *supra* Part.III.B.

works. Just as the critics of the test for computer programs have stated, identifying the specific purpose of a work is difficult if not impossible.<sup>175</sup>

The more widely applied test for determining the scope of copyright protection for computer programs is the abstraction-filtration-comparison test.<sup>176</sup> In *Computer Associates International v. Altai*,<sup>177</sup> the Second Circuit devised a three-step test that is similar to the dissection test used in *Zalweski*.<sup>178</sup> The first step, abstraction, “recognizes that any given work may consist of a mixture of numerous ideas and expressions.”<sup>179</sup> Similar to reverse engineering, the court dissects the program by retracing the steps of the program designer and breaking down each level of the hierarchy of the program.<sup>180</sup> The second step, filtration, requires examining each abstraction task and determining whether including that task at that level could be considered an unprotectable idea based on efficiency, necessity, external factors, or public domain elements.<sup>181</sup> This filtration step serves “the purpose of defining the scope of plaintiff’s copyright.”<sup>182</sup> The final step is the comparison step, which involves comparing the “golden nugget”—those elements that courts do not consider to be ideas dictated by efficiency or necessity or taken from the public domain—with the infringing work.<sup>183</sup> The abstraction-filtration-comparison test is the most accepted analysis for computer programs.<sup>184</sup>

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175. See *Computer Assoc. Int’l*, 982 F.2d at 705.

176. See *infra* note 184 (listing the courts that have followed this method).

177. 982 F.2d 693.

178. *Id.* at 703.

179. *Id.* at 707 (quoting 3 NIMMER & NIMMER, *supra* note 36 at § 13.03[F]).

180. For example, take a program that identifies all of the even numbers of a set of input numbers and then multiplies them together. The highest level of abstraction would be the idea for the program itself: to identify even numbers and multiply them. Then the program can be broken down into three main subtasks: (1) decide if a number is even, (2) multiply the set of even numbers, and (3) output the answer. Moving further away from abstraction, within these subtasks, other subtasks exist. For subtask (1), one possible sub-subtask would include dividing each inputted number by two and a second sub-subtask would be determining if the resulting number was a fraction or not. At this sub-subtask level, the program would be at its least abstract.

181. *Computer Assocs. Int’l*, 982 F.2d at 707.

182. *Id.* (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475 (9th Cir.)).

183. *Id.* at 710.

184. See *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014); *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396 (5th Cir. 2000); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996); *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476 (10th Cir. 1993); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823 (10th Cir. 1993); *Baystate Tech., Inc. v. Bentley Sys., Inc.*, 946 F. Supp. 1079 (D. Mass. 1996). *Cf.* *Lotus Dev. Corp. v. Borland Int’l*, 49 F.3d 807, 815 (1st Cir. 1995) (“While the *Altai* test may provide a useful framework for assessing the alleged nonliteral copying



The abstraction-filtration-comparison test mirrors the approach that the Second Circuit in *Zalewski* takes: pick apart the design, throw out what falls under public domain, necessity, or idea categories, and then analyze what is left—the “golden nugget.”<sup>185</sup> This analysis was adapted for a computer program that has parts that can be examined independently. Most of the program’s sub-levels are essentially programs themselves; dissecting a program still leaves pieces of a program to analyze. Therefore, the risk of leaving original overall forms unprotected is likely less of a problem for computer programs than for architecture. When an architectural work is dissected, the analysis will generally turn on individual elements that are not themselves architectural works. Carefully applying this method, however, can be appropriate for defining the scope of protection for elements of architectural works when overall form lacks the requisite originality. Courts should use the computer-programming cases that have utilized the abstraction-filtration-comparison test as illustrations when analyzing copyright protection for individual elements of architectural works.

### *B. Industrial Design*

Although courts’ treatment of copyright protection for computer programming offers guidance on applying the originality standard to architectural works, a specialized form of protection could avoid the non-functionality issues altogether. Congress has the ability to extend “various forms of limited protection to industrial design” and has done so through *sui generis* protection for special types of intellectual property.<sup>186</sup> *Sui generis* protection affords copyright-like protection for a limited duration—ten years.<sup>187</sup> This type of protection strikes a balance between ensuring that functional works are not removed from the public domain and incentivizing continued innovation.<sup>188</sup> The standard for originality is generally the same,

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of computer code, we find it to be of little help in assessing whether the literal copying of a menu command hierarchy constitutes copyright infringement.”).

185. *Compare Computer Assocs. Int’l*, 982 F.2d at 707 with *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 106 (2d Cir. 2014). The court’s approach for architectural work is likely based on the approach for computer programs, which came 22 years prior from the same circuit.

186. *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 167 (1989). *Sui generis* protection is a specialized protection scheme to protect rights that fall outside the traditional copyright doctrine. BLACK’S LAW DICTIONARY 1572 (9th ed. 2009).

187. *See, e.g.*, 17 U.S.C. § 904(b) (2012) (ten-year protection for semiconductor chips); 17 U.S.C. § 1305(a) (ten-year protection for boat hulls).

188. *See, e.g.*, H.R. REP. NO. 98–781, at 5–11 (1984), reprinted in 1984 U.S.C.C.A.N. 5750, 5754–60 (“From a Congressional perspective, the unique problems posed by the need to reward creativity, encourage innovation, research

but the non-functionality requirement is relaxed.<sup>189</sup> Some products that have sui generis of protection include semi-conductor chips and boat hulls.<sup>190</sup> In those areas, the creation of the work requires strenuous effort and the work is vulnerable to copying, but the inherent functionality of the product limits the availability of copyright protection.<sup>191</sup>

Sui generis protection is a possible remedy to the current ambiguities in the area of architectural protection. Relying on past works for inspiration is a widely accepted practice in architecture, which is often a deterring factor in affording full duration copyright protection for architectural works.<sup>192</sup> If Congress shortened the duration of the protection, courts may be less hesitant to extend the scope of copyright protection. Therefore, strenuous tests like the Second Circuit's dissection test would be unnecessary. Congress could even define the originality standard for architecture as something higher than a spark.<sup>193</sup> That way, truly creative works would be protected while mundane, standard designs such as the four-bedroom homes in *Zaleswki* and *Intervest* would be excluded from protection.

Customizable protection could be the answer to the complex question of copyright protection for architectural works. However, the Berne Convention requires that architectural works retain full term copyright protection—life of the author plus 50 years.<sup>194</sup> Therefore, if Congress were to amend the Copyright Act to exclude architectural works from full-term copyright protection, the United States would be in violation of the Berne

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and investment in the semiconductor industry while at the same time protecting the interest of the public has called for unique solutions.”).

189. See, e.g., 17 U.S.C. §§ 1301, 1302 (“The designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection . . .”).

190. 17 U.S.C. § 902 (1985) (semiconductor chips); 17 U.S.C. § 1301 (2008) (boat hulls).

191. See, e.g., Regan E. Keebaugh, *Intellectual Property and the Protection of Industrial Design: Are Sui Generis Protection Measures the Answer to Vocal Opponents and a Reluctant Congress?*, 13 J. INTEL. PROP. L. 255, 260 (2005) “Many reasons have been given in support of protecting industrial design” including “that strong design protection will lead to increased innovation and creativity by providing designers with an economic incentive to develop better products.” *Id.* But “the consensus among intellectual property scholars and industrial designers” is that neither copyright, patent, nor trademark law “provides a level of protection that adequately serves the needs of the design community.” *Id.*

192. See Su, *supra* note 161, at 1858–59 (discussing examples of great architectural works derived from other works and the practice of apprenticeships in the architectural field); see also Mow, *supra* note 35, at 868 (“Architecture is a profession that has largely accepted an architect’s general borrowing or imitation of another’s ideas.”).

193. See *supra* note 27.

194. See *supra* note 64.

Convention. Although *sui generis* protection is especially enticing, non-compliance with the Berne Convention is likely not a viable route. Therefore, courts should look to the treatment of computer programs as a model for architectural works with some adjustments based on the need to protect overall form of architectural works.

#### V. PUTTING THE HOUSE BACK TOGETHER AGAIN

Although the other areas that grapple with inherently functional works are informative and three tests have been proffered for copyright analysis, courts are still left with an unclear standard for determining the scope of protection for architectural works. The low originality standard for copyright stands in contrast to the inherent functionality of architectural works and the long-standing practice of architects “borrowing” from existing designs. Some have argued that functionality and accepted inspirational borrowing are insurmountable hurdles to copyright protection, and thus Courts should not afford architecture protection at all.<sup>195</sup> In fact, the Eleventh Circuit comes quite close to this conclusion with its categorical test that ensures all architecture is protected only from near-exact copying.<sup>196</sup> Not only is this position contrary to the wide breadth of protection afforded to other types of copyright-protected works, but the position is also in opposition to the intent of Congress.<sup>197</sup> Congress made clear that courts should afford architecture full copyright protection, but limited the scope of protection to non-functional aspects of the work.<sup>198</sup> This non-functionality requirement does not level with Congress’s ban on the separability test. Defining the elements of a building, especially its overall form, is impossible without considering its functional aspects. This reasoning—filtering out the functional aspects of a work—is the separability test that Congress itself found inappropriate for architectural works by pulling architectural works out from under the “pictorial, graphic, and sculptural” works category.<sup>199</sup> Courts are limited to deciding whether to follow Congress’s non-functionality requirement or its ban on the separability test.

Instead, courts should use the Second Circuit’s dissection test, with some modifications, when faced with a copyright infringement case for architectural works. The dissection test offers an analytical approach to dealing with functional elements that are inherent in the form of the work and ensures that standard elements of architectural design are available for future architects. A strict application of the dissection test, however, could leave the overall form of the building and even some original elements

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195. See Bucher, *supra* note 127.

196. See *supra* Part IV.B.

197. See *supra* Part III.A.

198. *Id.*

199. See *supra* Part I.B.

without protection. To remedy this issue, courts should add a specific step to the dissection test for architectural works and apply the dissection method less rigorously. Courts should first analyze the overall form of the building, and then analyze the individual elements under the dissection method.

*A. Step One: Protecting the Original Overall Form*

When utilizing the modified dissection method, the initial inquiry the courts should ask is whether the overall form of the building demonstrates a recognizably, non-trivial variation.<sup>200</sup> Courts should analyze overall form first because an architectural work is often more complex than other artistic endeavors and is composed of “numerous aesthetic decisions” designed to create a whole.<sup>201</sup> An architect combines excerption, modification, and arrangement of public-domain compositions with “the development and representation of wholly new motifs and the use of texture and color, etc.” to form the finished product.<sup>202</sup> For example, the beauty in a gothic cathedral is not in any one pointed arch but in the relationship between hundreds of pointed arches of varying sizes and degrees. An architect’s work is most reflected through the whole rather than individual features. Further, by examining the work as a whole and not as a set of dissected

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200. *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981) (“Anyone can copyright anything, if he adds something original to its expression.”); *Yankee Candle Co. v. New Eng. Candle Co.*, 14 F. Supp. 2d 154, 158 (D. Mass. 1998) (“Courts have routinely protected modern architectural structures, such as commercial homes, that possess the minimal amount of originality that copyright law requires . . .”).

201. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003); *see* H.R. REP. NO. 101-735, at 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6949 (“The phrase ‘arrangement and composition of spaces and elements’ recognizes that: (1) creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotect[able] elements into an original, protectable whole; (2) an architect may incorporate new, protect[able] design elements into otherwise standard, unprotect[able] building features; and (3) interior architecture may be protected.”); *see also* *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97, 115 (1st Cir. 2006) (“Copyright protection exists . . . in the architectural work taken as a whole”); *Cornerstone Home Builders, Inc. v. McAllister*, 303 F. Supp. 2d 1317, 1320 (M.D. Fla. 2004) (“This distinguishing ‘look and feel’ . . . is subject to protection.”); *Arthur Rutenberg Homes v. Maloney*, 891 F. Supp. 1560, 1566 (M.D. Fla. 1995) (“[L]ike all modern homes, [the designs in question] are comprise[d] of many standard features (e.g., doors, windows, a staircase), the overall arrangement of these features, all of which provide a ‘look’ and ‘feel’ to a home, distinguishes [the designs] from other homes.”); MATTHEW FREDERICK, 101 THINGS I LEARNED IN ARCHITECTURE SCHOOL 51 (2007) (“Beauty is due more to harmonious relationships among the elements of a composition than to the elements themselves.”).

202. *Tufenkian Imp./Exp. Ventures*, 338 F.3d at 134.

features, courts will stay true to the definition of architecture in the AWCPA, which states that an architectural work includes “*overall form* as well as the arrangement and composition of spaces and elements.”<sup>203</sup>

That courts should protect the overall form of an architectural work is a logical conclusion.<sup>204</sup> How much protection courts should give the overall form, however, is what has animated the courts. Architecture is unique from other types of works protected by copyright in that drawing inspiration from existing designs is an acceptable practice.<sup>205</sup> Therefore, one of the reasons that courts struggle with affording protection to buildings is because that protection would hinder the work of future architects contrary to the constitutional mandate that copyright promote progress in the arts. Clearly, if a court affords a four-bedroom colonial home copyright protection, not every architect who wishes to design a four-bedroom colonial home should have to pay a licensing fee. But when affording protection to overall form, courts run the risk of monopolizing entire styles of architecture.

The infringement standard—substantially similar—does not clarify the issue. For example, all colonial homes will be substantially similar to one another. If that is the standard, once the first colonial home is copyrighted, all subsequent designs will be at risk for infringement. To adequately provide protection for the overall form of truly unique designs, courts must rethink the substantially similar standard for infringement based on the type of work.

The level of protection for overall form should be on a sliding scale ranging from the “thin” protection that requires near identical copying or “super substantial similarity” to the normal substantially similar standard.<sup>206</sup> The more unique the building, the higher the protection the overall form should receive. For example, the overall form of the Taliesen should receive protection from copying that results in a substantially similar work while a four-bedroom colonial home should receive protection only from near-exact copying. Courts have recognized the need to deviate from the substantial similarity test when a work has “both protect[able] and unprotect[able] elements,” which is often the case with architecture.<sup>207</sup> Therefore, courts must decide the level of copying necessary to constitute infringement based on the creativity of the overall form. The sliding scale of protection acknowledges

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203. 17 U.S.C. § 101 (2012) (emphasis added).

204. *Id.*

205. *See supra* note 192.

206. *See supra* note 103; *see also* Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66–68 (2d Cir. 2010) (providing an example of the court applying the substantial similarity standard to the overall feel of a building).

207. Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 123 (2d Cir. 1994).

that courts should protect the overall form of an architectural work while ensuring that less creative overall forms do not disrupt innovation in the field. This analysis would also specifically outlaw the categorical test. Instead of inappropriately applying the substantial similarity standard across the board, this test recognizes the need to accommodate the wide range of complexities and originality in architecture.

Analyzing the overall form first is a necessary step; courts must vigilantly avoid applying the dissection test prematurely by analyzing elements in a vacuum for originality.<sup>208</sup> As the Second Circuit has noted, “[b]y factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author’s expression.”<sup>209</sup> The aim is not to solely protect features such as ornate shutters or artistic chimney shapes, but rather to protect an architect’s entire work while leaving standard features free for future innovation. Some architectural works, however, do not have an original overall form, but may still contain original elements. Likewise, those that do have an original overall form may still have specific elements that deserve copyright protection.<sup>210</sup> Therefore, the next step in determining the scope of copyright protection is to apply the Second Circuit’s dissection test and analyze individual elements for protection.

### *B. Step Two: Protecting Individual Elements*

The dissection test focuses on originality through a process of elimination to ensure that overreaching copyrights do not hinder future architectural innovation.<sup>211</sup> By factoring out features that are solely a function

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208. *Peter F. Gaito Architecture*, 602 F.3d at 66 (“[W]e have disavowed any notion that we are required to dissect the works into their separate components, and compare only those elements which are in themselves copyrightable.” (quoting *Knitwaves, Inc. v. Lollytogs Ltd. Inc.*, 71 F.3d 996, 1002 (2d Cir. 1995) (internal quotation marks omitted))).

209. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979–80 (2d Cir. 1980).

210. *See T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97, 115 (1st Cir. 2006) (copyright protection can exist in *portions* of a work); *Axelrod & Cherveny Architects, P.C. v. T. & S. Builders, Inc.*, 943 F. Supp. 2d 357, 362 (E.D.N.Y. 2013) (“Infringement can be established on the basis of infringing either the floor plans or the exterior, or both.” (quoting *Richmond Homes Mgmt., Inc. v. Raintree, Inc.*, 862 F. Supp. 1517, 1527 (W.D. Va. 1994))); *see also Nikanov v. Simon & Schuster, Inc.*, 246 F.2d 501, 504 (2d Cir. 1957) (“While only a part of the plaintiff’s copyrighted work was appropriated, what was taken was clearly material, as the district court found.”); H.R. REP. NO. 101-735, at 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6949 (Those “individual features that reflect the architect’s [sic] creativity” are protectable under the act.).

211. *See supra* Part I.

of necessity or societal expectations, courts can use a near-objective approach in deciding whether an element deserves copyright protection at all. A helpful tool for the courts when deciding this threshold question for works designed in a specific style—such as the designs in *Zalewski* and *Intervest*—is the Third Circuit’s structure, sequence, and organization test used in the analysis for computer programs.<sup>212</sup> This test would allow the court to objectively decide if certain features were *scènes-à-faire* to the style the architect was working in or if the elements were creative.

Courts should carefully apply this process of elimination. If the court too rigorously defines the public domain, original features can go unprotected. The test cannot be that rigid and some flexibility must exist in its application. Therefore, courts will necessarily decide the dissection test on an ad hoc basis. Although this type of approach may decrease predictability, the courts will still have a more standardized test than is currently available. By inserting flexibility into the dissection test, courts will ensure that no truly creative element will go unprotected.

After dissecting the building and factoring out the unprotectable, courts will apply the substantial similarity standard to individual elements. The sliding scale for the infringement analysis is not particularly helpful for the dissection method because elements are generally not as complex as overall form.<sup>213</sup> With elements, tying up entire styles is less likely and copying becomes more obvious. For example, comparing two entire buildings is much more complex and less obvious than comparing two window shapes.

By first analyzing overall form and then applying a modified version of the Second Circuit’s dissection test for the elements, courts are better equipped to protect original works of architecture without destroying the industries’ practice of inspirational borrowing or hindering progress and competition. This entire process gives more structure and guidance to the courts when deciding infringement cases over architectural works.

#### CONCLUSION

As one commentator has noted, “[a] proper building grows naturally and logically, and poetically out of all its conditions.”<sup>214</sup> Architectural works are a unique category of copyright subject matter in that they fuse function and aesthetics within complex works.<sup>215</sup> Because the works are so complex and

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212. See *supra* Part III.A.

213. When courts analyze large scale elements, however, the courts should lean on the same sliding scale for infringement as used for overall form. These large scale elements present some of the same complexity issues.

214. FREDERICK, *supra* note 201, at 30.

215. See Shipley, *supra* note 46, at 426 (“[A]esthetic elements of some articles are so inextricably interwoven with the item’s utilitarian aspects that there are no

consist of many elements, only analyzing those elements as individual features and missing the protectable overall form or grouping of elements of the building is an easy mistake to make.<sup>216</sup> The three alternative tests—Congress’s functionality test, the Eleventh Circuit’s categorization analysis, and the Second Circuit’s dissection method—all may produce agreeable results when applied to common architectural works such as typical single-family homes.<sup>217</sup> But rigid or inattentive application of even the most doctrinally sound of these tests, the dissection method, could lead to an original overall form or original large-scale grouping of elements being denied protection.<sup>218</sup> Originality is the cornerstone of copyright law and courts should focus first on the originality of the overall form of the work.<sup>219</sup> Then, the courts should turn to a flexible application of the dissection method to protect individual elements of the work.<sup>220</sup> Focusing first on originality of the overall form ensures that original works of architecture are fully protected while the dissection method protects individual original elements. These two inquiries together ensure that no original aspect of an architectural work is left open to unlawful copying while guaranteeing progress and competition in the field of architecture.

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features that can be separated conceptually, let alone physically, to stand alone as copyrightable works.”); *see also* Bucher, *supra* note 127, at 1273–74 (“[M]ost works of architecture serve some definite utilitarian purpose, such as providing places to live, work, learn, and play. Yet these works often possess distinct aesthetic qualities as well.”).

216. *See supra* Part III.C.

217. *See supra* Part III.

218. *Id.*

219. Copyright is contingent on originality of expression. 17 U.S.C. § 102 (2012) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”). An approach that disregards originality is inapposite to the purposes of copyright protection.

220. H.R. REP. NO. 101-735, at 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6949; *see also* T-Peg, Inc. v. Vt. Timber Works, Inc., 459 F.3d 97, 115 (1st Cir. 2006) (holding that copyright protection can exist in *portions* of a work); Nikanov v. Simon & Schuster, Inc., 246 F.2d 501, 504 (2d Cir. 1957) (“While only a part of the plaintiff’s copyrighted work was appropriated, what was taken was clearly material, as the district court found.”).

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