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A Half-Built House

THE SUBSTANTIAL SIMILARITY ANALYSIS SPLIT IN ARCHITECTURAL COPYRIGHT INFRINGEMENT CASES

*“Architecture is a small piece of [the] human equation, but for those of us who practice it, we believe in its potential to make a difference, to enlighten and to enrich the human experience, to penetrate the barriers of misunderstanding and provide a beautiful context for life’s drama.”*¹

INTRODUCTION

In 1987, Demetriades Developers, Inc., an architectural development company that is well-known for designing unique luxury homes, unveiled its latest luxury home in Scarsdale, New York.² The home sold for over two million dollars one week after its first open house.³ The Kaufmanns, a family in the market for a new home, attended the open house but did not end up bidding; instead, the couple went to a different developer and contracted for the construction of a home of “substantially identical design” to the home constructed by Demetriades, on the exact same street as the Demetriades home.⁴ The Kaufmanns admitted that they utilized the Demetriades design plans without authorization, and the court noted that their architect appeared to blatantly trace the Demetriades plans to prepare for construction of the Kauffmanns’ new home.⁵

When Demetriades learned of the Kaufmanns’ construction, Demetriades filed suit for copyright infringement in the United States District Court for the Southern District of New York.⁶ The court ruled against Demetriades and held that

¹ Frank Gehry, Ceremony Acceptance Speech for the Pritzker Architecture Prize 1 (1989), https://www.pritzkerprize.com/sites/default/files/inline-files/Frank_Gehry_Acceptance_Speech_1989.pdf [<https://perma.cc/KFJ7-E74S>].

² Demetriades v. Kaufmann, 680 F. Supp. 658, 659–60 (S.D.N.Y. 1988).

³ *Id.* at 660.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 660–61.

absent a design patent, a developer “does not obtain a protectable interest in the useful article depicted [in the design] plans.”⁷ Relying on a seminal Supreme Court case, *Baker v. Selden*,⁸ the court reasoned that although Demetriades had a valid, registered copyright for the design plans as drawings, federal copyright protection did not extend to the design or, in this case, the house itself.⁹ The court enjoined the Kaufmanns from reproducing further copies of the Demetriades design plan; however, the court allowed the construction of the Kaufmann home to continue, despite the clear similarities to the Demetriades build.¹⁰ Essentially, the Kaufmanns were still legally able to construct their home with duplicate design plans under federal copyright law.¹¹

The Kaufmann-Demetriades saga depicts a practical reality that plagues intellectual property rights in the field of architecture. Architectural works have consistently played a critical role in society.¹² Each building is a reflection of culture at the time it was built and a projection of how a culture wishes to be perceived in the future.¹³ It plays an aesthetic and utilitarian role in society; while a design must be aesthetically pleasing, it also must be functional.¹⁴ Furthermore, architecture encourages scientific innovation.¹⁵ Architecture has “provided the impetuses for such varied technical advancements as the . . . elevator, reinforced concrete, plate glass, and the air conditioner, to name only a few.”¹⁶ Similarly, architecture becomes interwoven with the communities it encompasses.¹⁷ For example, “the Empire State Building has become part of the

⁷ *Demetriades*, 680 F. Supp. at 664. “A ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Congress purposefully excluded objects that are solely utilitarian from copyright protection under the “useful articles” doctrine with the goal of only granting protection to aesthetic, not functional, works. See Jane C. Ginsburg, “Courts Have Twisted Themselves into Knots”: *U.S. Copyright Protection for Applied Art*, 40 COLUM. J. L. & ARTS 1, 1 (2016).

⁸ See *Baker v. Selden*, 101 U.S. 99, 101–02, 104–05 (1879) (holding that the words in a book explaining a bookkeeping system were protectable under copyright law, but the use of the bookkeeping system prescribed by the book was not copyrightable because it was a useful article and, therefore, only protectable under patent law).

⁹ *Demetriades*, 680 F. Supp. at 664–65.

¹⁰ *Id.* at 666.

¹¹ *Id.*

¹² Vikas Shah, *The Role of Architecture in Humanity’s Story*, THOUGHT ECON. (June 18, 2012), <https://thoughteconomics.com/the-role-of-architecture-in-humanitys-story/> [<https://perma.cc/6ARY-48EH>].

¹³ *Id.*

¹⁴ Raphael Winick, Note, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1600 (1992).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Shah, *supra* note 12.

image and identity of New York and is a source of pride for the people of the city, and a connection . . . to the city's past.”¹⁸

Although many classic American architectural structures have existed since the nineteenth century,¹⁹ architectural works themselves did not receive specific copyright protection in the United States until 1989, when the United States joined the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention).²⁰ The Berne Convention has afforded protection for architectural structures since 1908.²¹ Thus, before 1989 any person in the United States could blatantly copy another's architectural work so long as the individual did not infringe upon the design plans.²² This distinction provided a loophole that effectively made the protection of design plans useless.²³ Logically, under that distinction, a potential infringer could build the exact same structure as another and escape liability if sued by the first architect by simply proving that they did not copy the physical design plans.²⁴

The path to extending copyright protection to architectural works in the United States has not come without its challenges, especially as the federal courts continue to muddle through complicated and varying case law to determine whether architectural design infringement has occurred in a given dispute.²⁵ Generally in all copyright infringement cases, to prove infringement, plaintiffs must prove that the infringer had access to the allegedly infringed-upon work and that the works

¹⁸ *Id.*

¹⁹ David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?*, 18 J. INTELL. PROP. L. 1, 3 (2010).

²⁰ Natalie Wargo, Note, *Copyright Protection for Architecture and the Berne Convention*, 65 N.Y.U. L. REV. 403, 403 (1990). The Berne Convention is a treaty that provides multinational copyright protection to certain works. *Id.*

²¹ *Id.* at 412–13.

²² See Shipley, *supra* note 19, at 3–4 (explaining that “the unauthorized copying of plans or blueprints constituted infringement,” but the use of plans or blueprints without permission to build the exact same building was allowable under copyright law). See, e.g., *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988) (case exemplifying that only design plans were protectable); *Scholz Homes, Inc. v. Maddox*, 379 F.2d 84 (6th Cir. 1967) (same); *Demetriades v. Kaufmann*, 680 F. Supp. 658 (S.D.N.Y. 1988) (same).

²³ See Elizabeth A. Brainard, Note, *Innovation and Imitation: Artistic Advance and the Legal Protection of Architectural Works*, 70 CORNELL L. REV. 81, 97–99 (1984) (explaining that completed structures and their design plans received little protection under the Copyright Act).

²⁴ See *supra* note 22 and accompanying text.

²⁵ Federal circuit courts have utilized different analyses to determine whether infringement has occurred. See, e.g., *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 100–07 (2d Cir. 2014); *Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC*, 496 F. App'x 314, 317–20 (4th Cir. 2012); *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919–21 (11th Cir. 2008); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295–1302 (D.C. Cir. 2002).

are substantially similar.²⁶ The substantial similarity analyses utilized by the federal circuit courts differ, creating an unclear level of protection for architectural works.²⁷ The differences in treatment are outcome determinative and underscore the need for uniformity.²⁸ Without clearer protections for architectural works and a marked improvement in the amount of protection granted to architectural works, there will be no incentive to create innovative architecture, as there will be no real way to ensure it will not be copied in the future.²⁹

Applying a uniform approach to analyze substantial similarity in a way that effectively protects architectural works across the federal circuits is necessary to fulfill the legislative intent and the constitutional intent of copyright protection. Likewise, a uniform approach will clarify the level of copyright protection that architectural works receive in the United States. Part I of this note provides an explanation of the constitutional context of copyright protection and discusses a history of the path towards affording architectural works protection under U.S. copyright law, delving further into the Berne Convention as well as the Architectural Works Copyright Protection Act (AWCPA). Part II addresses and analyzes the fundamental factors necessary to build and win an architectural infringement case. Part III explains how various circuit courts analyze substantial similarity differently, leading to the current circuit split. This part also discusses the benefits and shortcomings of each circuit's approach. Part IV argues that a multistep approach to analyzing substantial similarity in architectural infringement cases is the most logical way to resolve the circuit split. Applying this multistep approach with an inverse ratio fulfills the legislative intent of the AWCPA as well as the constitutional purposes of copyright protection, and it provides architects with a uniform understanding of how the law will be applied should they need to initiate an infringement action.

²⁶ *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992); Laura N. Gasaway, *Copyright Basics: From Earliest Times to the Digital Age*, 10 WAKE FOREST INTELL. PROP. L.J. 241, 252–53 (2009).

²⁷ Jonathan Seil Kim, Note, “Filtering” Copyright Infringement Analysis in *Architectural Works*, 2018 U. ILL. L. REV. 281, 283 (2018); see Shipley, *supra* note 19, at 7 (“Even with the Architectural Works Copyright Protection Act’s (AWCPA) expansive definition of ‘architectural work,’ the many reported decisions show that the scope of copyright protection for most architectural works is thin. As a result, the architect plaintiff will ordinarily have to prove close to verbatim reproduction in order to win.”).

²⁸ See Ruth S. Thomson, Comment, *Home Sweet Copyright*, 84 U. CHI. L. REV. 495, 509 (2017).

²⁹ See Shipley, *supra* note 19, at 60–61 (noting that the author is unsure that the AWCPA has stimulated excellence in the architectural field due to thin copyright protection).

I. BACKGROUND

A. *Constitutional Framework*

When the Framers of the Constitution converged in Philadelphia to sign the U.S. Constitution, they unanimously approved what is today considered to be the copyright clause, or the intellectual property clause,³⁰ of the Constitution.³¹ The copyright clause states “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³² Twelve of the thirteen states had already enacted copyright laws by the time the Framers met at the Constitutional Convention,³³ likely following the influence of England, which passed the notorious copyright protection statute, the Statute of Anne, in 1709.³⁴

Essentially, the purpose of the copyright clause is utilitarian: It is meant to secure the societal benefits that follow from incentivizing authors to continue to create new works.³⁵ By rewarding authors with the possibility of profit from the exploitation of their works, copyright law provides incentives for authors to continue to “redound to the public benefit by resulting in the proliferation of knowledge.”³⁶ Pursuant to its constitutional powers, Congress has passed and “overhauled the [federal] copyright laws several times.”³⁷ The current statutory provision governing federal copyright law is the Copyright Act of 1976;³⁸ however, it has been amended numerous times to comply with treaties and to enact other revisions that Congress deems fit.³⁹ In 1990, Congress amended the

³⁰ Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective (Part 1)*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 763, 765 n.1 (2001) (referring to the copyright clause as the “intellectual property clause”).

³¹ See U.S. CONST. art. I, § 8, cl. 8 (the copyright clause clause); Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include it With Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 361 (1992) (providing explanation for the unanimous approval the copyright clause received).

³² U.S. CONST. art. I, § 8, cl. 1, 8.

³³ See Donner, *supra* note 31, at 361–62 (1992).

³⁴ See *id.* at 367 (providing a historical analysis of England’s road to copyright protection).

³⁵ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03(A)(1) (Matthew Bender rev. ed. 2020). Here, works is referred to broadly as any work protected by copyright law. See 17 U.S.C. § 102. Similarly, author is referred to as the creator of any work protectable by copyright law, including architects, artists, musicians, designers, etc. See *id.*

³⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (quoting *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992)).

³⁷ See 1 NIMMER & NIMMER, *supra* note 35, § A.01(A).

³⁸ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–810).

³⁹ *Id.*

Copyright Act to allow for protection of architectural works in order to comply with the Berne Convention.⁴⁰

B. Copyright Protection of Architectural Structures in the United States

The Berne Convention is a treaty signed in 1886 in Geneva, Switzerland.⁴¹ Its purpose is to provide multinational copyright protection to works, but it was not implemented in the United States until 1989, one year after the *Demetriades* case was decided.⁴² The United States was hesitant to join the Berne Convention because of fundamental differences between the United States' and other countries' approaches to copyright protection.⁴³ Generally, the United States affords copyright protection for utilitarian purposes,⁴⁴ whereas copyright laws of other countries, such as those of France, exist to protect the moral rights of authors.⁴⁵

Under a utilitarian model, society and the author both benefit from a work; consequently, protection is only given to the extent necessary not to hinder an author's incentive to create.⁴⁶ Under a moral rights view, on the other hand, an author receives copyright protection because he or she has a moral right to control his or her work.⁴⁷ The parties to the Berne Convention employ moral rights copyright systems, and so the Convention's agreements are similarly premised on moral rights, in opposition to U.S. copyright law.⁴⁸ Despite this, the United States finally joined the Berne Convention in 1989 after growing pressure from authors to protect their interests abroad.⁴⁹

To adapt U.S. copyright laws to the requirements of the Berne Convention, Congress passed the Berne Convention Implementation Act of 1988 and other acts, such as the AWCPA, which proscribed the loophole in U.S. copyright protection of

⁴⁰ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (amending 17 U.S.C. § 101); Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5133 (1990) (amending 17 U.S.C. § 101).

⁴¹ See Wargo, *supra* note 20, at 403.

⁴² *Id.* at 403; *Demetriades v. Kaufmann*, 680 F. Supp. 658, 660 (S.D.N.Y. 1988).

⁴³ See Wargo, *supra* note 20, at 403-04; see also Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 IDEA 607, 623 (2003).

⁴⁴ See *supra* Section I.A.

⁴⁵ See Wargo, *supra* note 20, at 404 n.8, 425; Jackson, *supra* note 43, at 608.

⁴⁶ See Jackson, *supra* note 43, at 614. Essentially, the utilitarian model assumes that if an author is able to own his or her work, they will create and disseminate more work, but too much ownership creates an access issue for society. See *id.* at 614-15. Finding the balance between benefiting authors while not harming society is the ultimate goal of the utilitarian model. See *id.*

⁴⁷ *Id.* at 615.

⁴⁸ *Id.* at 623.

⁴⁹ *Id.*

architectural works by affording protection to structures themselves.⁵⁰ Initially, Congress wanted to be clear that affording protection to architectural works, although based on the Berne Convention members' moral rights theory of protection, still aligned with the United States' utilitarian theory of protection.⁵¹ Congress stated, "[p]rotection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal."⁵²

Acknowledging the importance of architecture as shelter and as art,⁵³ Congress declared architectural works as protectable.⁵⁴ Section 703 of the AWCPA added architectural works to the list of enumerated protectable works in Section 102 of the Copyright Act.⁵⁵ Congress added the category in an attempt to separate architectural works from "pictorial, graphic, [and] sculptural works."⁵⁶ The intent behind this separation was to shield architecture from the complicated legal questions surrounding the aforementioned categories, and this theoretically satisfied Congress's goal of affording copyright protection to architecture.⁵⁷ Congress proposed a two-step test for determining protectability of an architectural work involving: (1) examine the work to determine if original elements are present, and (2) determine whether the original elements are functionally required.⁵⁸ If the element is functionally required, Congress proposed that protection should be denied for that element.⁵⁹

In Section 702 of the AWCPA, Congress defines "architectural work" as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard

⁵⁰ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. See generally Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5133 (1990).

⁵¹ H.R. REP. NO. 101-735, at 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6944.

⁵² *Id.*

⁵³ *Id.* at 12.

⁵⁴ Architectural Works Copyright Protection Act § 703.

⁵⁵ *Id.*

⁵⁶ H.R. REP. NO. 101-735, at 20. Courts evaluate "pictorial, graphic, [and] sculptural works" under the separability test for useful articles; Congress purposefully added the category of architectural works to avoid involving architectural works in the judicial disagreement over the test. *Id.*; see also Ginsburg, *supra* note 7, at 1, 17–18.

⁵⁷ Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering Out "Total Concept and Feel,"* 101 NW. U. L. REV. 1851, 1863 (2007); H.R. REP. NO. 101-735, at 20 ("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.").

⁵⁸ H.R. REP. NO. 101-735, at 20–21.

⁵⁹ *Id.* at 21.

features.”⁶⁰ In the House Report, Congress stated that protecting individual standard features that tend to appear in every building, like standard doors and windows, would “impede, rather than promote, the progress of architectural innovation.”⁶¹ The definition of a standard feature is amenable to many different judicial interpretations,⁶² but Congress explicitly mentioned that this provision did not exclude “individual features that reflect[ed] the [a]rchitect’s creativity.”⁶³

Similarly, Congress noted that “creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotect[a]ble elements into an original, protect[a]ble whole.”⁶⁴ This statement has caused confusion among the courts interpreting the AWCPA,⁶⁵ but it ultimately recognizes that architecture often involves a combination of unprotectable and protectable elements that form a protectable whole.⁶⁶ Congress also stated that:

[D]eterminations of infringement of architectural works are to be made according to the same standard applicable to all other forms of protected subject matter. The references in the definition of “architectural work” to “overall form,” and to the non-protect[a]bility of “individual standard features” are not intended to indicate that a higher standard of similarity is required to prove infringement of an architectural work, or that the scope of protection of architectural works is limited to verbatim or near-verbatim copying.⁶⁷

This statement adds to confusion among the courts as it indicates that despite the exclusions from protectability,⁶⁸ the level of protection should be the same as any other work.

II. THE BUILDING BLOCKS OF AN INFRINGEMENT CASE

Under the Copyright Act, a valid copyright owner has six exclusive rights relating to the copyrighted material: the rights to

⁶⁰ Architectural Works Copyright Protection Act § 702.

⁶¹ H.R. REP. NO. 101-735, at 18.

⁶² Xiyin Tang, *Narrativizing the Architectural Copyright Act: Another View of the Cathedral*, 21 TEX. INTELL. PROP. L.J. 33, 45 (2013). For example, certain courts have interpreted that market demands and building codes are standard features. *See, e.g., Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC*, 716 F. Supp. 2d 428, 440 (E.D. Va. 2010). Others, conversely, have declined to determine the standard features of the work at all. *E.g., T-Peg, Inc. v. Vt. Timber Works, Inc.*, No. 03-cv-462-SM, 2009 U.S. Dist. LEXIS 26102, at *1–2, *7–8 (D.N.H. Mar. 27, 2009).

⁶³ H.R. REP. NO. 101-735, at 18.

⁶⁴ *Id.*

⁶⁵ *See infra* Section IV.A. (analyzing how some of the different Circuit Courts approach architectural works infringement cases).

⁶⁶ *See* Winick, *supra* note 14, at 1616–17.

⁶⁷ H.R. REP. NO. 101-735, at 21.

⁶⁸ Architectural Works Copyright Protection Act § 702.

(1) reproduce, (2) prepare derivative works, (3) distribute, (4) perform publicly, (5) display publicly, and (6) perform publicly.⁶⁹ A violation of any of these exclusive rights can lead to a copyright infringement lawsuit.⁷⁰ Two elements in particular must be met to prevail in any infringement action, no matter which exclusive right is being violated: (1) a “valid copyright” must be owned by the plaintiff, and (2) the defendant must have copied the plaintiff’s validly copyrighted material.⁷¹ To prove whether there was copying by the defendant, courts may utilize another two part test: (1) the defendant must have had access to the copyrighted material, and (2) there must be substantial similarity between the defendant’s work and the copyrighted work.⁷² The inverse ratio rule historically applies to the requirements of access and substantial similarity in some of the federal circuit courts in order to prove copying. This rule states that the greater the similarity between two works, the lower the requirement for proving access (and vice versa).⁷³ This Part of this note will discuss the access and substantial similarity factors in turn.

A. *Factor One: Access*

Although courts have defined access in different ways, the prevailing approach is that the access requirement is met if the defendant had “a reasonable opportunity to copy.”⁷⁴ Access may not be speculative and there must be a “reasonable possibility of viewing plaintiff’s work—not a bare possibility.”⁷⁵ Direct proof of access is often difficult to offer, as access typically occurs without any witnesses.⁷⁶ For example, imagine an architect taking a photo of another architect’s design plans, alone in an office. The other architect may have a difficult time proving that the copying architect unquestionably copied his or her plans.

To combat this evidentiary difficulty, courts have determined that the access requirement can be fulfilled by proving that the defendant had an opportunity to access the copyrighted

⁶⁹ 17 U.S.C. § 106.

⁷⁰ 17 U.S.C. § 501(a)–(b).

⁷¹ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (Matthew Bender rev. ed. 2020). This Note will not explore the first element of an infringement action: “ownership of a valid copyright.” *Id.*

⁷² *Id.*

⁷³ *Id.* § 13.03(D) (explaining that the Second Circuit completely rejects the inverse ratio rule, the Ninth Circuit recently rejected it, and the Seventh Circuit acknowledges it but no longer uses it).

⁷⁴ See Gasaway, *supra* note 26, at 252; 4 NIMMER & NIMMER, *supra* note 71, § 13.02(A).

⁷⁵ See 4 NIMMER & NIMMER, *supra* note 71, § 13.02(A).

⁷⁶ *Id.*; see also Gasaway, *supra* note 26, at 252 (describing the difficulty of proving access).

material.⁷⁷ Most courts recognize that an opportunity to access can be demonstrated by proving widespread dissemination of a work or that a “chain of events exists” from which access can be inferred.⁷⁸ The access prong of the formula is hardly straightforward;⁷⁹ the same can be said for the substantial similarity prong.⁸⁰

B. *Factor Two: Substantial Similarity*

Determining the level of similarity between works “presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.”⁸¹ Congress has never defined substantial similarity, so the inquiry has developed entirely from case law.⁸² As with many other factor tests subject only to judicial discretion,⁸³ courts use case law-driven definitions and formulas differently, subjecting the substantial similarity analysis to different treatment across the circuits.⁸⁴

The Supreme Court has notably held that “[n]ot all copying [] is copyright infringement.”⁸⁵ If a plaintiff makes every other showing required to make out an infringement case, yet a court nevertheless determines that the original work and infringing work are not substantially similar, the plaintiff will lose their case.⁸⁶ This situation could arise when the substantially similar elements between the two works are unprotected elements.⁸⁷ The standard that must be met for an affirmative finding of substantial similarity may vary based on the amount of creative effort needed to create the work.⁸⁸ However, most federal circuit courts have adhered to their own

⁷⁷ See 4 NIMMER & NIMMER, *supra* note 71, § 13.02(A).

⁷⁸ *Id.* (showing that a particular chain of events can prove access, like evidence that a defendant was a customer of the plaintiff).

⁷⁹ See *id.*

⁸⁰ Eric Rogers, *Substantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis Among the Federal Circuits*, 2013 MICH. ST. L. REV. 893, 895 (2013) (“The confusion and disagreement in the doctrine of substantial similarity is not only found in the inter-circuit divergences, but also in the lack of clarity in each circuit’s particular test for copyright infringement.”).

⁸¹ See 4 NIMMER & NIMMER, *supra* note 71, § 13.03(A).

⁸² *Id.*

⁸³ For another example of courts defining and interpreting a legal term differently leading to a circuit split, look to the courts’ varying deference to agency interpretations of ambiguous contract terms. See Heather Elliot, *Justice Gorsuch’s Would-Be War on Chevron*, 21 GREEN BAG 315, 317 (2018).

⁸⁴ See Gasaway, *supra* note 26, at 253.

⁸⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). For example, copying of only ideas or *scenes à faire* would not constitute infringement. See *infra* Section II.C.

⁸⁶ See 4 NIMMER & NIMMER, *supra* note 71, § 13.03(A).

⁸⁷ See *infra* Section II.C. for a description of which elements are protected by U.S. copyright law and which are not.

⁸⁸ See 4 NIMMER & NIMMER, *supra* note 71, § 13.03(A)(4).

formulas for substantial similarity,⁸⁹ despite the obvious need to create a formula that is best for each type of protectable work.⁹⁰

C. *Elements of Creative Works That Are Not Protectable*

Generally, copyright law protects expressions, not ideas.⁹¹ To give an author a monopoly on a mere idea would run counter to the utilitarian, progress-oriented purpose of copyright protection.⁹² In the same vein, there are certain ideas that can be expressed in only one way, so the idea merges with the expression to create an unprotectable expression.⁹³ If there were only a few ways to present a particular idea, copyright law would likely not protect the expression of that idea; this is called the merger doctrine.⁹⁴ An example of how the merger doctrine is used in practice is evident when analyzing signs prohibiting certain activities:

To illustrate this point, imagine the symbol often used on public signs displaying a circle with a diagonal line crossed through it. . . . This same symbol is used in a wide variety of contexts to express that something is prohibited, e.g., no swimming, no food or drink, no cell phone. Since there are effectively only a few ways of visually presenting the idea that an activity is not permitted, copyright law would not protect the expression in this case, i.e., the circle with the line through it.⁹⁵

Another doctrine that can prevent liability for certain similarities is *scènes à faire*.⁹⁶ *Scènes à faire* has been described as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”⁹⁷ A common example of the application of *scènes à faire* doctrine is the inability to claim ownership over classic

⁸⁹ See *id.* § 13.03(A) (“[A]ll the decisions on point emanate from the inferior courts.”).

⁹⁰ Courts are starting to realize the need for different tests for different types of works. See, e.g., *Whelan Assocs. v. Jaslow Dental Lab. Inc.*, 797 F.2d 1222, 1233 (3d Cir. 1986) (creating a new substantial similarity analysis for computer programs involving protection of the program’s structure, sequence, and organization); *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707 (2d Cir. 1992) (using a filtration approach to analyze substantial similarity in a computer software infringement case).

⁹¹ See 4 NIMMER & NIMMER, *supra* note 71, § 13.03(B)(2)(a).

⁹² See *supra* Part I; see also *CCC Info. Servs. Inc. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 69 (2d Cir. 1994) (discussing the fundamental principle that “ideas are too important to the advancement of knowledge to permit them to be under private ownership, and that open public debate, which is essential to a free democratic society, requires free access to the ideas to be debated”).

⁹³ See 4 NIMMER & NIMMER, *supra* note 71, § 13.03(B)(3)(a).

⁹⁴ *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1143 (11th Cir. 2007).

⁹⁵ *Id.*

⁹⁶ See 4 NIMMER & NIMMER, *supra* note 71, § 13.03(B)(4).

⁹⁷ *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982).

tropes like portraying “flights through the woods” being chased by animals.⁹⁸ Beyond fictional matters, *scènes à faire* can also apply to architecture.⁹⁹ For example, in the architectural context, the amount of bedrooms, open floorplans, and certain genre-specific architectural styles cannot be protectable under the *scènes à faire* doctrine.¹⁰⁰

Lastly, there are many works in the public domain whose protections have expired. All works consist of public domain elements.¹⁰¹ The Second Circuit has explained the public domain to be “not only elemental ‘raw materials,’ like colors, letters, descriptive facts, and the catalogue of standard geometric forms, but also earlier works of art that . . . are no longer . . . protected” due to the passage of time.¹⁰² Copyright protection, under the 1976 Copyright Act, is available for “the life of the author” and “[seventy] years [beyond] the author’s death.”¹⁰³ After that passage of time, protection expires and the work enters the public domain.¹⁰⁴ When analyzing substantial similarity, it is especially important that courts consider all of the unprotectable elements to ensure that they are only extending protection to what is actually protectable.¹⁰⁵ In sum, the criteria discussed above comprise the building blocks of a copyright infringement case. These building blocks lay the foundation for the next Part, which discusses the architectural copyright circuit split.

III. THE SUBSTANTIAL CIRCUIT SPLIT IN ARCHITECTURAL INFRINGEMENT CASES

A. *The Eleventh Circuit: A Compilation Analysis*

The Eleventh Circuit first fully analyzed substantial similarity in architectural infringement cases in *Intervest*

⁹⁸ *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (“Attempted escapes, flights through the woods . . . and other miseries are all found in stories . . . as old as [plaintiff’s] . . . Nobody writes books of purely original content . . . [T]he plaintiff misconceives the protections of the copyright law in her listing of infringements by including such [*scènes à faire*].”).

⁹⁹ *See Thomson*, *supra* note 28, at 525–26.

¹⁰⁰ *Id.*

¹⁰¹ *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 132 (2d Cir. 2003).

¹⁰² *Id.*

¹⁰³ 17 U.S.C. § 302(a) (amended 1998).

¹⁰⁴ *See id.*

¹⁰⁵ *See Thomson*, *supra* note 28, at 524. Recall that standard features, such as doors and windows, were purposefully excluded from protection unless the architect implements some level of creativity into the feature. *See supra* Section I.B.; *see also* H.R. REP. NO. 101-735, at 18.

*Constr., Inc. v. Canterbury Estate Homes, Inc.*¹⁰⁶ In *Intervest*, Intervest Construction sued another construction company, claiming that the defendant's design plans infringed upon Intervest's plans.¹⁰⁷ Both of the floorplans depicted four bedroom homes with many similar aspects such as a: "two-car garage; living room; dining room; 'family' room; foyer; 'master' bedroom; kitchen; second bathroom; nook; and porch/patio."¹⁰⁸ The district court focused on the dissimilarities between the nonoriginal, commonplace elements of the plans and held for the defendant, determining that "no reasonable observer could conclude that the copyrightable elements of the two floor-plans were substantially similar."¹⁰⁹

In affirming the district court's decision, the Eleventh Circuit went a step further and decided to treat architectural works like compilations, which would provide such works with the narrowest or thinnest amount of protection.¹¹⁰ The court relied on the fact that the legislative history of the AWCPA states that "creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotect[a]ble elements into an original, protect[a]ble whole."¹¹¹ In the seminal compilation case, *Feist Publications, Inc. v. Rural Telephone Services Co.*, the Supreme Court held that compilations are only protectable to the extent that "the collection and assembling of preexisting materials . . . are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."¹¹² Therefore, in *Intervest*, when the Eleventh Circuit saw the terminology "selection, coordination, or arrangement" in the legislative history of the AWCPA, it associated the substantial similarity analysis to the substantial similarity analysis of compilations.¹¹³ The Eleventh Circuit applied the compilations test to the design plans at hand and determined that the district court properly concluded that there was not substantial similarity between the floorplans because

¹⁰⁶ *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008). See generally *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218 (11th Cir. 2008) (earlier Eleventh Circuit case involving architectural works).

¹⁰⁷ *Intervest*, 554 F.3d at 916.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 918.

¹¹⁰ *Id.* at 919. Compilations are "work[s] 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." See 17 U.S.C. § 101.

¹¹¹ H.R. REP. NO. 101-735, at 18.

¹¹² *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (emphasis and internal quotation marks omitted).

¹¹³ *Intervest*, 554 F.3d at 919.

the plans consisted of prominently unprotectable elements and lacked the necessary similarities in floor plan.¹¹⁴

The Eleventh Circuit recently reconsidered *Intervest* in another architectural infringement case, *Home Design Services v. Turner Heritage Homes, Inc.*¹¹⁵ In this case, the Eleventh Circuit affirmed its holding in *Intervest*, yet it limited its holding to mean that there is no infringement when only noncopyrightable elements are similar.¹¹⁶ Even though the Eleventh Circuit did not state verbatim that it was sticking with a compilation analysis, it did again mention the “arrangement” terminology that is used in the definition of protectable compilations from *Feist*.¹¹⁷

Utilizing a compilation analysis for architectural works affords them little protection and disregards the fact that the Copyright Act mentions that the “overall form” of a building can be protected.¹¹⁸ The phrase “overall form” in the statute “strongly suggests that Congress did not” want architectural works to be treated akin to compilations.¹¹⁹ Affording only “thin protection to architectural works . . . runs the risk of creating an insufficient incentive for architects to design and create original structures.”¹²⁰

B. *The Second Circuit: A Filtration Approach*

In *Zalewski v. Cicero Builder Dev., Inc.*, the Second Circuit applied traditional copyright mechanisms to architecture, but fell short in its analysis when it failed to account for the overall form of the architectural works.¹²¹ In this case, an architect, Zalewski, granted the defendants a license to use his design plans for several colonial homes that Zalewski designed.¹²² Following the license’s expiration, the defendants were allegedly still using Zalewski’s designs as either a basis for their new designs in addition to adding customizations to Zalewski’s designs in order to slightly alter

¹¹⁴ *Id.* at 921. The court noted that “spacial depictions of rooms, doors, windows, walls, etc.” are not protectable elements themselves. *Id.* at 920.

¹¹⁵ See generally *Home Design Servs. V. Turner Heritage Homes, Inc.*, 825 F.3d 1314 (11th Cir. 2016) (reconsidering treating architectural works akin to compilations).

¹¹⁶ *Id.* at 1324.

¹¹⁷ *Id.* at 1325; see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991).

¹¹⁸ See Thomson, *supra* note 28, at 507, 520.

¹¹⁹ See *id.*; see also Thomas Commons, Note, *The Copyright Protectability of Architectural Works: The Eleventh Circuit Walks a Thin Line*, 90 ST. JOHN’S L. REV. 469, 488 (2016).

¹²⁰ See Commons, *supra* note 119, at 490; Tang, *supra* note 62, at 54 (providing an analysis of the demoralization costs associated with granting architects only thin copyright protection).

¹²¹ See generally *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95 (2d Cir. 2014) (analyzing substantial similarity in an architectural infringement case).

¹²² *Id.* at 98.

them.¹²³ The district court entered judgment for the defendants, and Zalewski appealed to the Second Circuit, which affirmed the judgment of the district court.¹²⁴

Initially, the Second Circuit rejected the Eleventh Circuit's approach to treat architectural works as compilations as seen in *Intervest*, but ultimately reached the same determination of noninfringement.¹²⁵ The court said, "[l]abeling architecture a compilation obscures the real issue. Every work of art will have some standard elements, which taken in isolation are uncopyrightable, but many works will have original elements—or original arrangements of elements."¹²⁶ The court emphasized the importance of determining what aspects of the design the author originated rather than simply taking the easy route and labeling architectural works as compilations.¹²⁷

The Second Circuit determined that to analyze substantial similarity in *Zalewski*, it "must ignore [the] aspects of [the] work that are unprotectable" and compare only the protectable elements.¹²⁸ The court ignored the unprotectable elements by employing the traditional copyright doctrines of public domain, *scènes à faire*, and merger.¹²⁹ In doing so, "any design elements [related] to building codes, topography, structures that already exist on the construction site, or engineering necessity" were filtered out and not compared.¹³⁰ Additionally, the court considered specific designs requested by consumers to be unprotectable.¹³¹ Likewise, the court labeled elements connected with recognized styles of architecture, like colonial homes and neoclassical government buildings, to be "*scènes à faire* in architecture."¹³²

After defining its approach, the court applied the test to the defendants' plans and determined that the defendants copied only the unprotectable elements of Zalewski's designs.¹³³ The court determined that most of the similarities resulted from consumer preference, which included the overall footprint and room sizes and the features common to all colonial homes, such as the style of the porch and the general layout.¹³⁴ The court said, "[A]s long as

¹²³ *Id.* at 98–99.

¹²⁴ *Id.* at 98.

¹²⁵ *Id.* at 103.

¹²⁶ *Id.* at 104.

¹²⁷ *Id.*

¹²⁸ *Id.* at 102.

¹²⁹ *Id.* at 102–03.

¹³⁰ *Id.* at 106.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 106–07.

¹³⁴ *Id.*

[Zalewski] adhered to a pre-existing style[,] his original contribution was slight—his copyright [therefore is] very thin.”¹³⁵

Filtering out unprotectable elements as the Second Circuit did in *Zalewski* has long been a common way of analyzing substantial similarity.¹³⁶ A major issue with separating out noncopyrightable elements before analyzing substantial similarity, however, is that it “fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another.”¹³⁷ The Copyright Act clearly states that protectable features of architectural works include “overall form as well as the arrangement and composition of spaces and elements in the design, but . . . not . . . individual standard features.”¹³⁸ If the overall form of a building is protectable,¹³⁹ a substantial similarity analysis should include an analysis of how similar the works are as a whole to ensure that the analysis covers the overall form of the architectural works as denoted by the Copyright Act.¹⁴⁰

Filtering out all of the unprotectable elements before analyzing substantial similarity makes it easy for potential infringers to take advantage of a loophole by altering small protectable details of the architectural works, like the type or color of stone.¹⁴¹ If a potential infringer can presume certain unprotectable elements will not be compared, they logically will focus on altering the protectable elements that would be compared in order to avoid a finding of substantial similarity. Likewise, filtering out unprotectable elements often results in the selection, arrangement, and coordination “of the elements being the only protectable aspect of the [] work.”¹⁴² Effectively, a filtration approach also leads to the compilation analysis applied by the Eleventh Circuit in *Intervest*.¹⁴³

Filtering out the unprotectable elements also “fl[ies] directly in the face of Congress’s . . . recognition that ‘creativity in architecture frequently takes the form of . . . unprotectable

¹³⁵ *Id.* at 107. The Seventh Circuit has since signed on to this filtration approach that the Second Circuit adopted in *Zalewski*. *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1102 (7th Cir. 2017).

¹³⁶ *Zalewski*, 754 F.3d at 102.

¹³⁷ *Williams v. Crichton*, 84 F.3d 581, 587–90 (2d Cir. 1996) (utilizing a lay observer test to determine if there was substantial similarity to protectable material of the works after using the doctrines of *scènes à faire* and merger to filter out the unprotectable elements).

¹³⁸ 17 U.S.C. § 101.

¹³⁹ *Id.* (meaning, that the building must be protectable under the Copyright Act).

¹⁴⁰ *See Tang, supra* note 62, at 43–44.

¹⁴¹ *Id.* at 44.

¹⁴² *Id.* at 43.

¹⁴³ *Id.*; *see Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919–21 (11th Cir. 2008).

elements into an original, protectable whole.”¹⁴⁴ Architecture is often regulated and dictated by a client’s preferences and by zoning and building codes.¹⁴⁵ Moreover, a client sometimes demands that the architect copy another architect’s work, as in *Demetriades*.¹⁴⁶ Therefore, rendering any expression that arises out of those preferences or codes automatically unprotectable creates quite the demanding, and legislatively unintended, judicial standard of “substantial similarity.”¹⁴⁷

C. *The District of Columbia Circuit: A Filtration and “Overall Look and Feel” Test*

The District of Columbia (D.C.) Circuit analyzed an architectural infringement claim in *Sturdza v. U.A.E.*¹⁴⁸ In *Sturdza*, the plaintiff architect alleged that another architect, Demetriou, infringed upon her design for the United Arab Emirates’ (UAE) new embassy.¹⁴⁹ Both parties participated in an architectural design competition where the winning design would be used to build the new UAE embassy in Washington, D.C.¹⁵⁰ Sturdza won the contest, but the UAE ceased communicating with her after two years of jointly editing the design and negotiating the terms of the agreement with each other.¹⁵¹ Sturdza later discovered that the UAE decided to use Demetriou’s design; however, Demetriou’s design was different from the one he had used to enter the contest and, according to Sturdza, the new design “copied and appropriated many of the design features that had been the hallmark of her design.”¹⁵² The district court granted summary judgment for Demetriou and Sturdza subsequently appealed to the Court of Appeals for the D.C. Circuit.¹⁵³

The D.C. Circuit’s substantial similarity inquiry involves two steps.¹⁵⁴ First, the court identifies which aspects of the work are protectable.¹⁵⁵ In determining this, the court uses the

¹⁴⁴ See Tang, *supra* note 62, at 43.

¹⁴⁵ *Id.* at 44.

¹⁴⁶ See *supra* Introduction; see also *Demetriades v. Kaufmann*, 680 F. Supp. 658, 660 (S.D.N.Y. 1988).

¹⁴⁷ See Tang, *supra* note 62, at 42–44 (discussing a similar substantial similarity test that the Federal Claims Court developed that involved separating out unprotectable aspects of the work); see also *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 18–20 (2005).

¹⁴⁸ See generally *Sturdza v. United Arab Emirates*, 281 F.3d 1287 (D.C. Cir. 2002) (analyzing substantial similarity in an architectural infringement case).

¹⁴⁹ *Id.* at 1291.

¹⁵⁰ *Id.* at 1291–92.

¹⁵¹ *Id.* at 1292.

¹⁵² *Id.*

¹⁵³ *Id.* at 1292–93.

¹⁵⁴ *Id.* at 1295.

¹⁵⁵ *Id.*

traditional *scènes a faire* doctrine and separates out aspects of the work considered to be unprotectable.¹⁵⁶ Initially, this test looks much like the Second Circuit's,¹⁵⁷ however, in the second step the court significantly deviates from the Second Circuit's test. Here, the court establishes whether the works are substantially similar to each other by performing an "overall look and feel"¹⁵⁸ test, which "turns on the perception of the 'ordinary reasonable person' or 'ordinary observer.'"¹⁵⁹ The court compares the works' individual elements and performs the "overall look and feel" test.¹⁶⁰ The court mentions, "[c]onsidering the works as a whole is particularly important because protect[a]ble expression may arise through the ways in which artists combine even unprotect[a]ble elements."¹⁶¹

Applying the analysis to *Sturdza*, the court methodically compared the two designs.¹⁶² The court determined that both the individual elements of the designs and the overall look and feel of the designs were sufficiently similar for a reasonable jury to find they were substantially similar.¹⁶³ The court asserted

both buildings have a pyramid-like clustering of pointed arches around the front entrances, prominent horizontal bands and vertical columns demarcating the windows, slightly protruding midsections, diamond grids, and similar latticework patterning inside the arches. . . . Demetriou . . . combin[es] his wind-towers, arches, dome, parapet, and . . . patterning in ways quite similar to *Sturdza*'s.¹⁶⁴

The circuit court ultimately reversed the district court's grant of summary judgment in favor of the defendants.¹⁶⁵

Utilizing an overall look and feel test fulfills congressional intent to protect the overall form and the arrangements of certain elements of a building.¹⁶⁶ The D.C. Circuit's overall look and feel test fulfills Congress' intent because it acknowledges that unprotectable elements can be

¹⁵⁶ *Id.*

¹⁵⁷ *See supra* Section III.B.

¹⁵⁸ *Sturdza*, 281 F.3d at 1296 (quoting *Boisson v. Banian, Ltd*, 273 F.3d 262, 272 (2d Cir. 2001)).

¹⁵⁹ *Id.* (quoting *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.2d 1280, 1288 (10th Cir. 1996)).

¹⁶⁰ *Id.* (quoting *Boisson v. Banian, Ltd*, 273 F.3d 262, 272 (2d Cir. 2001)). Courts have also labeled this phrase "total concept and feel." *See, e.g.*, *Shine v. Childs*, 382 F. Supp. 2d 602, 615 (S.D.N.Y. 2005) (quoting *Boisson v. Banian, Ltd*, 273 F.3d 262, 272 (2d Cir. 2001)).

¹⁶¹ *Sturdza*, 281 F.3d at 1296.

¹⁶² *Id.* at 1297–99.

¹⁶³ *Id.* at 1299.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 17 U.S.C. § 101; *see supra* Section I.B.

combined to create a protectable whole.¹⁶⁷ This revelation accords with Congress's view that creativity in architecture often consists of arrangements, selection, or coordination of the unprotectable into a protectable whole.¹⁶⁸

Nevertheless, there are also criticisms of the overall look and feel test. First, it allows unprotectable elements to be analyzed for substantial similarity, which is problematic due to the abundance of traditional copyright doctrines that ensure that unprotectable elements are not analyzed.¹⁶⁹ In the same vein, the *Sturdza* decision has been criticized for protecting mere ideas;¹⁷⁰ for example, in reversing the district court's grant of summary judgment, the D.C. Circuit noted a list of similarities between the works.¹⁷¹ Some of the similarities listed, like the "slightly protruding midsections,"¹⁷² could be viewed as mere ideas or concepts that protection should not be extended to.¹⁷³ Thus, while the D.C. Circuit's copyright analysis moves protection for architectural works closer to congressional intent, it deviates quite significantly from widely-accepted and traditional copyright doctrines. As a result, this test should not be adopted across the circuit courts to provide copyright protection for architectural works.

D. *The Fourth Circuit: An Extrinsic and Intrinsic Similarity Test*

The Fourth Circuit tackled the substantial similarity issue in regards to architectural works in *Charles W. Ross Builder, Inc. v. Olsen Fine Home Building, LLC*.¹⁷⁴ In *Ross*, a building company named Charles Ross Homes hired an architect to design a Georgian-style model home called the Bainbridge, for which the company registered for copyright protection.¹⁷⁵ Potential buyers, the Rubins, toured the Bainbridge model home, took brochures home, and received an unsolicited portfolio of the plans of the model homes that Charles Ross Homes offered in the mail.¹⁷⁶ The potential buyers decided to contract with

¹⁶⁷ *Sturdza*, at 1296; see *supra* Section I.B.

¹⁶⁸ H.R. REP. NO. 101-735, at 18.

¹⁶⁹ See Su, *supra* note 57, at 1871.

¹⁷⁰ *Id.* at 1871–72.

¹⁷¹ *Id.*; *Sturdza*, 281 F.3d at 1299.

¹⁷² *Sturdza*, 281 F.3d at 1299. Other ideas mentioned by the court were "domes, wind-towers, parapets, arches, and Islamic patterns." *Id.* at 1297.

¹⁷³ See Su, *supra* note 57, at 1872.

¹⁷⁴ See generally *Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC*, 496 F. App'x 314 (4th Cir. 2012) (analyzing substantial similarity in an architectural infringement case).

¹⁷⁵ *Id.* at 315–16.

¹⁷⁶ *Id.* at 316.

Olsen Fine Home Building instead of Charles Ross Homes, and when an owner of Charles Ross Homes viewed the plans for the Rubins' home, he realized that they resembled the plans for the Bainbridge.¹⁷⁷ Charles Ross Homes then filed suit; the district court awarded summary judgment to the defendants, holding that the models were not substantially similar after using both the Second Circuit's substantial similarity test, the same test used in *Zalewski*, and the Eleventh Circuit's test from *Intervest*.¹⁷⁸ Charles Ross Homes appealed to the Fourth Circuit, which vacated the district court's judgment¹⁷⁹

The Fourth Circuit utilizes a two-part test to determine if works are substantially similar for the purposes of copyright analysis.¹⁸⁰ At the time that *Ross* came before the Fourth Circuit panel, this test had not yet been applied to the field of architecture.¹⁸¹ First, "a plaintiff must [prove] that the works are . . . extrinsically similar because they contain substantially similar ideas that are subject to copyright protection."¹⁸² The extrinsic similarity test is an objective inquiry, so the court first makes sure that the works contain at least some protectable aspects that are substantially similar.¹⁸³ The court allows expert testimony to aid the extrinsic similarity determination.¹⁸⁴ Once the court determines that there are protectable elements that are substantially similar, the court moves on to the second part of the test, known as the intrinsic similarity test: The plaintiff must prove intrinsic similarity by showing that the expression of the ideas is substantially similar from the perspective of the ordinary observer or "the intended audience of the work."¹⁸⁵ The second part of this analysis shares many parallels with the overall look and feel test utilized by D.C. Circuit.¹⁸⁶

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 316, 319; *see also supra* Sections III.A.–B.

¹⁷⁹ *Id.* at 317, 320.

¹⁸⁰ *Id.* at 318.

¹⁸¹ *Id.*

¹⁸² *Ross*, 496 F. App'x at 318 (quoting *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 435 (4th Cir. 2010)).

¹⁸³ *Id.*; *see also Universal Furniture*, 618 F.3d at 436 (explaining that the court can consider unprotectable features but would err if it found substantial similarity in only the unprotectable features).

¹⁸⁴ *Ross*, 496 F. App'x at 319.

¹⁸⁵ *Id.* at 318 (quoting *Universal Furniture*, 618 F.3d at 435). "[T]he intrinsic similarity test asks whether 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'" *Id.* at 318–19 (quoting *Universal Furniture*, 618 F.3d at 436).

¹⁸⁶ *See Universal Furniture*, 618 F.3d at 436 ("In assessing intrinsic similarity, the factfinder looks to the 'total concept and feel of the works, but only as seen through the eyes of the . . . intended audience of the plaintiff's work.'" (alteration in original) (emphasis omitted) (quoting *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001)); *see also supra* Section III.C. for discussion of the D.C. Circuit's test.

In deciding to apply their generally applicable copyright analysis to *Ross*, the Fourth Circuit concluded that the district court should not have utilized the Second and Eleventh Circuit's tests in the case at hand because their own substantial similarity test was equally applicable to architectural works.¹⁸⁷ The Fourth Circuit found that when the district court separated out the unprotectable elements of the homes, it "deviated from the essential principle of the intrinsic component of [the] two-part test, namely, that a court is not to 'set out to detect the disparities' or engage in 'analytic dissection of protected and unprotected elements.'"¹⁸⁸

Initially, the intrinsic, subjective portion of the Fourth Circuit's test fulfills congressional intent and the statutory definition of architectural works defined by the Copyright Act.¹⁸⁹ By using a subjective ordinary observer test, the Fourth Circuit recognizes that the overall form of a work can be protectable.¹⁹⁰ Likewise, the court recognizes that "creativity in architecture" often involves the combination of multiple unprotectable elements into a protectable whole.¹⁹¹

The intrinsic portion of the Fourth Circuit's test, however, begets the same criticisms that the D.C. Circuit's overall look and feel test does.¹⁹² The intrinsic test allows unprotectable elements to be considered and ignores the traditional copyright doctrine that separates protectable elements from unprotectable elements.¹⁹³ The Fourth Circuit, arguably, overcomes this criticism by ensuring that protectable elements are similar in the extrinsic portion of the substantial similarity test before moving on to the second part of its analysis.¹⁹⁴ Thus, the first part of the test acts as a threshold standard that incorporates the traditional copyright doctrines that the D.C. Circuit's test invariably omits.

¹⁸⁷ *Ross*, 496 F. App'x at 319.

¹⁸⁸ *Id.* at 320 (citing *Universal Furniture*, 618 F.3d at 436, 437).

¹⁸⁹ 17 U.S.C. § 101 (definition of architectural work); H.R. REP. NO. 101-735, at 18 (congressional intent for the statute); *see also supra* Section I.B.

¹⁹⁰ *See Ross*, 496 F. App'x at 317–18 (recognizing that the intrinsic ordinary observer test involves analyzing the totality of the works in question); *see also* 17 U.S.C. § 101 (defining the protection of architectural works as including their overall form).

¹⁹¹ *Ross*, 496 F. App'x at 317.

¹⁹² *See Su*, *supra* note 57, at 1872 (discussing the criticism of an overall look and feel test).

¹⁹³ *Id.* at 1871–72.

¹⁹⁴ *Ross*, 496 F. App'x at 318.

E. What to Take Away from the Different Approaches

In sum, there are certain themes that can be gathered from analyzing the Eleventh, Second, D.C., and Fourth Circuits' tests to determine whether architectural works are substantially similar. The Eleventh and Second Circuits tend to afford architectural works thin protection by filtering out all of the unprotectable elements via various traditional copyright doctrines and then comparing the works.¹⁹⁵ The D.C. and Fourth Circuit extend protection further by analyzing the overall look and feel of the architectural works, as well as filtering out all of the unprotectable elements via various traditional copyright doctrines.¹⁹⁶

There are numerous reasons why providing thin protection, like some of the Circuits do, to architectural works is unfounded based on the AWCPA and the Copyright Act.¹⁹⁷ As each of the Circuits currently analyze substantial similarity differently,¹⁹⁸ applying a uniform approach to substantial similarity—one that effectively protects architectural works in all of the federal circuits—is necessary to fulfill the legislative intent of the AWCPA and the Copyright Act and to fulfill the constitutional intent of the copyright clause.

IV. A RECOMMENDED SOLUTION: A SUBSTANTIAL SIMILARITY TEST FIT FOR ARCHITECTURAL WORKS

Judge Learned Hand, a renowned Second Circuit judge, notoriously remarked that “[t]he test for infringement of a copyright is of necessity vague.”¹⁹⁹ Since each infringement case is different, decisions regarding these cases must be made on a fact-by-fact, ad hoc basis.²⁰⁰ For that reason, it is difficult to create a universally applicable test or formula to determine whether two works are substantially similar.²⁰¹ While one test may not fit every situation, it is important to analyze which current test or combination thereof will best suit the constitutional intent of the copyright clause and the legislative intent of the Copyright Act.²⁰²

¹⁹⁵ See *supra* Section III.A.–B (analyzing the Eleventh and Second Circuit approaches to infringement of architectural works).

¹⁹⁶ See *supra* Section III.C–D (analyzing the D.C. and Fourth Circuit approaches to infringement of architectural works).

¹⁹⁷ See *infra* Section IV.A.

¹⁹⁸ See *supra* Section III.A.–D.

¹⁹⁹ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² See *Morgan v. Hawthorne Homes, Inc.*, No. 04-1809, 2009 U.S. Dist. LEXIS 31456, at *25, *36–37 (W.D. Pa. Apr. 14, 2009) (interpreting both the constitutional intent of the

Courts should adopt a two-part test that balances an overall look and feel test and a filtration test to ensure the proper level of copyright protection is afforded to architectural works.

A. *Architectural Works Should Not Be Afforded Thin Protection*

Treating architectural works as compilations, like the Eleventh Circuit did in *Intervest*, is contrary to the constitutional intent of the copyright clause, the pure language of the Copyright Act, and the legislative intent of the AWCPA.²⁰³ Providing architectural works with only thin protection does not fulfill the constitutional goal of providing an incentive for architects to create useful and original works.²⁰⁴ If architects are aware that their work must meet an exceptionally high level of originality to be protectable, architects may stop striving to create original works.²⁰⁵ Imaginably, a world without innovative architecture would be quite dull, and recent studies have found that the architectural industry is evolving very slowly.²⁰⁶ While the presumption that architects will stop striving to create original, innovative works may be somewhat hyperbolic because architects created novel works when architectural works were not protected under copyright law in the pre-Berne era,²⁰⁷ it is absolutely possible that architects would at least stop relying on

copyright clause and the congressional intent of the Copyright Act in determining whether there was infringement in an architectural works copyright infringement case).

²⁰³ See generally *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (a case where the Eleventh Circuit used a compilation analysis affording architectural works thin protection).

²⁰⁴ See Commons, *supra* note 119, at 490.

²⁰⁵ See Shipley, *supra* note 19, at 60–61 (noting that the author is unsure that the AWCPA has stimulated excellence in the architectural field due to thin copyright protection and various other reasons).

²⁰⁶ Quang Truong, *Where Will Innovation in Architecture Come from Next?*, ARCHDAILY (Aug. 3, 2020), <https://www.archdaily.com/944910/where-will-innovation-in-architecture-come-from-next> [<https://perma.cc/4Z7J-ZBDA>] (“[T]he [architecture] industry [is] in desperate need of innovation. A 2017 McKinsey report stated that global construction ‘has evolved at a glacial pace’ . . . [and] found [that] productivity [in the architectural field] is declining.”).

²⁰⁷ See Wargo, *supra* note 20, at 446–56 (explaining protection of architectural works in the United States before it joined the Berne Convention). Before architectural structures themselves received copyright protection, architects relied on various other legal theories to protect themselves such as design patents and the common law tort of unfair competition, which are still utilized today in partnership with copyright law to protect architects’ works. See Brainard, *supra* note 23, at 87–91.

copyright law as a remedy,²⁰⁸ which evades the whole point of protecting the works via copyright law in the first place.²⁰⁹

Treating architectural works as compilations, as the Eleventh Circuit did in *Intervest*, is blatantly contrary to the language of the Copyright Act, which directs courts to consider that the overall form of an architectural work can be protectable if the work meets the appropriate standards of protectability.²¹⁰ Failing to consider the overall forms of the home is directly against the statutory language directing courts to do so.²¹¹ Utilizing a compilation analysis is also contrary to the legislative intent of the AWCPA, wherein Congress recognized that architecture tends to involve unprotectable elements that form to create a protectable whole.²¹² By failing to analyze the works as a whole in *Intervest*, the Eleventh Circuit failed to fulfill the legislative intent of the AWCPA.²¹³

Likewise, the Second Circuit's act of filtering out unprotectable elements cannot be the end of the infringement analysis. Initially, the Second Circuit's filtering of unprotectable elements seems to be a more appropriate test than that used by the Eleventh Circuit. However, in actuality, the two tests provide similar outcomes by providing only a thin level of protection to architectural works.²¹⁴ Although the analysis may be different, the same issues arise because the courts both compare only the protectable elements.²¹⁵ Utilizing a filtration approach without analyzing the architectural work as a whole is contrary to Congress's statement that "creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotect[a]ble elements into an original, protectable whole."²¹⁶

Congress also made a point to note that a higher standard of similarity is not necessary to show in architectural

²⁰⁸ See Shipley, *supra* note 19, at 61 (noting how difficult it is to prove substantial similarity and prevail in architectural infringement cases). To be clear, architects can still rely on design patents to protect their work, but the process of getting a design patent is much more difficult than a copyright and the term of protection for a design patent, only fifteen years, is much less than that of a copyright. See Carl J. Hall, *A Patently Offensive Test: Proposing Changes to the Test for Design Patent Infringement*, 53 VAL. U. L. REV. 297, 300, 302–06 (2018) (explaining the difficulties associated with the patent process and the timeframe); see also Brainard, *supra* note 23, at 87–89 (discussing how patent protection is different from copyright protection of architectural works).

²⁰⁹ U.S. CONST. art. I, § 8, cl. 8; see also *supra* Section I.A.

²¹⁰ 17 U.S.C. § 101; see also *supra* Section III.A.

²¹¹ 17 U.S.C. § 101; see also Section III.A.

²¹² See H.R. REP. NO. 101-735, at 18; see also *supra* Section III.A.

²¹³ See *supra* Section III.B.

²¹⁴ *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 103 (2d Cir. 2014) (citing *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008)).

²¹⁵ *Id.* at 106; *Intervest*, 554 F.3d at 920.

²¹⁶ H.R. REP. NO. 101-735, at 18.

infringement cases,²¹⁷ which runs counter to what the Second Circuit did when it filtered out the unprotectable and stopped its analysis at that.²¹⁸ Theoretically, filtering out the unprotectable elements before comparing the works made it more difficult for the works to be considered substantially similar because it disregards the fact that unprotectable elements, taken together, can form a protectable whole.²¹⁹ Just as the Eleventh Circuit's compilation analysis could render the constitutional intent of the copyright clause useless, so could the Second Circuit's filtration approach.²²⁰ If an architect is aware that such a high level of originality is required to prevail in an architectural infringement case, it is possible that architects would stop relying on copyright protection for relief.²²¹ A lack of reliance on copyright protection, in turn, would render copyright protection for architectural works pointless.

Another problematic part of the Second Circuit's analysis is that its filtration test is a new form of the separability doctrine that Congress aimed to eliminate from architectural infringement cases.²²² Separating out elements that are functional, such as "building codes, topography, structures that already exist on the construction site, or engineering necessity,"²²³ is essentially a restatement of the separability tests utilized for pictorial, graphic, and sculptural works.²²⁴ When drafting the AWCPA, Congress specifically sought to isolate architectural works from the judicial confusion surrounding the separability test, and separating out certain elements effectively puts architectural works in exactly the same position that Congress intended to pull them out of.²²⁵ For these reasons, a uniform test that is true to Congressional intent is necessary to effectively protect architectural works. Below, a two-part test is proposed as a potential solution to resolve this circuit split and ensure copyright protection for architectural works.

²¹⁷ H.R. REP. NO. 101-735, at 21.

²¹⁸ *Zalewski*, 754 F.3d at 106.

²¹⁹ H.R. REP. NO. 101-735, at 18.

²²⁰ *See supra* Section IV.A.

²²¹ *See* Shipley, *supra* note 19, at 61 (noting how difficult it is to prove substantial similarity and prevail in architectural infringement cases).

²²² H.R. REP. NO. 101-735, at 20; *see supra* Section IV.B.

²²³ *Zalewski*, 754 F.3d at 106.

²²⁴ *See* Tang, *supra* note 62, at 40. The separability test is a judicially created test where any solely functional elements of a work are separated out before a substantial similarity analysis; Congress purposefully excluded objects that are solely utilitarian from copyright protection under the useful articles doctrine with the goal of only granting protection to aesthetic, not functional, works. *See* Ginsburg, *supra* note 7, at 1.

²²⁵ H.R. REP. NO. 101-735, at 20 ("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.").

B. *Adopt a Step-by-Step Approach to Analyze Substantial Similarity*

1. Step One: Overall Look and Feel Test

To fulfill the constitutional intent of the Copyright Clause, the legislative intent of the AWCPA, and the Copyright Act itself, courts should adopt a two-part test that resembles the test that the Fourth Circuit utilized in *Ross*²²⁶ and the test that the D.C. Circuit utilized in *Sturdza*.²²⁷ Courts should begin with an overall look and feel test from the viewpoint of an ordinary observer in order to satisfy the legislative intent of the AWCPA and the plain language of the Copyright Act. The Copyright Act defines architectural works as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”²²⁸ Utilizing an overall look and feel test or an ordinary observer test as the first step of the analysis would accomplish Congress’s goal of including overall form in the definition of what comprises a protectable part of an architectural works.

Adopting an overall look and feel test as the initial inquiry when analyzing substantial similarity also fulfills the legislative intent of the AWCPA. When Congress drafted the AWCPA, they noted that “[c]reativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotect[a]ble elements into an original, protectable whole.”²²⁹ While it is meritorious to criticize overall look and feel tests for providing copyright protections for elements that are not protectable on their own, this argument disregards Congress’s express statement that unprotectable elements can form a protectable whole.²³⁰

²²⁶ See generally *Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC*, 496 F. App’x 314 (4th Cir. 2012) (utilizing an intrinsic, ordinary observer test and an extrinsic, filtration test to determine whether two architectural works were substantially similar); see also *supra* Section III.D.

²²⁷ See generally *Sturdza v. United Arab Emirates*, 281 F.3d 1287 (D.C. Cir. 2002) (filtering out the unprotectable elements via traditional copyright doctrine then utilizing the overall look and feel test); see also *supra* Section III.C.

²²⁸ 17 U.S.C. § 101.

²²⁹ H.R. REP. NO. 101-735, at 18.

²³⁰ H.R. REP. NO. 101-735, at 18.

2. Step Two: Filter Out the Unprotectable Elements

The second step of the proposed test will further address the criticism against the overall look and feel test. After performing an overall look and feel test and finding substantial similarity from the viewpoint of an ordinary observer, courts should filter out the unprotectable elements through traditional copyright mechanisms like the public domain, merger, and *scènes à faire* and compare the works again to ensure that there is substantial similarity between protectable elements of the works. Congress made it clear that architectural works were to be held to the same standards as other protected works,²³¹ so applying traditional copyright mechanisms to filter out the unprotectable fulfills that intent. Similarly, filtering out the unprotectable through traditional copyright mechanisms ensures that protection for substantially similar elements in the overall look and feel test does not override the traditional mechanisms of copyright law.²³²

For example, consider a suit involving two modern American colonial-style homes. In the overall look and feel test, an ordinary observer may consider the homes to be substantially similar for the first part of the test because of the classic columns and white siding.²³³ However, after filtering out the *scènes à faire* and public domain elements of white siding and columns,²³⁴ a court could find that the works are not substantially similar without those elements. Therefore, since the colonial homes did not demonstrate substantial similarity in both parts of the test, the works would not be considered substantially similar, and accordingly, a court would not find infringement.²³⁵

3. Weigh the Two Inquiries

While the proposed two-part test somewhat resembles some of tests circuit courts currently use,²³⁶ this note argues that courts should apply the two tests—an overall look and feel test followed by

²³¹ H.R. REP. NO. 101-735, at 21.

²³² See *supra* Section II.C.

²³³ See Kimberly Blackford, *American Colonial Architecture History*, HOUSE PLANS & MORE, https://houseplansandmore.com/resource_center/american-colonial-homes.aspx [<https://perma.cc/8FU3-8VQ8>] (describing characteristics of classic colonial architecture).

²³⁴ *Id.*

²³⁵ See *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 437 (4th Cir. 2010) (explaining that the court can consider unprotectable features but would err if it found substantial similarity in only the unprotectable features).

²³⁶ See *supra* Sections III.C.–D.

a filtration test—with an inverse ratio.²³⁷ For example, if in the overall look and feel test an ordinary observer finds the works to be substantially similar in a multitude of ways, but, after filtering out the unprotectable, the works are only slightly substantially similar, courts should strongly consider the extreme substantial similarity from the overall look and feel test. Each infringement case is going to be different, and each judge or jury will see things differently, but inserting as much consistency as possible into the analysis is necessary to effectuate Congress’s intent of affording protection to architectural works. Employing an inverse ratio presumption would ensure that if both inquiries show substantial similarity, the plaintiff will be more likely to prevail.

The Constitution mandates that “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²³⁸ Congress clearly believed that, despite the Berne Convention’s moral rights theory of protection for architectural works, its protection still met the United States’ utilitarian theories for copyright protection.²³⁹ Congress stated, “[p]rotection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal.”²⁴⁰

This two-part test fulfills the utilitarian purpose of affording copyright protection to architectural works.²⁴¹ Rather than providing architects with thin copyright protection,²⁴² which fails to fulfill the utilitarian purpose of copyright law, the proposed two-part test provides architects with enough protection to allow them to feel that their works are protected. Therefore, the incentive to continue creating original works is preserved under the two-part test, and society will continue to benefit from the innovative creation of architectural works.

CONCLUSION

The current state of substantial similarity analysis in copyright infringement cases involving architectural works

²³⁷ See 4 NIMMER & NIMMER, *supra* note 71, § 13.03(D) for an example of courts using inverse ratios in copyright infringement cases; see also *supra* Part II.

²³⁸ U.S. CONST. art. I, § 8, cl. 1, 8.

²³⁹ H.R. REP. NO. 101-735, at 13.

²⁴⁰ *Id.*

²⁴¹ See 1 NIMMER & NIMMER, *supra* note 35, § 1.03(A)(1), which defines the utilitarian function of copyright law as securing the societal benefits that follow from continued creation of works by authors.

²⁴² See generally *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95 (2d Cir. 2014) (for an example of a case granting thin protection); cf. *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (for another example of thin protection).

provides an unclear level of protection for architects.²⁴³ As neither Congress nor the Supreme Court have legislated or ruled on the precise meaning of substantial similarity, the inquiry is entirely composed of divergent, inconsistent judge-made case law and formulas.²⁴⁴ The differences in treatment are outcome determinative and highlight the need for uniformity.²⁴⁵ Without a clear level of protection, the incentive to create new architectural works is dramatically lessened.²⁴⁶

While no single test can properly fit every situation, courts should evaluate substantial similarity within the context of the legislative intent and statutory language of the Copyright Act and the AWCPA. For architectural works, fulfilling the intent and adhering the language of these two acts necessitates straying away from a compilation analysis and avoiding filtering out unprotectable elements as the lone step. Instead, adopting a two-part test that balances an overall look and feel test and a filtration test fulfills the legislative intent of the AWCPA, the plain language of the Copyright Act, and the constitutional intent of the copyright clause. Likewise, employing a standard test among the circuits for architectural works gives clarity to all parties and will ease the infringement proof inquiry currently required by circuits with thinner protection for architectural works. It will put all architects on notice of how much copying is too much copying, thereby reducing the likelihood of infringement suits. If this approach had been followed in the *Demetriades* case,²⁴⁷ and in many cases that followed, it is likely that Demetriades and other architects furthering the field of architecture would have received the relief they so deserved.

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²⁴³ See Kim, *supra* note 27, at 283.

²⁴⁴ 4 NIMMER & NIMMER, *supra* note 71, § 13.03 (A).

²⁴⁵ See Thomson, *supra* note 28, at 509.

²⁴⁶ See Shipley, *supra* note 19, at 60–61 (noting that the author is unsure that the Architectural Works Copyright Protection Act has stimulated excellence in the architectural field due to thin copyright protection).

²⁴⁷ See generally *Demetriades v. Kaufmann*, 680 F. Supp. 658 (S.D.N.Y. 1988) (providing the plaintiff architect with very little copyright protection). This case involved unquestionable access and the exact same design plans. *Id.* at 660.

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