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## The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?

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**THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT AT TWENTY: HAS FULL PROTECTION MADE A DIFFERENCE?**

*David E. Shipley\**

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## I. INTRODUCTION

Many critically acclaimed buildings were designed by H.H. Richardson, Louis Sullivan, Frank Lloyd Wright, Max Abramovitz, Robert Venturi and other highly regarded American architects during the latter part of the nineteenth century and through most of the twentieth century. Their artistry flourished even though their works received only second-class protection under United States copyright law until 1990. Architects and their works did not receive the same level of protection that copyright law extended to the paintings, sculptures, and other works of authorship created by their highly regarded contemporaries in those other fine arts. The Copyright Act of 1909 did not include architectural plans, blueprints, designs, or models as copyrightable subject matter, and the 1976 Act did not mention architectural works either.<sup>1</sup>

Even though our copyright statutes were silent about architecture until 1990, it was well established that plans, blueprints and models were copyrightable writings under the 1909 Act's category of "drawings or plastic works of a scientific or technical character,"<sup>2</sup> and then as "pictorial, graphic, and sculptural works" under the 1976 Act.<sup>3</sup> The scope of an architect's copyright protection was, however, quite limited. The unauthorized copying of plans or blueprints constituted infringement,<sup>4</sup> but most authorities concluded that plans were not infringed by using them, without the architect's permission, to construct the building they depicted.<sup>5</sup> Moreover, the prevailing view was that an architect's rights did not extend to the actual building derived from his or her plans.<sup>6</sup> A building, as a useful article,<sup>7</sup> could be protected by copyright only to the extent

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<sup>1</sup> MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 130 (5th ed. 2010); David Shipley, *Copyright Protection for Architectural Works*, 37 S.C. L. REV. 393, 395 (1986).

<sup>2</sup> 17 U.S.C. § 5(i) (1973).

<sup>3</sup> 17 U.S.C. § 102(a)(5) (2006). *See also* Leicester v. Warner Bros., 232 F.3d 1212, 1227 (9th Cir. 2000) (Fisher, J., dissenting). The definition of pictorial, graphic, and sculptural works was amended in 1990 to include architectural plans. Pub. L. No. 100-568, § 4(a)(1)(A), 102 Stat. 2853 (1988) (codified at 17 U.S.C. § 101).

<sup>4</sup> *See, e.g.*, Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Const. Co., 542 F. Supp. 252 (D. Neb. 1982); Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981).

<sup>5</sup> *Compare* Scholz Homes, Inc. v. Maddox, 379 F.2d 84 (6th Cir. 1967), *with* Imperial Homes v. Lamont, 458 F.2d 895 (5th Cir. 1972). *See also* Shipley, *supra* note 1, at 403–06; LEAFFER, *supra* note 1, at 130–31 (“[C]opyright in architectural plans or models did not convey a right to control their use.”).

<sup>6</sup> Shipley, *supra* note 1, at 395.

<sup>7</sup> PAUL GOLDSTEIN, COPYRIGHT §§ 2.15.1, 2:183 (1996) (buildings erected from blueprints and plans will rarely qualify as pictorial, graphic, or sculptural works because their intrinsic utilitarian function makes them “useful articles”). A useful article is defined as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a ‘useful article.’” 17 U.S.C. § 101.

it had artistic features that could be identified separately from, and were capable of existing independently of, the structure's utilitarian aspects.<sup>8</sup>

The useful article limitation on protection meant that embellishments and other unnecessary ornamentation added to a structure could be protected by copyright, but that most aspects of a building enjoyed little, if any, protection.<sup>9</sup> However, monumental, nonfunctional works of architecture were protected under Section 102(a)(5) as sculptural works.<sup>10</sup> As a result, Eero Saarinen's Gateway Arch in St. Louis enjoyed copyright protection but hardly any protection was afforded to his design of the Laird Bell Law Quadrangle at the University of Chicago or Mies Van der Rohe's famous apartment buildings on Lake Shore Drive in Chicago.

Almost twenty-five years ago, I published an article advocating both judicial recognition of an architect's right to control the use of his or her plans and of an expansive definition of the copyrightable aspects of functional structures. My rationale for advocating these positions was that architects deserved protection comparable to what copyright law afforded creators of other artistic and sculptural works,<sup>11</sup> and that enhanced protection would promote progress in this important profession.<sup>12</sup> I can take no credit, though, for what happened several years after my article was published when, in 1990, Congress enacted the Architectural Works Copyright Protection Act (AWCPA) and thereby dramatically changed the copyright status of architecture in the United States.<sup>13</sup>

The AWCPA was passed soon after United States' adherence to the Berne Convention for the Protection of Literary and Artistic Works became effective.<sup>14</sup> Congress, in passing this statute, recognized that expanding protection for architecture would "stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal."<sup>15</sup> The AWCPA is said to confer full protection to works of architecture<sup>16</sup> by establishing them as a new category of protectable subject matter in

<sup>8</sup> *Leicester*, 232 F.3d at 1227–28 (Fisher J., dissenting); LEAFFER, *supra* note 1, at 130.

<sup>9</sup> LEAFFER, *supra* note 1, at 130.

<sup>10</sup> Shipley, *supra* note 1, at 424–25; H.R. REP. NO. 101-735, at 18 n.43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6944 [hereinafter H.R. REP.].

<sup>11</sup> Shipley, *supra* note 1, at 444–45.

<sup>12</sup> *Id.* at 448.

<sup>13</sup> Architectural Works Copyright Protection Act, Pub. L. No 101-650, 104 Stat. 5089, 5133 (1990). I did, however, express some of my opinions to the Copyright Office in response to a Notice of Inquiry. See Letter from Professor David E. Shipley to Library of Congress, Copyright Office (Sept. 10, 1988), *reprinted in* The Register of Copyrights, Copyright in Order of Architecture, app. C (June 19, 1989) [hereinafter Shipley letter].

<sup>14</sup> The United States joined the Berne Convention on March 1, 1989, and Congress passed the AWCPA to comply with treaty obligations. CRAIG JOYCE ET AL., COPYRIGHT LAW 206–07 (8th ed. 2010).

<sup>15</sup> H.R. REP., *supra* note 10, at 12.

<sup>16</sup> LEAFFER, *supra* note 1, at 132.

Section 102(a)(8)<sup>17</sup> and defining an 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 features.”<sup>18</sup>

There have been many decisions interpreting and applying the AWCPA since it became effective in 1990.<sup>19</sup> There are routine disputes over ownership of plans,<sup>20</sup> there are claims involving unauthorized copying of plans,<sup>21</sup> and there are cases involving the alleged infringement of buildings like condominium complexes<sup>22</sup> and large homes.<sup>23</sup> Some of these decisions are very interesting. For example, *Shine v. Childs* involved the alleged infringement of an architecture student’s designs for a twisting skyscraper with an elongated diamond pattern by an established architect’s design for the new Freedom Tower at the World Trade Center site in New York City.<sup>24</sup> A leading copyright law casebook<sup>25</sup> states in a note following its presentation of *Shine v. Childs* that

<sup>17</sup> 17 U.S.C. § 102(a)(8) (1990).

<sup>18</sup> *Id.* § 101. See generally LEAFFER, *supra* note 1, at 132–33. Some of the points I made in my article while arguing for expanding protection are reflected in this definition. For instance, I stated that an architect’s copyright should not cover processes or methods of construction or the use of elements like skylights, atriums, and domes. “Rather, it is the designer’s particular arrangement, treatment, and configuration of such unprotectible elements that should be regarded as the copyrightable expression embodied in both his plans and the structure.” Shipley, *supra* note 1, at 445. This is similar to the AWCPA’s definition of architectural work.

<sup>19</sup> Cf. LEAFFER, *supra* note 1, at 132 (“[T]he courts have only begun to create a body of law providing significant guidance on what constitutes originality for architectural works.”).

<sup>20</sup> See, e.g., *Watkins v. Chesapeake Custom Homes*, 330 F. Supp. 2d 563 (D. Md. 2004) (builders modified their copyrighted plans to reflect owners’ revisions; owners then registered copyright on these plans and sued builders for infringement and builders won on summary judgment because owners’ plans, as derivative works, did not qualify for copyright protection and owners failed to show that builders had copied their work); *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998); *Phelps & Assocs. v. Galloway*, 492 F.3d 532 (4th Cir. 2007); *Zitz v. Pereira*, 119 F. Supp. 2d 133 (E.D. N.Y. 1999), *aff’d*, 225 F.3d 646 (2d Cir. 2000) and 232 F.3d 290 (2d Cir. 2000).

<sup>21</sup> See, e.g., *Precision Craft Log Structures, Inc. v. Cabin Kit Co.*, No. CIV 05-199-S-EJL, 2007 U.S. Dist. LEXIS 3829, at \*3 (D. Idaho Jan. 17, 2007).

<sup>22</sup> See, e.g., *Chirco v. Rosewood Vill., L.L.C.*, No. 03CV72145DT, 2005 U.S. Dist. LEXIS 43748, at \*2 (E.D. Mich. Mar. 22, 2005), *accepted, in part, rejected, in part*, *Chirco v. Rosewood Vill., L.L.C.*, 2006 U.S. Dist. LEXIS 70197 (E.D. Mich., Sept. 28, 2006); *Chirco v. Gateway Oaks, L.L.C.*, No. 02-CV-73188, 2005 U.S. Dist. LEXIS 43081 (E.D. Mich. Aug. 26, 2005).

<sup>23</sup> See, e.g., *Richmond Homes Mgmt. v. Raintree*, 862 F. Supp. 1517 (W.D. Va. 1994), *aff’d in part, rev’d in part on other grounds*, 66 F.3d 316 (4th Cir. 1995).

<sup>24</sup> 382 F. Supp. 2d 602 (S.D.N.Y. 2005).

<sup>25</sup> I teach Copyright from a very comprehensive casebook written by four highly regarded copyright law scholars: Craig Joyce, Marshall Leaffer, Peter Jaszi and Tyler Ochoa. Their materials on architectural works are excellent. See JOYCE ET AL., *supra* note 14, at 206–20. The architecture student’s infringement claim in *Shine* withstood a summary judgment motion filed by the established architect and his highly regarded architectural firm. The case is presented in *id.* at 208–15.

[m]ost architectural works cases deal with alleged infringement of designs less fanciful than the one involved in *Shine*. A good deal of litigation concerns competing plans for mass-produced “semi-custom” development homes, which consist of a combination of elements that might be called “standard features,” incapable of copyright protection in themselves.<sup>26</sup>

In another note, this casebook’s authors state:

Like most architectural works cases, those just cited involve relatively “mundane” works. Is copyright protection really necessary to protect these works? For that matter, is copyright needed at all to encourage creativity in the field of architecture? How is it that the United States was at the forefront of architectural creativity for more than 100 years without such protection?<sup>27</sup>

I know enough about the history of architecture to be in full agreement with the casebook authors’ statement about the United States being at the forefront of architectural creativity for more than a century without having full copyright protection. Moreover, after reading scores of decisions involving the AWCPA, I also agree with the authors’ statement that most reported cases involve relatively mundane works. Cases like *Shine v. Childs* are the exception, not the rule. It is reasonable to ask, after analyzing many trial and appellate court opinions, whether the AWCPA has made much of a difference in the last twenty years.

This Article discusses variations on the casebook authors’ questions of whether the protection provided by the AWCPA is needed for mundane architectural works, and whether copyright protection is needed as an incentive for architects. Specifically, it addresses the impact of the AWCPA and considers whether that act has made a significant difference for architects and architecture.

I have read, categorized, and analyzed most of the architecture copyright decisions reported since 1990. I will not swear that I have located and read every case, but I have pored over more than enough to feel confident in making the following statements about the impact of the AWCPA:

- Disputes over the ownership of plans and blueprints were litigated before 1990 and they have been litigated regularly since the passage of the AWCPA.

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<sup>26</sup> *Id.* at (7) on 216.

<sup>27</sup> *Id.* at (8) on 217.

- Litigation over the alleged infringement of plans and blueprints was common before 1990 and these disputes have been litigated regularly since the passage of the AWCPA. However, unlike the pre-1990 case law, it is now settled that unauthorized use of plans constitutes infringement.
- Even with the AWCPA's 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.
- The thin scope of protection for architectural works is due to several related factors: most buildings are functional; individual standard features cannot be protected; an architect's arrangement and composition of design features is often treated as analogous to a compilation; and the idea/expression dichotomy and the *scenes a faire* doctrine both operate to restrict the protectable elements in architectural works.
- Relatively unique, custom-designed structures may benefit to some extent from the protection afforded by the AWCPA, but there are limits to how far a court can go in protecting a particular style or school of architecture. Thus, architect plaintiffs face a daunting task even in those cases where a court gets to the point of asking whether the total concept and feel of the parties' architectural works is substantially similar.

Notwithstanding the difficult task of proving substantial similarity of protected expression, there have been many more architectural works infringement cases litigated and decided in the last twenty years than were reported prior to the passage of the AWCPA in 1990. Perhaps this legislation has given architects who believe that their works have been infringed some confidence in threatening litigation or negotiating settlement after a suit is filed. However, it is difficult to say whether the AWCPA has encouraged architectural creativity or served to discourage some architects from evoking certain styles out of fear of being sued.<sup>28</sup> Other than benefiting, to some degree, relatively unique, custom-designed structures, the AWCPA has not had a substantial impact on architects and architecture because the scope of copyright protection for most architectural works is thin.

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<sup>28</sup> Cf. LEAFFER, *supra* note 1, at 132.

## II. THE NEED FOR PROTECTION AND DEFINING AN “ARCHITECTURAL WORK”

Copyright protection subsists in original works that are “fixed in any tangible medium of expression.”<sup>29</sup> The copyrightability of architectural plans, blueprints, and renderings was well established long before the passage of the AWCPA in 1990.<sup>30</sup> However, prior to 1990, copyright protection was not extended to the actual buildings depicted in plans, blueprints, renderings, drawings, and models, due in large part to the Copyright Act’s “useful article” limitation.<sup>31</sup> The substantial change made by the AWCPA was the extension of copyright protection to fully constructed works of architecture like houses, office towers, condominium complexes, and parking decks.<sup>32</sup> “It confers full protection on works of architecture.”<sup>33</sup>

There are several related reasons for enactment of the AWCPA in 1990. One is that architecture is an important form of artistic expression worthy of protection.

Architecture plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a work of art. . . . We rarely appreciate works of architecture alone, but instead typically view them in conjunction with other structures and the

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<sup>29</sup> 17 U.S.C. § 102(a) (1990).

<sup>30</sup> Shipley, *supra* note 1, at 398–99. A “useful article” is defined as “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. Plans and blueprints convey information to the builder about how to erect the depicted building, and are copyrightable works that function to portray the appearance of a useful article—the completed structure. Shipley, *supra* note 1, at 398 n.18.

<sup>31</sup> Raleigh Newsam, *Architecture and Copyright: Separating the Poetic from the Prosaic*, 71 TUL. L. REV. 1073, 1077 (1997); Shipley, *supra* note 1, at 433–35 (arguing for expanded protection while noting that most authorities had concluded that functional structures, although attractively designed, were not entitled to copyright protection); LEAFFER, *supra* note 1, at 131.

<sup>32</sup> Andrew Pollock, Comment, *The Architectural Works Copyright Protection Act: Analysis of Probable Ramifications and Arising Issues*, 70 NEB. L. REV. 873, 874 (1991); LEAFFER, *supra* note 1, at 133. See, e.g., *Intervest Constr. v. Canterbury Estates Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (litigation involving plans depicting four bedroom homes); *Chirco v. Rosewood Vill., L.L.C.*, No. 03CV72145DT, 2005 U.S. Dist. LEXIS 43748 (E.D. Mich. Mar. 22, 2005), *accepted, in part, rejected, in part*, *Chirco v. Rosewood Vill., L.L.C.*, 2006 U.S. Dist. LEXIS 70197 (E.D. Mich., Sept. 28, 2006) (upon reconsideration, grant of summary judgment for defendant in litigation over condominium complex design denied given material issues as to access, substantial similarity and independent creation); *Shine v. Childs*, 382 F. Supp. 2d 602 (S.D.N.Y. 2005) (litigation over designs for a skyscraper to be built on the World Trade Center site); *Moser Pilon Nelson Architects, L.L.C. v. HNTB Corp.*, 80 U.S.P.Q.2d (BNA) 1085 (D. Conn. 2006) (parking deck at a university in Connecticut).

<sup>33</sup> LEAFFER, *supra* note 1, at 133.

environment at large, where, at their best, they serve to express the goals and aspirations of the entire community.<sup>34</sup>

That is a lofty statement about the importance of architecture. Others have said that it “is the most commonly experienced and pervasive of all the arts. The creative efforts of architects culminate in structures used for shelter, pleasure, business, entertainment, and transportation.”<sup>35</sup>

The drafters of the AWCPA echoed these sentiments, saying that “[p]rotection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal . . . .”<sup>36</sup> I wrote roughly the same thing about twenty-five years ago, arguing that architects deserved to be rewarded for their creativity.<sup>37</sup> I asserted that “[i]n order to promote progress in this important art form and to grant architects copyright protection commensurate to that already enjoyed by other artists, the courts should reconsider their approaches to [the unauthorized use of plans and defining the copyrightable aspects of buildings].”<sup>38</sup>

Another reason for amending the Copyright Act so that greater protection was afforded to architecture involved treaty obligations. The United States became an adherent to the Berne Convention for the Protection of Literary and Artistic Works on March 1, 1989.<sup>39</sup> This convention requires member states to afford copyright protection to “‘works of architecture’ — the constructed design of buildings,” as distinct from plans, illustrations, and sketches.<sup>40</sup> After being directed to undertake a full review of the protection afforded architecture under the 1976 Act, the Register of Copyrights concluded on June 19, 1989, notwithstanding disagreement within the Copyright Office, that the Berne Convention required the United States to afford full protection to architectural works.<sup>41</sup> As a result, the AWCPA was enacted and became effective December 1, 1990.<sup>42</sup> The Act covers architectural works created on or after that date and

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<sup>34</sup> H.R. REP., *supra* note 10, at 11.

<sup>35</sup> ShIPLEY, *supra* note 1, at 394 (citing Hellmuth, *Obsolescence Ab Initio: The New Act and Architectural Copyright*, 22 BULL. COPYRIGHT SOC'Y 169, 170–71 (1974)).

<sup>36</sup> H.R. REP., *supra* note 10, at 12.

<sup>37</sup> ShIPLEY, *supra* note 1, at 395–96.

<sup>38</sup> *Id.* at 448–49.

<sup>39</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853; JOYCE ET AL., *supra* note 14, at 35–37.

<sup>40</sup> H.R. REP., *supra* note 10, at 10.

<sup>41</sup> *Id.* at 11.

<sup>42</sup> Architectural Works Protection Act, Pub. L. No. 101-650, 104 Stat. 5133 (1990). Works that were constructed or otherwise published before December 1, 1990 are not eligible for protection under the AWCPA. 37 C.F.R. § 202.11(d)(3) (2009). The issue of whether a particular architectural work falls under the AWCPA has been litigated. *See, e.g., Zitz v. Pereira*, 232 F.3d 290 (2d Cir. 2000) (affirming lower court's determination that the AWCPA did not apply to plaintiff's work because the townhouse was substantially completed as of December 1, 1990); *Lindal Cedar Homes, Inc., v. Ireland*, No. 03-6102-TC, 2004 U.S. Dist. LEXIS 18878 (D. Or.

included unconstructed works embodied in unpublished plans provided those works were constructed before December 31, 2002.<sup>43</sup>

The AWCPA amended the list of categories of works of authorship in Section 102(a) to include “architectural works” as a new category.<sup>44</sup> The AWCPA added to Section 101 the definition of an “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 features.”<sup>45</sup>

The legislation did not, however, define the term “building.” Copyright Office regulations implementing the AWCPA define “buildings” as “humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos, and garden pavilions.”<sup>46</sup>

According to the AWCPA’s legislative history, the term “building” includes structures that are used by, but not inhabited by, humans, like churches and pergolas; it does not extend to mobile homes and non-habitable, three-dimensional structures like dams, canals, highways, and bridges.<sup>47</sup> These limitations on what is a protectable building are also reflected in regulations that provide that “[s]tructures other than buildings, such as bridges, cloverleaves, dams, walkways, tents, recreational vehicles, mobile homes, and boats” cannot be registered.<sup>48</sup> However, monumental, nonfunctional works of architecture that could be protected under section 102(a)(5) as pictorial, graphic, or sculptural works before the passage of the AWCPA are now protected as architectural works under Section 102(a)(8).<sup>49</sup>

Sept. 14, 2004) (plaintiff concedes that it has no claim under the AWCPA but court notes that nothing in AWCPA affects protection for plans as pictorial, graphic, and sculptural works). *See also* JOYCE ET AL., *supra* note 14, at 210 n.10.

<sup>43</sup> Architectural Works Copyright Protection Act § 706. *See* 17 U.S.C. § 303 (2006). *See also* LEAFFER, *supra* note 1, at 135.

<sup>44</sup> 17 U.S.C. § 102(a)(8).

<sup>45</sup> *Id.* § 101.

<sup>46</sup> 37 C.F.R. § 202.11(b)(2) (2010).

<sup>47</sup> H.R. REP., *supra* note 10, at 18–20.

<sup>48</sup> 37 C.F.R. § 202.11(d)(1). A House subcommittee deleted the term “three-dimensional structure” from the draft legislation, fearing that it might include works like bridges, canals, and other parts of the nation’s transit system. The rationale for deletion was that protection was not needed to stimulate creativity or to block unauthorized copying. Pollack, *supra* note 32, at 875.

<sup>49</sup> H.R. REP., *supra* note 10, at 18 & n.43. Whether monumental works like the Statute of Liberty or the Gateway Arch might be better treated as pictorial, graphic, or sculptural works instead of architectural works is discussed in another section of this Article. *See infra* notes 247–59 and accompanying text in connection with Section 120(a) pictorial remnant—item limiting on architectural copyright protection. *Cf.* Pollara v. Seymour, 344 F.3d 265, 270 n.4 (2d Cir. 2005) (noting that “Frank Gehry’s Guggenheim Museum in Bilbao is a work, and it has recognized stature as art, but it could not be made to fit within the statute’s definition of a ‘work of visual

## A. WHAT IS A BUILDING?

There has been litigation since 1990 over what constitutes a building that can be protected as an architectural work. This may reflect the fact that architects and other designers create a wide variety of structures.<sup>50</sup> Homes,<sup>51</sup> condominiums,<sup>52</sup> skyscrapers,<sup>53</sup> and restaurants<sup>54</sup> are easy but, as noted in the previous paragraph's summary of Copyright Office regulations and the AWCPA's legislative history, things are not so clear with some structures.<sup>55</sup>

For instance, does a building have to be a free standing structure? In *Yankee Candle Co. v. New England Candle Co.*, the court held that a store enclosed within a shopping mall was not an architectural work entitled to protection, even though the mall itself qualified as a building.<sup>56</sup> The court stated that the ambiguous nature of the term "building" "might leave a structure like Fenway Park, one of the greatest architectural works ever designed, undeserving of copyright protection as a building without a roof over its baseball diamond (a space used for recreation, business, and, some would say, religion)."<sup>57</sup>

The dispute in *Viad Corp. v. Stak Design, Inc.*<sup>58</sup> was similar. The court was asked to decide whether kiosks designed for displaying items for sale within a preexisting structure could be protected as buildings under the AWCPA.<sup>59</sup> Viad sought to register the kiosks as architectural works, and the Copyright Office ruled against it, saying that a structure within a preexisting structure designed to display items for sale could not sustain an architectural copyright claim. Viad moved for summary judgment, arguing that the Copyright Office's definition of "building" was too narrow, while Stak argued that it did not matter whether the term "building" was ambiguous because Congress did not intend to include all three-dimensional structures within the AWCPA.<sup>60</sup>

art' " because buildings are excluded from VARA).

<sup>50</sup> See Pollock, *supra* note 32, at 875–76 (noting that the new legislation raised questions about the protectability of a variety of structures).

<sup>51</sup> *Intervest Constr. v. Canterbury Estates Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (involving plans depicting four bedroom homes).

<sup>52</sup> *Chirco v. Rosewood Village, L.L.C.*, 2005 U.S. Dist. LEXIS 43748 (E.D. Mich. 2005), *accepted, in part, rejected, in part*, *Chirco v. Rosewood Vill., L.L.C.*, 2006 U.S. Dist. LEXIS 70197 (E.D. Mich., Sept. 28, 2006) (considering infringement of condominium complex design).

<sup>53</sup> *Shine v. Childs*, 382 F. Supp. 2d 602 (S.D.N.Y. 2005) (litigation over designs for skyscraper to be built on the World Trade Center site).

<sup>54</sup> *Hunt v. Pasternack*, 192 F.3d 877 (9th Cir. 1999) (dispute over designs for an "Organ Stop Pizza" restaurant large enough to hold a "Mighty Wulitzer" organ).

<sup>55</sup> See *supra* notes 45–49 and accompanying text.

<sup>56</sup> 14 F. Supp. 2d 154 (D. Mass. 1998).

<sup>57</sup> *Id.* at 159. Notwithstanding this denial of protection to a structure-within-a-structure, the court found that defendant had infringed the plaintiff candle store's floor plans. *Id.* at 161. The case was eventually settled and the opinion vacated. 29 F. Supp. 2d 44 (D. Mass. 1998).

<sup>58</sup> No. 6:04-CV-407, 2005 U.S. Dist. LEXIS 6572 (E.D. Tex. Apr. 14, 2005).

<sup>59</sup> *Id.* at \*2.

<sup>60</sup> *Id.* at \*2–4.

The court, noting the *Yankee Candle* opinion's question about whether Fenway Park would be denied protection because it lacked a roof over the diamond, decided that the term "building" was ambiguous.<sup>61</sup> However, it then determined that Viad's contention that the term included any three-dimensional object that could be used by humans was too broad and would strip the word "building" of any meaning if adopted.<sup>62</sup> The court concluded that the Copyright Office's definition of building, "demarcating those structures that may be occupied from those that may not," is reasonable.<sup>63</sup> As a result, Viad's kiosks were not copyrightable as architectural works.<sup>64</sup>

In contrast, the court in *Moser Pilon Nelson Architects v. HNTB Corp.* held that a new parking garage for Central Connecticut State University was a copyrightable building.<sup>65</sup> The plaintiffs, who lost a public-bid competition to design the garage, alleged that the defendants, who were the winning bidders, had modified plaintiffs' design for the facility and submitted it as their own.<sup>66</sup> The court did not accept the defendants' argument that the garage was not a building within the meaning of the AWCPA since it was not meant for use by humans as a place to socialize, work, relax, and linger.<sup>67</sup> It agreed that the garage was not habitable in the same manner as a house, but said that it was permanent, stationary, and as much designed for human occupancy as a garden pavilion.<sup>68</sup> After all, visitors to the university leave their cars there all day, they can obtain food at the vending machines, and it protects them and their cars from the elements. Moreover, the defendants' theory, which attempted to restrict the category of protected structures on the basis of the duration of human occupancy, strained the ordinary meaning of the terms "building" and "occupancy." "Congress would [not] have wished to protect an architect's design of a home but not of an adjacent garage that was designed as an integral part of the homeowner's property."<sup>69</sup>

In *Patriot Homes, Inc. v. Forest River Housing*, a dispute between manufacturers of modular housing, the narrow issue for the court was whether Patriot's Elite Modular design was a building under the AWCPA.<sup>70</sup> The defendant argued that the exclusion of mobile homes in the Copyright Office's regulations meant that

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<sup>61</sup> *Id.* at \*7. The court questioned in a footnote how Texas Stadium, a structure with a hole in the roof, would fare under the several definitions of "building." *Id.* at \*7 n.4.

<sup>62</sup> *Id.* at \*8.

<sup>63</sup> *Id.* at \*9.

<sup>64</sup> *Id.* at \*9-10. The court declined to resolve whether the Copyright Office interpretation of the term "building" was entitled to *Chevron* deference or the less-deferential *Skidmore* standard, but said that the regulation was reasonable even under *Skidmore*.

<sup>65</sup> 80 U.S.P.Q.2d (BNA) 1085 (D. Conn. 2006).

<sup>66</sup> *Id.* at 1087.

<sup>67</sup> *Id.* at 1091.

<sup>68</sup> *Id.* at 1092.

<sup>69</sup> *Id.* at 1091.

<sup>70</sup> 548 F. Supp. 2d 647, 649 (N.D. Ind. 2008).

modular homes could not be protected. The court disagreed and explained that mobile and manufactured homes were different from modular homes. Plaintiff's units were clearly buildings because they were permanent and stationary shelters designed to be used as dwellings, with or without a permanent foundation. They had to meet building code requirements, and were not built on a chassis like a mobile or manufactured home.<sup>71</sup> Moreover, the Elite Modular's floor plan was copyrightable because "the overall form displays a creative arrangement of rooms in various sizes designed to be an affordable and practical option for living headquarters."<sup>72</sup>

For the most part, these decisions, determining what is and is not a "building" for purposes of protection under AWCPA, make sense. However, I disagree with the determination in *Yankee Candle* that a structure within a structure is not a protectable building. It is reasonable to envision modular structures, like those held to be protectable in *Patriot Homes*, designed as homes or places of business, being placed inside a much larger structure. Still, even though the Copyright Office regulations, which are entitled to at least *Skidmore* deference, provide considerable guidance, it seems likely that in the future there will be occasional disputes as to whether a particular structure falls within the scope of the AWCPA. However, in the vast majority of the cases discussed or cited in this Article, there was no dispute over whether the plaintiff's structure was a building protected by the AWCPA.

#### B. MUST THE BUILDING BE CAPABLE OF CONSTRUCTION?

Well before the passage of the AWCPA in 1990, courts had held that copyright protection extended to simplified floor plans, brochures with floor plans, promotional materials, and cut sheets of copyrighted architectural plans.<sup>73</sup> It did not matter whether an experienced contractor might have been able to construct a house based on a brochure with simple floor plans and a rendering of the finished house, because pre-AWCPA cases did not demand constructability while affording copyright protection to such works of authorship. Similarly, there is nothing in the AWCPA stating or implying that copyright in an architectural work can subsist only in a work that has been

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<sup>71</sup> *Id.* at 651.

<sup>72</sup> *Id.*

<sup>73</sup> *John Wieland Homes and Neighborhoods, Inc. v. Poovey*, 71 U.S.P.Q.2d (BNA) 1929, 1933 (W.D.N.C. 2004) (citing *Donald Frederick Evans & Assocs., Inc. v. Continental Homes, Inc.*, 785 F.2d 897, 904–05 (11th Cir. 1986), *Imperial Homes v. Lamont*, 458 F.2d 895, 898 (5th Cir. 1972), and *Arthur Rutenberg Corp. v. Parrino*, 664 F. Supp. 479, 481 (M.D. Fla. 1987)); *Kent v. Revere*, 229 U.S.P.Q. 828, 832 (M.D. Fla. 1985) (brochures with floor plans contained sufficient information for residential designer to produce technical drawings). See also *Herman Frankel Organization v. Tegman*, 367 F. Supp. 1051 (E.D. Mich. 1973) (defendant building company and draftsman admitted copying copyrighted abridged floor plans alone from brochure constituted violation of Copyright Act).

constructed,<sup>74</sup> or that only designs capable of construction are copyrightable as architectural works.<sup>75</sup> In short, it does not matter whether a building depicted in plans has been constructed or can be constructed in order for the plans to be protected as an architectural work.<sup>76</sup> After all, an architectural work is the design of a building as embodied in a building, plans, or drawings.<sup>77</sup> An unconstructed architectural work, embodied only in plans, drawings, or models, can be infringed by a completed structure embodying or depicting the protected design.<sup>78</sup>

For example, in *Shine v. Childs* the court said it was irrelevant whether a skyscraper for the World Trade Center site could be constructed from the plaintiff's highly-acclaimed designs, renderings, and models.<sup>79</sup> The court said that the Second Circuit "[had] twice noted that plans or designs not sufficiently detailed to allow for construction still may be protected" and that "[t]his reasoning should apply equally to architectural works because [they are generally] subject to the same standards that apply to other copyrightable works."<sup>80</sup>

The decision in *Oravec v. Sunny Isles Luxury Ventures*<sup>81</sup> is similar. The court did not accept the defendant's argument that plaintiff's plans for a high-rise building were unprotectable because they were too conceptual, consisted of no more than commonly-used functional features, and lacked floor plans, site plan

<sup>74</sup> *Hunt v. Pasternack*, 192 F.3d 877, 879–80 (9th Cir. 1999) (appellate court admits confusing matters in an earlier decision and says that the statute makes clear that protection is not limited to building designs embodied in constructed buildings).

<sup>75</sup> *Shine v. Childs*, 382 F. Supp. 2d 602, 608 (S.D.N.Y. 2005) ("The [AWCPA] nowhere states or implies that only designs capable of construction are worthy of protection.").

<sup>76</sup> *Hunt v. Pasternack*, 192 F.3d 877, 879 (9th Cir. 1999) (finding defendants liable for using plaintiff's copyrighted plans for a restaurant even though the building depicted in those plans had not been constructed). See also Louis Altman, *Copyright on Architectural Works*, 33 IDEA 1, 61 (1992) (it is not a defense that the defendant took less than all that is in plaintiff's plans and did not use the rest—the material taken does not have to be a large part of the plaintiff's work); Pollock, *supra* note 32, at 881–87 (general discussion of the scope of exclusive rights in architectural works).

<sup>77</sup> 17 U.S.C. § 101 (2006) (definition of "architectural work"). See also *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 109 (1st Cir. 2006) (a completed building or structure can itself constitute an infringing copy of a copyrighted work). The plaintiff designer in the T-Peg litigation ultimately failed to prove at trial that the defendant builder copied its plans. *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 2010 Copyright Law Decisions ¶ 29,990 (D.N.H. 2010).

<sup>78</sup> *Hunt v. Pasternack*, 179 F.3d 683 (9th Cir. 1999), *amended by*, 192 F.3d 877 (9th Cir. 1999); *Allora, L.L.C. v. Brownstone, Inc.*, No. 1:07CV87, 2007 U.S. Dist. LEXIS 31343 (W.D.N.C. Apr. 27, 2007) (defendant's unauthorized use of plaintiff's copyrighted architectural plans to construct homes outside geographic restrictions where designs could be used and in advertising and real estate listings was actionable, but the court refused to enjoin construction because plaintiff's damages remedy was adequate).

<sup>79</sup> 382 F. Supp. 2d at 609.

<sup>80</sup> *Id.* at 608 (citing and quoting from *Attia v. Soc'y of the N.Y. Hosp.*, 201 F.3d 50, 57 (2d Cir. 1999) and *Sparaco v. Lawler, Matusky & Skelly Eng'rs, LLP*, 303 F.3d 460, 469 (2d Cir. 2002)).

<sup>81</sup> 469 F. Supp. 2d 1148 (S.D. Fla. 2006), *aff'd*, 527 F.3d 1218 (11th Cir. 2008).

dimensions, and indicators of site support.<sup>82</sup> The court said that no constructability test exists, that plaintiff's use of convex and concave segments was distinctive in relation to other aspects of his design, and that his arrangement and use of elevator towers was original and concrete.<sup>83</sup> Since it is possible to afford protection to plans depicted in a promotional brochure, it is reasonable to afford protection to an architectural work depicted in an architect's rendering of a new building contained in a bid proposal.<sup>84</sup>

An important caveat in regard to the issue of protecting works that might not be capable of construction is that constructability is not the same as copyrightability. Plans which are preliminary and generalized, and which describe a proposed design at a very general level of abstraction, may contain little more than unprotectable ideas, and thus may be entitled to very limited or even no protection.<sup>85</sup> For instance, "the concept of using an island-or peninsula-shaped bar to bisect a seating area which has booths on one side and stool seating on the other" for part of a restaurant's interior plan is a general idea that is not copyrightable.<sup>86</sup> Similarly, in litigation over a substantial addition to a major New York City hospital, the plaintiff claimed that his copyright on preliminary drawings extended to the placement of the addition over FDR Drive, the use of a three-story high truss to transfer weight, the insertion of a connecting roadway between 68th and 70th Streets, and the placement of the mechanical floor in the same location in the new building.<sup>87</sup>

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<sup>82</sup> *Id.* at 1162. The plaintiff alleged that the high-rise condominium complexes of Trump Palace and Trump Royale infringed his plans. *Id.* at 1159.

<sup>83</sup> *Id.* at 1165–66. Nevertheless, the court granted summary judgment for the defendants because no reasonable jury could find that their buildings were substantially similar to plaintiff's designs. *Id.* at 1172. The Eleventh Circuit affirmed. 527 F.3d 1218 (11th Cir. 2008). *See also* T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 114–15 (1st Cir. 2006) (reversing summary judgment for defendant and explaining that the question was not whether plaintiff created a completed frame design but whether a jury could conclude that defendant's frame for a house, as drawn and built, was substantially similar to plaintiff's architectural work as embodied in preliminary plans for a person's house); Lindal Cedar Homes, Inc. v. Ireland, No. 03-6102-TC, 2004 U.S. Dist. LEXIS 18878 (D. Or. Sept. 14, 2004) (denying summary judgment against defendant who allegedly based plans for custom home on one page from plaintiff's plan book).

<sup>84</sup> *See supra* notes 73–74 and accompanying text.

<sup>85</sup> *Attia v. Soc'y of the N.Y. Hosp.*, 201 F.3d at 55 (plaintiff's preliminary drawings for modernizing hospital were not infringed by defendants' detailed schematic design drawings which incorporated several of the same design ideas and concepts).

<sup>86</sup> *Ale House Mgmt., Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137, 143 (4th Cir. 2000). Decisions from before the passage of the AWCPA made the same point. For instance, the concept of a T-shaped building is not copyrightable, but detailed plans and drawings for a specific structure are entitled to protection. *Nucor Corp. v. Tennessee Forging Steel Serv., Inc.*, 476 F.2d 386, 390 (8th Cir. 1973).

<sup>87</sup> *Attia*, 201 F.3d at 55–56. *Cf. Sparaco v. Lawler, Matusky & Skelly Eng'rs, LLP*, 303 F.3d 460, 468–69 (2d Cir. 2002) (distinguishing *Attia* and holding that plaintiff's site plan for an assisted living facility was sufficiently concrete and detailed to be entitled to copyright protection). *But cf. Grusenmeyer & Assocs. v. Davison, Smith & Certo Architects, Inc.*, 212 Fed. Appx. 510 (6th Cir. 2007) (affirming trial court's grant of summary judgment where plaintiff's site plan was

The court said that these elements were no more than ideas and concepts that could not be protected by copyright.<sup>88</sup>

There is not a constructability test for protecting an architectural work, but it is necessary for the architect's work product to be more developed than general ideas and concepts. This requirement is not unique to architectural works. After all, Section 102(b) states that protection for an original work of authorship does not "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>89</sup>

### III. COPYRIGHT OWNERSHIP ISSUES

Disputes about the ownership of copyrighted plans and blueprints were litigated prior to the enactment of the AWCPA<sup>90</sup> and they will continue to be hotly contested. The AWCPA does not address copyright ownership, but the standard American Institute of Architecture (AIA) contract provides that "the architect shall be deemed the author of the documents and drawings prepared with respect to [a particular] project and shall retain all rights to said documents including copyrights."<sup>91</sup> The standard contract also provides that the documents and drawings "shall not be used by the owner or others on other projects, for additions to this Project or for completion of this Project by others, unless the architect is adjudged to be in default under this agreement, except by agreement in writing with appropriate compensation to the Architect."<sup>92</sup> This language is clear but disputes still arise frequently over ownership of the copyright in plans and versions of plans modified and used by clients or builders without the architect's permission.<sup>93</sup>

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not sufficiently unique to merit copyright protection and where, in the alternative, use of the plan was authorized under a contract).

<sup>88</sup> *Attia*, 201 F.3d at 56.

<sup>89</sup> 17 U.S.C. § 102(b) (2006).

<sup>90</sup> *See, e.g., Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr.*, 542 F. Supp. 252 (D. Neb. 1982). The defendant paid the plaintiff for its architectural service, then decided to use the plans to build a second apartment complex without the plaintiff firm's consent or knowledge. The court determined that the plans were not a commissioned work and that plaintiff had not transferred copyright ownership to defendant, resulting in victory for the plaintiff.

<sup>91</sup> *Johnson v. Jones*, 149 F.3d 494, 497 (6th Cir. 1998) (quoting Abbreviated Form of Agreement Between Owner and Architect, art. 6, § 6.1).

<sup>92</sup> *Id.* (italics removed).

<sup>93</sup> *See, e.g., Christopher Phelps & Assocs. v. Galloway*, 492 F.3d 532 (4th Cir. 2007); *Zitz v. Pereira*, 119 F. Supp. 2d 133 (E.D.N.Y. 1999), *aff'd sub nom., Richard J. Zitz, Inc. v. Pereira*, No. 99-9399, 2000 U.S. App. LEXIS 26392 (2d Cir. Aug. 31, 2000), *and* 232 F.3d 290 (2d Cir. 2000) (ownership dispute regarding plans to several townhouses resolved against copyright claimant because it was determined he was not the author of the plans and the AWCPA was not applicable since townhouses were under construction prior to Act's effective date); *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998); *Watkins v. Chesapeake Custom Homes*, 330 F. Supp. 2d 563 (D. Md. 2004) (builders modified their copyrighted plans to reflect owners' revisions; owners then

For example, the defendant in *Christopher Phelps & Associates v. Galloway* wanted to build an upscale retirement home on Lake Wylie near Charlotte, North Carolina.<sup>94</sup> He saw a house he liked on Lake Norman, about thirty miles away, and asked the builder for a copy of the plans.<sup>95</sup> The builder advised the defendant to ask the homeowner who, thinking that she had rights in the plans because she had commissioned and purchased them, gave them to the defendant on the condition that he not build his home on Lake Norman.<sup>96</sup> Each page of those plans had a copyright notice and the name of the plaintiff architect.<sup>97</sup> The architect eventually sued for copyright infringement and won.<sup>98</sup> The Lake Norman home owner might have owned a copy of the plans, but the copyright on the plans was retained by the plaintiff architect.<sup>99</sup>

Similarly, in *Johnson v. Jones* the owner and the architect could not agree on all the terms of a contract for the design and construction of the owner's dream home, even after the architect started work on the project.<sup>100</sup> The draft contracts had the standard AIA language about ownership of plans and copyright.<sup>101</sup> The owner eventually fired the architect, hired another architect and builder, and gave the original architect's plans to his construction agent who used them to build the dream house.<sup>102</sup> The court held that this was copyright infringement.<sup>103</sup>

The basic rule remains as it was before the passage of the ACWPA:<sup>104</sup> absent an agreement to the contrary, the architect holds the copyright to the architectural work prepared for the client.<sup>105</sup> In addition, courts are fairly

registered copyright on these plans and sued builders for infringement, but builders won on summary judgment because the owners' plans, as derivative works, did not qualify for copyright protection and owners failed to show that the builders had copied their work). *Cf. Javelin Invs., L.L.C. v. McGinnis*, No. H-05-3379, 2007 U.S. Dist. LEXIS 21472 (S.D. Tex. Jan. 23, 2007) (plaintiff builders invoked several contradictory theories of ownership in plans drawn by nonparty architect against building owners; court ruled in owner's favor, dismissing builder's claims).

<sup>94</sup> 492 F.3d 532, 535 (4th Cir. 2007).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 536.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 536, 547.

<sup>99</sup> *Id.* at 547. *See* 17 U.S.C. § 202 (stating that ownership of copyright is distinct from ownership of tangible object).

<sup>100</sup> 149 F.3d 494, 497 (6th Cir. 1998).

<sup>101</sup> *Id.* at 497–98.

<sup>102</sup> *Id.* at 499.

<sup>103</sup> *Id.* at 507.

<sup>104</sup> *See, e.g., Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252 (D. Neb. 1982); *see also Shipley, supra* note 1, at 400–01 & n.37 (discussing *Aitken* and noting court's conclusions that the plans were not a commissioned work, that there was no work-for-hire relationship because architect was an independent contractor, and that there was no joint authorship).

<sup>105</sup> *See, e.g., Watkins v. Chesapeake Custom Homes, L.L.C.*, 330 F. Supp. 2d 563 (D. Md. 2004). In their contract, the builders/architects modified plans to reflect homeowners' wishes. The homeowners' copyright registration falsely asserted that the plans were based on plans that were

reluctant to conclude, in situations like those in *Johnson and Phelps & Associates*,<sup>106</sup> that the client, a rival architect, or a builder has an implied, non-exclusive license to use the original architect's plans. In cases where courts have determined that an implied license exists or plausibly may exist, the plaintiff architect/copyright owner was found to have intended that his or her architectural work be used in the manner in which it was eventually used.<sup>107</sup> The plaintiffs in *Johnson and Phelps & Associates* never intended for their plans to be used without their involvement, consent, and compensation.<sup>108</sup>

An implied license was found in *I.A.E., Inc. v. Shaver*,<sup>109</sup> where two construction companies created a joint venture, I.A.E./BMI, which was hired to design an air-cargo hangar at the Gary, Indiana airport.<sup>110</sup> They retained Shaver, an architect, to create schematic documents for the first phase of this multi-stage project; he signed a contract stating that he would do this for \$10,000.<sup>111</sup> Shaver created the schematics, delivered them to I.A.E./BMI, and was paid.<sup>112</sup> He was hoping that he would be retained to work on the remaining phases, but I.A.E./BMI hired another architect to finish the project and Shaver mailed I.A.E./BMI an acknowledging letter that he was no longer involved.<sup>113</sup> His schematic documents, along with a message conveying his hope that "the ideas and knowledge exhibited in [the] work . . . assist the Airport," were enclosed with that letter.<sup>114</sup> The I.A.E./BMI venture eventually sought a declaratory judgment that it had not infringed any copyrights held by Shaver, and that it had a right to use his drawings.<sup>115</sup> The trial court agreed with I.A.E./BMI, and the Seventh Circuit affirmed. Based on the written contract describing the work to be done, Shaver's clear intent in his letter to I.A.E./BMI that his schematics be used for the first phase of the project and the fact that Shaver had received payment for his services, it was reasonable to conclude that Shaver had granted an implied nonexclusive license to I.A.E./BMI.<sup>116</sup>

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used with the builders' permission. Summary judgment granted for builders/architects.

<sup>106</sup> See *supra* notes 93–104 and accompanying text.

<sup>107</sup> *Johnson v. Jones*, 149 F.3d at 500–02 (discussing *Effects Assocs. v. Cohen*, 908 F.2d 555 (9th Cir. 1990) and *I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996)).

<sup>108</sup> *Id.* at 501; *Christopher Phelps & Assoc. v. Galloway*, 492 F.3d 532, 535–36 (9th Cir. 2007). See also *Thomas M. Gilbert Architects, P.C. v. Accent Builders and Developers, L.L.C.*, 2010 Copyright Law Rescissions ¶ 29,927 (4th Cir. 2010) (builder's affirmative defense of implied license properly dismissed).

<sup>109</sup> 74 F.3d 768 (7th Cir. 1996).

<sup>110</sup> *Id.* at 770.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 771.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 770–72.

<sup>116</sup> *Id.* at 776–77. See also *Johnson v. Jones*, 149 F.3d at 501 (discussing *I.A.E. Inc. v. Shaver*); *Francois Assocs. Architects v. Jack Ruch Quality Homes, Inc.*, 81 U.S.P.Q.2d (BNA) 1485 (C.D. Ill. 2006) (court cites and discusses *Shaver* in deciding, based on invoices, conduct of the parties,

*R. Miller Architecture, Inc. v. Edgington Enterprises, Inc.* is another case in which a court said that the defendant, a construction company, might enjoy an implied license to use the plaintiff architect's drawings.<sup>117</sup> The defendant and plaintiff had an informal work agreement for a 158-unit residential townhouse community the defendant was constructing.<sup>118</sup> The defendant started to experience financial difficulties, so the architect did only minimal work after a certain point in time, and ultimately disassociated himself from the project.<sup>119</sup> The architect was paid for his services, and several units based on his designs were built.<sup>120</sup> He then sought a preliminary injunction to prevent the defendant from continuing to use his designs.<sup>121</sup> The court concluded that plaintiff could likely establish copyright ownership, but it denied injunctive relief, reasoning that plaintiff architect had not shown a substantial likelihood of success on the merits because the defendant had several strong defenses, including an implied license to use the plans.<sup>122</sup> The court explained that the architect was hired in 1999 to create the designs at issue, that he delivered the designs to defendant upon request, that he acknowledged in several letters between 2000 and 2005 that the designs would be distributed, that he did not include any warnings that further use of the designs would be regarded as copyright infringement, and that it was not until 2006 that the architect mentioned any limits on the use of the drawings.<sup>123</sup>

The First Circuit, in affirming a district court's finding of sufficient evidence of the plaintiff architect's intent to convey an implied nonexclusive license for use of his plans, acknowledged that implied licenses are not common, that the

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correspondence, and affidavits, that it could not yet say at this stage of litigation whether architect plaintiff had granted implied license).

<sup>117</sup> 81 U.S.P.Q.2d 1819 (M.D. Fla. 2006).

<sup>118</sup> *Id.* at 1820–21.

<sup>119</sup> *Id.* at 1821.

<sup>120</sup> *Id.* at 1822.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1823.

<sup>123</sup> *Id.* at 1824. The court also said that the architect should have known of the alleged infringement as early as 2001. As a result, his claim might have been barred by the doctrines of laches and equitable estoppel as well as the statute of limitations. *Id.* at 1824–25. See also Jeffrey A. Grusenmeyer & Assocs. v. Davison, Smith & Certo Architects, Inc., 212 Fed. Appx. 510, 514 (6th Cir. 2007) (defendant entitled to use plaintiff's master site plan for school expansion under the contract between the plaintiff and the school); John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 41–42 (1st Cir. 2003) (factors pointed away from an implied license because the plaintiff had a long-term relationship with the developer of the site, the parties had signed the standard AIA contract, and the alleged infringer had not obtained the plans from the supposed licensor); Foad Consulting Grp., Inc. v. Musil Govan Azzalino, 270 F.3d 821, 832 (9th Cir. 2001) (applying California law in finding that initial contract between defendants and "plaintiff engineering firm" granted defendants an implied license to copy and adapt the firm's plot plan and to publish the resulting derivative work for construction of project for which it was designed).

burden of establishing the license rests on the party alleging its existence, and that the determination of intent is key.<sup>124</sup> The considerations include:

- (1) whether the parties were engaged in a short-term discrete transaction, as opposed to an ongoing relationship; (2) whether the creator utilized written contracts . . . providing that copyrighted materials could only be used with the creator's future involvement or express permission; and (3) whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible.<sup>125</sup>

The court of appeals, agreeing with the district court, concluded that the facts favoring the existence of an implied license were compelling.<sup>126</sup>

As noted above, the AWCPA does not address copyright ownership issues. These issues were litigated prior to 1990 and will continue to be contested.<sup>127</sup>

#### IV. SATISFYING THE ORIGINALITY REQUIREMENT

What does it take for an architect's design to be protected by copyright? Some of the cases discussed in this Article's first section indicate that a designer has to go beyond general ideas and general concepts, while other cases hold that protection would be afforded to rudimentary plans and renderings in promotional brochures.<sup>128</sup> How can these decisions be reconciled? What does it take to secure copyright protection for an architectural work?

Assuming fixation of the architect's work in plans, a model, a sketch, or some other tangible form,<sup>129</sup> the basic question is what constitutes an original architectural work. The Supreme Court stated that

[t]he *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.

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<sup>124</sup> Estate of Hevia v. Portrio Corp., 602 F.3d 34, 41 (1st Cir. 2010).

<sup>125</sup> *Id.* at 41 (quoting Nelson-Salabes, Inc. v. Morningside Dev., L.L.C., 284 F.3d 505, 516 (4th Cir. 2002)).

<sup>126</sup> *Id.*

<sup>127</sup> Disputes can arise even after litigation. For example, in *Thomsen v. Famous Dave's of America, Inc.*, 606 F.3d 905 (8th Cir. 2010), Famous Dave's hired a contractor to design the décor for several restaurants, but there was a dispute about ownership of those designs. The parties resolved that dispute through settlement in 2001, with the contractor releasing all copyright, proprietary designs, and sign work to the restaurant chain. *Id.* at 907–08. The contractor sued the chain in 2007, alleging copyright infringement, and the district court interpreted the 2001 settlement in the restaurant's favor, holding that the contractor had transferred the design. *Id.* at 906, 908. The Eighth Circuit affirmed. *Id.* at 912.

<sup>128</sup> See *supra* notes 73–89 and accompanying text.

<sup>129</sup> 17 U.S.C. § 102 (2006).

Original, as the term is used in copyright, means 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. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.<sup>130</sup>

Another way to approach this issue is to assume that the architectural work owes its origin to its architect (that it was not copied)<sup>131</sup> and ask what in the work constitutes the modicum of creativity that must be present in order for the work to be protected.

Consistent with *Feist*, “not much” creativity is required of the architect. The Copyright Act’s definition of architectural work states that protection does not extend to individual, standard features, but that it does cover the overall form of the work as well as the arrangement and composition of spaces and elements in the design.<sup>132</sup> This means that an architectural work includes the design’s overall form, the arrangement and composition of the spaces in the design, and the arrangement and composition of the design’s elements minus the individual standard features like “common windows, doors, and other staple building components.”<sup>133</sup>

The AWCPA’s legislative history explains that the phrase “arrangement and composition of spaces and elements in the design” found in the definition of architectural work recognizes that creativity in an architect’s design often includes “[the] selection, coordination, or arrangement of unprotectible elements into an original, protectible whole,” and the incorporation of “new, protectible design elements into otherwise standard, unprotectible building features.”<sup>134</sup> It also acknowledges that “interior architecture may be protected.”<sup>135</sup>

This language about selecting, coordinating and arranging is similar to the Copyright Act’s definition of “compilation” as “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>136</sup> The requisite creativity for a compilation, like a directory or taxonomy, may come from the author’s choice of materials to include in the work, the order in which the information is

<sup>130</sup> *Feist Pub., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citations omitted).

<sup>131</sup> *Id.* at 346 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (defining “author” as “he to whom anything owes its origin; originator; maker”).

<sup>132</sup> 17 U.S.C. § 101 (2006) (definition of architectural work).

<sup>133</sup> Newsam, *supra* note 31, at 1115, quoting H.R. REP., *supra* note 10, at 18.

<sup>134</sup> 17 U.S.C. § 101 (2006) (definition of “architectural work”).

<sup>135</sup> H.R. REP., *supra* note 10, at 18.

<sup>136</sup> 17 U.S.C. § 101 (definition of “compilation”). See also *id.* § 103(b) (copyright in a compilation extends only to the material contributed by the author, as opposed to preexisting material employed in the work).

placed, or the manner in which data are arranged within the work.<sup>137</sup> Sweat and elbow grease alone do not satisfy the creativity requirement.<sup>138</sup> Moreover, “selections and arrangements that are mechanical, routine, common place, typical, garden variety, obvious, inevitable, time-honored, age-old, or dictated by law will fail to pass muster.”<sup>139</sup> Finally, the scope of protection for a compilation is limited to the material contributed by the author and does not extend to the preexisting material employed in the work.<sup>140</sup> Protection for compilations is often described as “thin.”<sup>141</sup>

According to Judge Stanley Birch of the U.S. Court of Appeals for the Eleventh Circuit, the requisite creativity for architecture to be copyrightable is analogous to that required for a compilation; the architect’s selection, coordination, or arrangement of the standard features may, together, constitute a protectable whole.<sup>142</sup> The case in which Judge Birch made this statement involved litigation over floor plans for residences with four bedrooms.<sup>143</sup> Although the plaintiff’s architectural work was found to be copyrightable, the trial court said that given the dissimilarities with respect to the coordination of non-original, commonplace, and elementary components, no reasonable observer could conclude that the works were substantially similar.<sup>144</sup> The court of appeals upheld the trial court’s grant of summary judgment for the defendant, holding that there was no infringement and noting that when the scope of copyright protection is thin, the substantial similarity inquiry is narrowed.<sup>145</sup> In essence, the copyright on the plaintiff’s architectural work was good but quite limited; the offending work had to be virtually identical to the plaintiff’s work in order to be deemed infringing.

Another recent Eleventh Circuit decision on architecture infringement says that when identifying the protected elements in an architectural work a court has to be mindful of the basic principle codified in Section 102(b): that protection does not extend to ideas, but to expression.<sup>146</sup> The court also noted that the AWCPA excludes individual standard features such as common

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<sup>137</sup> *Feist*, 499 U.S. at 348.

<sup>138</sup> *Id.* at 352–56 (rejecting “sweat of the brow” approach).

<sup>139</sup> David E. Shipley, *Thin But Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91, 98 (2007).

<sup>140</sup> 17 U.S.C. § 103(b) (2006).

<sup>141</sup> *Feist*, 499 U.S. at 349 (“[C]opyright in a factual compilation is thin.”); Shipley, *supra* note 139, at 96.

<sup>142</sup> *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919 (11th Cir. 2008).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 918.

<sup>145</sup> *Id.* at 919, 921 (citing *Key Pub. Inc. v. Chinatown Today Publ’g Enter.*, 945 F.2d 509, 514 (2d Cir. 1991)). See generally Shipley, *supra* note 139.

<sup>146</sup> *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224–25 (11th Cir. 2008). See also *Ale House Mgmt. v. Raleigh Ale House, Inc.*, 205 F.3d 137, 143 (4th Cir. 2000) (general concept of using an island or peninsula-shaped bar to bisect seating area in a restaurant not entitled to copyright protection).

windows, doors, and other staple building features from protection.<sup>147</sup> At the same time, the court said that creativity in architecture often involves the selection, coordination, or arrangement of unprotectable elements into a protectable whole, and that the statute itself defines an architectural work as “the arrangement and composition of spaces and elements in the design.”<sup>148</sup>

Many other courts have said essentially the same thing: the copyrightability of plans “is in the selection of its elements and in the coordination and arrangement of those elements into a design.”<sup>149</sup> The existence of common, unprotectable design features in a building’s design does not preclude the design as a whole from securing copyright protection.<sup>150</sup> Plans or architectural works using features common in the building industry can constitute original, protectable works when one considers the plans or the building as a whole and the ways in which the architect combines the unprotectable elements.<sup>151</sup> Similarly, although aspects of a particular style of architecture may be unprotectable as standard features or under the *scenes a faire* doctrine, the architect’s combination of the style’s standard elements or features can possess the requisite originality to be deemed a copyrightable work.<sup>152</sup>

As with other works of authorship, an architect who, with permission of the copyright owner, makes sufficient changes to an existing architectural work to create a second architectural work is entitled to copyright protection on the new structure or set of plans. The new architectural work constitutes a derivative work.<sup>153</sup> The same holds true for an architect who makes substantial enough

<sup>147</sup> *Oravec*, 527 F.3d at 1225 (citing 17 U.S.C. § 101 and H.R. REP. NO., *supra* note 10).

<sup>148</sup> *Id.* (citing 17 U.S.C. § 101 (definition of “architectural work”) and *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 110 (1st Cir. 2006)). *See also* *Miller’s Ale House, Inc. v. Boynton Carolina Ale House, L.L.C.*, 2010 Copyright Law Decisions ¶ 29,984 (S.D. Fl. 2010) (floor plans of new restaurant chain did not infringe an established chain’s plans because architectural works are accorded only thin protection for their overall arrangement of common elements and defendant’s plans were not substantially similar).

<sup>149</sup> *Lindal Cedar Homes, Inc. v. Ireland*, No. 03-6102-TC, 2004 U.S. Dist. LEXIS 18878, at \*6 (D. Or. Sept. 14, 2004) (noting that the AWCPA did not apply because the plaintiff’s Parkside model was designed, and largely constructed, before 1990, but also noting that the new law did not affect protection of plans as pictorial, graphic, or sculptural works).

<sup>150</sup> *Id.*

<sup>151</sup> *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (even though colors themselves are not copyrightable, the architect’s selection, coordination, and arrangement of color may be protectable).

<sup>152</sup> *See, e.g., id.* at 1286; *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8 (Fed. Cl. 2005).

<sup>153</sup> *See, e.g., Tiseo Architects, Inc. v. SSOE, Inc.*, 431 F. Supp. 2d 735, 738–39 (E.D. Mich. 2006) (considering defendants’ argument that plaintiff’s copyright on its “Chilson Commons” design for a commercial development anchored by a large grocery was invalid because it was not sufficiently different from the plaintiff’s design for a similar development in another township, but ruling that differences were great enough that summary judgment could not be granted); *Richmond Homes Mgmt. v. Raintree, Inc.*, 862 F. Supp. 1517, 1520–21 (W.D. Va. 1994) (plaintiff’s “Louisa” model was found to be derivative of the plaintiff’s “Heritage” model with enough significant variations, especially as to the exterior, to be copyrightable); *Lindal*, 2004 U.S. Dist. LEXIS 18878, at \*10 (a defendant who, without permission, uses plaintiff’s abbreviated

changes to the design of a public domain architectural work. His or her derivative work should be copyrightable.<sup>154</sup>

Ordinarily, it should be relatively easy for an architect to satisfy the originality requirement in designing an architectural work. However, the scope of copyright protection for plans and the building constructed from those plans will be quite limited for many architectural works. This is because most buildings are functional. Moreover, because the protection of architectural works is analogous to the protection afforded compilations, the scope of copyright protection for many architectural works will be relatively thin.<sup>155</sup> As explained in the following sections, ordinarily only a limited number of elements in an architectural work are protected by copyright and almost verbatim copying must be established in order to succeed in an infringement suit.<sup>156</sup>

## V. INFRINGEMENT OF ARCHITECTURAL WORKS

### A. THE BASICS

To prevail [in a copyright infringement claim], plaintiff must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” To prove copying of original elements of his work, in addition to showing originality, plaintiff must demonstrate both that defendants actually copied his works, and that such copying was illegal because there is substantial similarity between [his work] and the alleged infringing “work.”<sup>157</sup>

Assuming ownership of a valid copyright,<sup>158</sup> the essential elements of the claim that the plaintiff must prove are that the defendant copied his work and,

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drawings from promotional literature to prepare more detailed plans and to construct a home from those plans, prepares a derivative work and thus infringes).

<sup>154</sup> See *supra* notes 129–48 and accompanying text.

<sup>155</sup> Theresa V. Casey, *Copyright Protection for “Green Design” of Architectural Works: Beyond Functionality*, 1 LANDSLIDE 48, 49 (May/June 2009) (citing *Feist Pub’n, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 348 (1991)). See generally Shipley, *supra* note 139, at 140–41.

<sup>156</sup> See *infra* notes 302–46 and accompanying text.

<sup>157</sup> *Shine v. Childs*, 382 F. Supp. 2d 602, 607 (S.D.N.Y. 2005) (quoting *Feist Pub’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

<sup>158</sup> As discussed earlier, ownership can be hotly contested. See, e.g., *Rotlund Co. v. Pinnacle Corp.*, 2004 WL 1879983 (D. Minn. 2004) (magistrate concludes plaintiff owned copyrights notwithstanding defendants’ arguments that he had committed fraud on the Copyright Office); *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 101–02 (1st Cir. 2006) (the parties disagreed about authorship and whether T-Peg or Timberpeg East was the copyright owner, and thus had standing to sue—the appellate court reversed the district court’s grant of summary judgment to defendants); *Richard J. Zitz, Inc. v. Pereira*, No. 99-9399, 2000 U.S. App. LEXIS

if so, that he copied more than the law allows—that there is substantial similarity of protected expression.<sup>159</sup> How an architect plaintiff can establish copying of his or her architectural work will be covered first, followed by considerably longer discussion of the challenges involved in proving substantial similarity of protected expression. The latter issue turns on defining the scope of copyright protection for a protected architectural work. Scope issues are discussed in a later section of this Article.<sup>160</sup>

Copying can be established by direct evidence, but when that is lacking, proof often focuses on showing that the defendant had access to the plaintiff's work and that the works are substantially, or probatively, similar.<sup>161</sup> Access may be established by showing that the defendant had a reasonable opportunity to view the plaintiff's work. This is said to mean that it was “reasonably possible that the paths of the infringer and the infringed work crossed.”<sup>162</sup>

For example, in *Shine v. Childs*, the defendants conceded that Childs had access to plaintiff's designs and models for two skyscrapers because he evaluated them as part of a jury at the Yale School of Architecture.<sup>163</sup> This, in turn, meant that plaintiff Shine had to show similarities between his works and defendants' Freedom Tower that were probative of copying.<sup>164</sup> The court concluded, after hearing from the parties' experts, that there was a genuine issue of material fact as to whether defendants had copied plaintiff's design for one of his skyscrapers, called Olympic Tower.<sup>165</sup> The court then turned to an

22418, at \*14 (2d Cir. Aug. 31, 2000) (plaintiff was not sole author of plans nor was he joint author, and the drafting did not qualify as a work for hire); *Beckwith Builders, Inc. v. Depietri*, 81 U.S.P.Q.2d (BNA) 1302 (D.N.H. 2006) (significant disagreements over plaintiff's right to sue for copyright infringement and other related claims). See also *supra* notes 90–127 and accompanying text.

<sup>159</sup> *Laureyssens v. Idea Group, Inc.* 964 F.2d 131, 140 (2d Cir. 1992). See generally JOYCE ET AL., *supra* note 14, at 644–50.

<sup>160</sup> See Section VI, Scope of Protection, *infra* notes 259–301 and accompanying text.

<sup>161</sup> *Towler v. Sayles*, 76 F.3d 579, 581–83 (4th Cir. 1996); *Plan Pros, Inc. v. Zych Constr.*, 2009 Copyright Law Decisions ¶ 29,870, at 42,167 (D. Neb. 2009).

<sup>162</sup> *Towler*, 76 F.3d at 582. See *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007) (summary judgment for defendant Disney because there was no admissible evidence that Disney had access to artist's rendering of an international theme park, and Disney had evidence of independent creation); *Scholz Design, Inc. v. Larue*, No. 4:06-CV-1600-RSW, 2008 U.S. Dist. LEXIS 62154, at \*10 (E.D. Ark. Aug. 14, 2008) (summary judgment for defendant because plaintiff could not show anything beyond the bare possibility of access); *Rottlund*, 452 F.3d at 731 (plaintiff entitled to summary judgment on issue of access because defendants had a reasonable opportunity to view his technical drawings, and there were disputed issues of material fact as to the total look and feel of the drawings at issue). See also Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1194–95 (1990).

<sup>163</sup> 382 F. Supp. 2d 602, 611–12 (S.D.N.Y. 2005).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 612.

analysis of whether there was substantial similarity of protected expression, and ultimately denied defendants' motion for summary judgment.<sup>166</sup>

In general, the plaintiff's "burden is not to disprove the possibility of independent creation, but instead to show similarities between [the plans at issue] which are probative of copying."<sup>167</sup> For instance, in *Lombardi v. Whitehall XII/Hubert Street*, the defendants argued on their motion for summary judgment that the plaintiff could not prove actual copying because all the elements of their building alleged by the plaintiff to have been copied from his plans were not original but were instead elements of an adjoining building owned by one of the defendants.<sup>168</sup> The plaintiff testified to the contrary regarding the similarities between his design, the defendant's building, and the adjoining structure.<sup>169</sup> The court concluded that there were disputed issues of fact and that a jury could reasonably find for the plaintiff on the issue of actual copying.<sup>170</sup>

If the plaintiff's proof of access is weak and the similarities between the architectural works in dispute go only to general design ideas and concepts, then there is a good chance that the plaintiff will lose at an early stage of the litigation. For instance, in *Ale House Management v. Raleigh Ale House, Inc.*,<sup>171</sup> the Fourth Circuit, affirming a trial court's determination that the plaintiff had failed to make out a prima facie case of infringement, said that comparing the restaurants' respective floor plans showed "at most, the imitation of an idea or a concept, but not a copying of the plans themselves. Raleigh Ale House's floor plans are not in the same dimensions or proportions as any of those presented by AHM."<sup>172</sup> The court noted that the closest similarity between the plans was

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<sup>166</sup> *Id.* at 615–16 (the court found a lack of probative similarity between plaintiff's Shine '99 and defendants' proposed Freedom Tower, but concluded that reasonable jurors could disagree as to substantial similarity between plaintiff's Olympic Tower and defendants' Freedom Tower); *cf.* *Plan Pros, Inc. v. Zych Construction*, 2009 Copyright Law Decisions ¶ 29,870, at 42,167 (D. Neb. 2009) (court assumed defendant construction company had access to plaintiff's plans, but denied summary judgment because there were genuine issues of material fact as to independent creation and substantial similarity of the respective plans); *Jack Preston Wood: Design, Inc. v. B.L. Building Co.*, No. H-03-713, 2004 U.S. Dist. LEXIS 30511, at \*30 (S.D. Tex. 2004) (side-by-side comparison of plans shows they are uncannily similar so as to preclude the possibility of independent creation by defendant, and partial summary judgment for the plaintiff was appropriate because no reasonable juror could find to the contrary).

<sup>167</sup> *Lombardi v. Whitehall XII/Hubert St. L.L.C.*, 95 U.S.P.Q.2d (BNA) 1151, 1162 (S.D.N.Y. 2010).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* See also *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 115–16 (1st Cir. 2006) (reversing the district court's grant of summary judgment for the defendant because the issue of whether defendant timberframe company's shop drawings and constructed frame were substantially similar to plaintiff corporation's architectural work, as embodied in plans for the homeowner's home, was one for the jury to decide after trial).

<sup>171</sup> 205 F.3d 137 (4th Cir. 2000).

<sup>172</sup> *Id.* at 143.

the “concept of using an island- or peninsula-shaped bar to bisect a seating area which has booths on one side and stool seating on the other.”<sup>173</sup> According to the court, this similarity was nothing more than an unprotectable idea.<sup>174</sup> Moreover, the size and proportions of the seating areas, the locations of pool tables, and the dimensions of the bars were different. These determinations, coupled with lack of probative evidence of access, warranted affirming the lower court’s finding of no infringement.<sup>175</sup>

Where the plaintiff cannot show access, he still may be able to establish copying by showing that his original work and the alleged infringing work are “strikingly similar.” This means that the similarities are so strong as to preclude the possibilities of independent creation, coincidence, or prior common source.<sup>176</sup> *Corwin v. Walt Disney Company* makes clear that this is a substantial hurdle for the plaintiff.<sup>177</sup> In this case, the plaintiff represented the estate of a deceased artist who painted a rendering of a concept for an international theme park in miniature.<sup>178</sup> The artist had painted the rendering at the request of Robert Jaffray, who had viewed miniature villages overseas and then developed a concept that “entailed cities, villages, and landscapes representing nineteen nations from six continents.”<sup>179</sup> The plaintiff’s claim was that Jaffray used the artist’s rendering in making a presentation of his concept for a theme park to Disney officials in the early 1960s, and that Disney based EPCOT on the artist’s illustration after rejecting Jaffray’s proposal; Disney denied that there had ever been a meeting with Jaffray.<sup>180</sup>

The trial court granted summary judgment for Disney, and the Eleventh Circuit affirmed because the plaintiff had no admissible evidence to demonstrate that Disney had access to the painting, and Disney presented evidence of independent creation.<sup>181</sup> Moreover, the plaintiff failed to raise a genuine issue of material fact as to striking similarity because there was no showing about the originality of the deceased artist’s arrangement of elements or how the expressive elements of that arrangement were duplicated by EPCOT or renderings of EPCOT.<sup>182</sup> In addition, there were significant

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (calling the feature a “mere concept” and thus not copyrightable).

<sup>175</sup> *Id.* at 144. See also *La Resolana Architects, P.A. v. Reno, Inc.*, 555 F.3d 1171 (10th Cir. 2009) (bare possibility that defendant developer had access to plans that plaintiff had allegedly faxed to firms with which the developer had no contact was not sufficient to establish access, and developer’s plans for housing complex were not strikingly similar to plaintiff’s plan; trial court credited the testimony of the defendant’s president over that of the plaintiff’s president).

<sup>176</sup> *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007) (citing *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984)).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1243.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1244.

<sup>181</sup> *Id.* at 1253.

<sup>182</sup> *Id.*

differences between the works, including the appearance of the globe, the location of pavilions, the route of the rail system, and the level of detail of the villages.<sup>183</sup>

It is important to recognize that plaintiffs alleging infringement of their architectural works have lost at the pleading stage and on motions for summary judgment. The Second Circuit has said that it is appropriate for a district court to consider the question of non-infringement on a motion to dismiss. The plaintiff's complaint must state a claim that is plausible on its face, and it may be appropriate for the trial court to make a determination of substantial similarity on a Rule 12(b)(6) motion.<sup>184</sup>

[W]here, as here, the district court has before it all that is necessary to make a comparison of the works in question, we see no error in the district court's decision to resolve the question of substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss.<sup>185</sup>

The flip side also is possible; summary judgment for the plaintiff architect is available and appropriate where the degree of substantial similarity is overwhelming—where no doubt exists that the offending structure is a knockoff.<sup>186</sup>

#### B. INFRINGEMENT BY THE REPRODUCTION OF PLANS

Assuming an architect's plans are copyrightable, and that ownership and copying are established, it has long been settled that unauthorized reproduction of plans constitutes infringement.<sup>187</sup> The enactment of the AWCPA did not

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<sup>183</sup> *Id.* at 1253–54.

<sup>184</sup> Peter F. Gaito Architecture, L.L.C. v. Simone Dev. Corp., 602 F.3d 57 (2d Cir. 2010).

<sup>185</sup> *Id.*

<sup>186</sup> *Axelrod & Cherveny, Architects, P.C. v. T. & S. Builders, Inc.*, 88 U.S.P.Q.2d (BNA) 1088 (E.D.N.Y. 2008) (undisputed that defendants copied plaintiffs' sales literature and contracts; the court determined that defendants' design was substantially similar to plaintiffs' design as embodied in those materials and that the external facades of several of the homes were substantially similar); *Axelrod & Cherveny Architects, P.C. v. Winmar Homes*, 2007 WL 708798 (E.D.N.Y. 2007) (summary judgment granted for the plaintiff because the fronts of the two homes were virtually identical and the blueprints showed that both homes had nearly identical interior layouts); *Nilson v. McGlaughon*, No. 2:02-CV-54-BO(1), 2004 U.S. Dist. LEXIS 30357 (E.D.N.C. Mar. 19, 2004) (granting summary judgment for plaintiff when defendant had access to the plans and plans were substantially similar to those used to build the house); *Bonner v. Dawson*, No. 5:02CV00065, 2003 U.S. Dist. LEXIS 19069 (W.D. Va. Oct. 14, 2003) (granting summary judgment for plaintiff where defendant had "the opportunity to view or copy the copyrighted material and where there were only minor differences in the designs of the two buildings").

<sup>187</sup> *See, e.g., Kent v. Revere*, 229 U.S.P.Q. (BNA) 828 (M.D. Fla. 1985) (floor plans on plaintiff's copyrighted brochure available at model home show copied by defendant and used to produce

change things in this regard, as illustrated by *Precision Craft Log Structures, Inc. v. Cabin Kit Co.*<sup>188</sup> Precision Craft designs and manufactures log homes, and it registered plans for its Ponderosa and Silver Creek homes with the Copyright Office as architectural works.<sup>189</sup> Precision Craft learned that Cabin Kit was displaying identical renderings of these homes on its website under different names, and that it had sold several exact copies of the standard plans for each model. Precision Craft sued for infringement and won.<sup>190</sup> This would have been an easy case prior to 1990 and it remains a straightforward case today.

### C. REVISION OF PLANS AND THE SECTION 120(B) LIMITATION

The unauthorized revision of protected plans to adapt them for use in a somewhat different structure can constitute infringement of the copyright owner's right, enumerated in Section 106(2),<sup>191</sup> to prepare derivative works.<sup>192</sup> In order to be successful, the plaintiff must show, as in any infringement action, that there is substantial similarity of protected expression.<sup>193</sup>

In *Lindal Cedar Homes, Inc. v. Ireland* the plaintiff owned copyrights on home designs and sold home packages, combining the home designs and building materials, through a network of dealers.<sup>194</sup><sup>195</sup> A prospective customer obtained

technical drawings for builder); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895 (5th Cir. 1972) (using floor plan in advertising brochure to reproduce floor plan from plaintiff's copyrighted drawings); *Herman Frankel Org. v. Tegman*, 367 F. Supp. 1051, 1052 (E.D. Mich. 1973) (creating floor plans for defendants' home using the plaintiff's copyrighted abridged floor plans).

<sup>188</sup> No. CIV 05-199-S-EJL, 2007 U.S. Dist. LEXIS 3829 (D. Idaho Jan. 17, 2007).

<sup>189</sup> *Id.* at \*2.

<sup>190</sup> *Id.* Cf. *Architects Collective v. Tannenbaum Group*, CCH Copyright Law Decisions ¶ 29,972 (W.D. Ok. 2010) (architect's state law conversion claim, alleging defendant real estate development company copied drawings, preempted because it is the same as a copyright infringement claim).

<sup>191</sup> 17 U.S.C. § 106(2) (2006).

<sup>192</sup> See, e.g., *Christopher Phelps & Assocs. v. Galloway*, 492 F.3d 532, 538 (4th Cir. 2007) (finding that trial court's instruction regarding the scope of the plaintiff's copyright on slightly-modified house was erroneous, and noting that where author of derivative work also has a copyright on the underlying work there is no need to protect the author of the underlying work because the entire work is that of a single author); *Thomas M. Gilbert Architects, P.C. v. Accent Builders & Developers, L.L.C.*, 629 F. Supp. 2d 526 (E.D. Va. 2008) (summary judgment for plaintiff after defendant took plans the plaintiff had modified at defendant's request, removed all references to plaintiff in those plans, modified them, and then used the plans to complete a townhouse project; court also held that this defendant's copying and modification was not a fair use and that defendant's copyright misuse defense lacked merit); *Lifetime Homes, Inc. v. Walker Homes, Inc.*, 485 F. Supp. 2d 1314, 1320, 1325 (M.D. Fla. 2007) (finding that copying took place when defendants revised the original plans; court ultimately held for the defendants on the basis that the designs were not substantially similar).

<sup>193</sup> *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994) (describing the substantial similarity requirement).

<sup>194</sup> No. 03-6102-TC, 2004 U.S. Dist. LEXIS 18878 (D. Or. Sept. 14, 2004).

<sup>195</sup> *Id.*

one of plaintiff's plan books of designs from a dealer and gave a page from that book to the defendant builder.<sup>196</sup> The builder then prepared construction plans and built a home for that customer. Lindal sued for infringement, alleging that this home was substantially similar to one of its copyrighted designs.<sup>197</sup> The builder moved for summary judgment on several grounds, including a contention that the page it used from plaintiff's plan book as the basis for construction plans contained merely unprotected ideas.<sup>198</sup> The court denied the motion while stating that "as to all of defendnat's [*sic*] arguments, when a defendant uses a plaintiff's abbreviated drawings from promotional literature to prepare derivative works, i.e., more detailed plans, and to construct a home from those plans, it can constitute infringement."<sup>199</sup>

In *Dalton-Ross Homes, Inc. v. Williams*, the plaintiff's copyrighted plans for its VDM model were used by defendant with permission for defendant's Link and Conway homes, and then without permission for its Latrobe home.<sup>200</sup> Defendants admitted that they based their plans for the Latrobe home on the unregistered plans for the Conway home, so the court's analysis focused on comparing the plans for the defendant's Latrobe model with the plans for plaintiff's copyrighted VDM model. It concluded the plans showed little similarity: there was no breakfast nook in the Latrobe; the master bedroom in the Latrobe had several features not found in the VDM; the layouts of the living rooms were different; the fireplaces were in different locations; and, "the size, type, and arrangement of rooms; the placement of various components within each room; as well as the 'expression of the VDM plans, taken as a whole' . . . [were] vastly different."<sup>201</sup> The court held that there was no infringement of plaintiff's copyright on the plans for its VDM model, even though the defendant's home was based on plans for a home which was, in turn, derived from plaintiff's copyrighted plans.<sup>202</sup>

The copying and revision of plans in connection with the remodeling or alteration of an existing building would seem to be a violation of the copyright owner's right to prepare derivative works. However, this kind of revision of plans may not constitute infringement due to an important limitation on the protection afforded architectural works. Section 120(b) of the Copyright Act states:

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<sup>196</sup> *Id.* at \*1.

<sup>197</sup> *Id.* at \*2.

<sup>198</sup> *Id.* at \*3-4.

<sup>199</sup> *Id.* at \*10. *See also* Jack Preston Wood: Design, Inc. v. B L Bldg. Co., No. H-03-713, 2004 U.S. Dist. LEXIS 30511, 30 (S.D. Tex. June 22, 2004) (side-by-side comparison of plans shows they are uncannily similar so as to preclude the possibility of independent creation).

<sup>200</sup> 83 U.S.P.Q.2d (BNA) 1953, 1954 (D. Ariz. 2007).

<sup>201</sup> *Id.* at 1956.

<sup>202</sup> *Id.*

Alterations to and destruction of buildings. Notwithstanding the provisions of section 106(2) [the right to prepare derivative works], the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.<sup>203</sup>

According to the AWCPA's legislative history, this provision is intended to prevent the architect/copyright owner, who holds the exclusive right to prepare derivative works, from interfering with alterations to a habitable architectural work.<sup>204</sup> One scholar explained that "Congress correctly viewed alteration and destruction of a building by its owner to be practical necessities. . . . In order to perform its utilitarian functions, a building must be able to adapt and change. Conditioning changes on the approval of the original architect may lead to frustrating delays."<sup>205</sup>

Reported cases in which Section 120(b) has been applied and discussed are rare. In one case, the plaintiff architect claimed infringement of his plans on the ground that the owners of the home depicted in those plans would have copied the plans and modified them when they remodeled their house.<sup>206</sup> The court did not accept this argument because it undermined Section 120(b).<sup>207</sup> The court explained that copying of plans could be inferred in almost any renovation project absent complete demolition of the structure and

[t]hus, home alteration projects would almost always be vulnerable to challenge on grounds that the original plans must have been copied. If such challenges were permitted, then section 120(b) would fall far short of its intended purpose "to permit the owners of buildings to do whatever they want" with their buildings.<sup>208</sup>

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<sup>203</sup> 17 U.S.C. § 120(b) (2006).

<sup>204</sup> H.R. REP., *supra* note 10.

<sup>205</sup> Raphael Winick, Note, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1622–23 (1992). *See also* Shipley letter, *supra* note 13, at 3.

<sup>206</sup> *Javelin Invs., L.L.C. v. McGinnis*, No. H-05-3379, 2007 U.S. Dist. LEXIS 21472, at \*2–5 (S.D. Tex. Jan. 23, 2007).

<sup>207</sup> *Id.* at \*34.

<sup>208</sup> *Id.* (quoting Architectural Works Copyright Protection Act of 1990: Hearing on H.R. 3990 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary, 101st Cong., 2d Sess. 60 (1990)).

The court concluded that the alteration safe harbor in Section 120(b) had to permit copying and modification of the plans “else its protections would be rendered largely nugatory.”<sup>209</sup>

#### D. UNAUTHORIZED USE OF PLANS

Are plans infringed by construction of the building they depict? Ordinarily, it is reasonable to assume that protected blueprints would have to be reproduced in order to construct the building depicted therein, but it is possible for a builder to construct the building without reproducing the plans. Before the passage of the AWCPA, a number of courts and commentators asserted that the completed structure was not a copy of the plans and that the copyright on the plans did not include a right to control use; there was not a right to build.<sup>210</sup> “So long as the putative infringer copied the building, rather than the plans for the building, no liability would attach.”<sup>211</sup> One court stated:

Whether or not the construction originally “flowed from” infringing copies of [plaintiff’s] plans . . . is immaterial. Construction of a building imitating that depicted in copyrighted architectural plans does not, consistent with [*Baker v. Selden*, 101 U.S. (11 Otto 99) (1879)], constitute infringement of those plans. Although individuals are not free to make unauthorized copies of copyrighted architectural plans, they remain free to duplicate houses depicted in those plans unless and until the designs embodied in such plans are secured by patent.<sup>212</sup>

The AWCPA changed this. As originally drafted, the bill referred only to architectural works as embodied in buildings, and there was a concern

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<sup>209</sup> *Id.* The architect’s claim of copyright infringement was barred by the AWCPA. The court distinguished *Guillot-Vogt Assocs. v. Holly & Smith*, 848 F. Supp. 682 (E.D. La. 1994) because it did not involve an architectural work but engineering drawings for the mechanical and electrical portions of a construction project. These drawings were protected as pictorial, graphic, and sculptural works and Section 120(b) was not applicable. *Id.*

<sup>210</sup> Shipley, *supra* note 1, at 403; LEAFFER, *supra* note 1, at 132–33. *See also* *Demetriades v. Kaufmann*, 680 F. Supp. 658, 666 (S.D.N.Y. 1988); *Muller v. Triborough Bridge Auth.*, 43 F. Supp. 298, 299 (S.D.N.Y. 1942). *But see* *Niemi v. NHK Spring Co.*, 84 U.S.P.Q.2d 1766, 1768 (N.D. Ohio 2007), *aff’d in part, rev’d in part*, 543 F.3d 294 (6th Cir. 2008) (citing several cases decided before 1990 for proposition that construction of the object depicted in drawings or plans infringes but also citing AWCPA’s definition of architectural work).

<sup>211</sup> Newsam, *supra* note 31, at 1078–79.

<sup>212</sup> *Demetriades*, 680 F. Supp. at 666. *See also* *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 280 (6th Cir. 1998) (applying pre-AWCPA law and saying that one may construct an identical home to one depicted in plans, but one may not directly copy plans and then use infringing plans to construct the home); *De Silva Constr. Corp. v. Herrald*, 213 F. Supp. 184, 198 (M.D. Fla. 1962) (unanimous view that the architect does not have exclusive right to build structures embodied in his technical writings).

expressed that this would allow a defendant with access to plans to construct an identical building but escape liability so long as the plans were not copied.<sup>213</sup> To close this gap in protection, the definition of architectural work was expanded to include a building's design "as embodied in any tangible medium of expression."<sup>214</sup>

Notwithstanding the definition of "architectural work" and this legislative history, some confusion remained about unauthorized use, as opposed to unauthorized reproduction, of plans. For instance, the plaintiff in *Eales v. Environmental Lifestyles, Inc.* discovered that her plans were used without her permission to build a home in Scottsdale, Arizona; she registered her copyright on the plans, sued for infringement, and won.<sup>215</sup> There is nothing especially remarkable about this outcome given the passage of the AWCPA, but the appellate court, before affirming the judgment, made the following incorrect statement in a footnote:

Because this case involves a claim of infringement of copyrighted plans, not a structure, the Architectural Works Protection Act of 1990 . . . is inapplicable. See 1 *Nimmer on Copyright* § 2.08[D]2, at 2.114 n.163.4 ("The Architectural Works Protection Act . . . does not affect protection for architectural plans, drawings and models as pictorial, graphic, or sculptural works.")<sup>216</sup>

This should have been an easy case because it appeared that the defendant had infringed by reproducing the plaintiff's plans,<sup>217</sup> but the court confused things by saying that the AWCPA was inapplicable to plans. The Ninth Circuit stated in a subsequent decision that the *Eales* court should not have suggested that copyright in an architectural work can subsist only in a work that has been constructed, that this was inaccurate dicta, that later versions of Nimmer's treatise discussed the court's error, that it was clear from the statute that an architectural work can be embodied in plans as well as a building, and that the *Eales* case arose before the AWCPA was passed.<sup>218</sup>

<sup>213</sup> H.R. REP., *supra* note 10.

<sup>214</sup> *Id.* See also *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 109 (1st Cir. 2006).

<sup>215</sup> 958 F.2d 876, 878–79 (9th Cir. 1992).

<sup>216</sup> *Id.* at 880 n.2.

<sup>217</sup> It appears from reading between the lines that the defendant must have reproduced the actual plans the plaintiff submitted to the city's building department. *Id.* at 878 (noting one defendant's familiarity with plaintiff's plans and construction on a lot).

<sup>218</sup> *Hunt v. Pasternack*, 192 F.3d 877, 878 (9th Cir. 1999). However, it was correct for the *Eales* court to state that protection for plans and drawings as pictorial, graphic, or sculptural works under Section 102(a)(5) was not affected by the AWCPA. See, e.g., *Guillot-Vogt Assocs. v. Holly & Smith*, 848 F. Supp. 682, 686–87 (E.D. La. 1994) (drawings and plans have long enjoyed protection, and 1990 amendments to the Copyright Act provide previously lacking copyright protection for architectural works). This means that there are now two separate copyrights: one in the plans or drawings, and the other in the architectural work that is the design of the building

Notwithstanding the confusion that might have been caused by the *Eales* decision, it is now settled that plans can be infringed by constructing the building they depict. For instance, in *Christopher Phelps & Associates, L.L.C. v. Galloway*, the defendant wanted to build an upscale retirement home on Lake Wylie near Charlotte, North Carolina.<sup>219</sup> He looked at completed homes about thirty miles away on Lake Norman, just north of Charlotte, saw a house he liked, and contacted the homeowner. This homeowner, thinking she owned the plans on her Lake Norman house, consented to the defendant's use of those plans so long as he did not build in the Lake Norman area.<sup>220</sup> Even though each page of the plans included a copyright notice and the name of the plaintiff's architectural firm, the defendants used them to build the home at Lake Wylie. Once the plaintiff learned that its plans were being used to construct a home, it sued for copyright infringement and won.<sup>221</sup>

Some courts, however, seem to remain confused by the distinctions between plans and renderings, and the building constructed from those plans and renderings. These courts have failed to read the AWCPA's definition of architectural work carefully.<sup>222</sup> This confusion might result from decisions holding that the unauthorized use of technical drawings to build a non-copyrightable machine or device depicted in the drawings does not infringe. The drawings are treated as pictorial, graphic, and sculptural works, and the design of a useful article like a machine is considered a pictorial, graphic, and sculptural work only to the extent the design incorporates "features that can be identified separately from, and are capable of existing independently of, the

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as depicted in the plans or in a completed building. *T-Peg, Inc. v. Vermon Timber Works, Inc.*, 459 F.3d 97, 110 (1st Cir. 2006); *Hunt v. Pasternack*, 179 F.3d 683, *amended*, 192 F.3d 877 (9th Cir. 1999); *cf. Nat'l Med. Care, Inc. v. Espiritu*, 284 F. Supp. 2d 424, 434 (S.D. W. Va. 2003) (architect enjoined from reproducing manufacturer's copyrighted information, but actual medical cabinets depicted in copyrighted drawings were highly utilitarian and could not be regarded as infringing copies of the drawings).

<sup>219</sup> 492 F.3d 532 (4th Cir. 2007). *See also supra* notes 94–99 and accompanying text.

<sup>220</sup> *Christopher Phelps & Assocs. L.L.C.*, 492 F.3d at 536.

<sup>221</sup> *Id.* at 537. The jury awarded plaintiff \$20,000. Most of this Court of Appeals decision is concerned with the amount of the award, whether certain instructions to the jury were appropriate, and whether injunctive relief should have been granted. The Fourth Circuit ultimately affirmed both the verdict and the trial court's order refusing to enjoin the lease or sale of the infringing home before remanding for consideration of whether the infringing plans should be destroyed or returned to the plaintiff. *Id.* at 547. *See also Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998) (architect and client unable to agree on contractual terms, architect learns client gave the plans to construction agent who then used those plans to begin work on the project, district court found copyright infringement and Court of Appeals affirmed).

<sup>222</sup> *See, e.g., Beckwith Builders, Inc. v. Depietri*, 81 U.S.P.Q.2d (BNA) 1302, 1312 (D.N.H. 2006) (holding, as was the case before the passage of the AWCPA, that a building is not a copy of an architectural plan; defendants, who were alleged to have built a particular home but not to have copied plaintiff's plans, cannot be liable for infringing registered drawings but might be liable for infringing architectural work).

utilitarian aspects of the article.”<sup>223</sup> If the unauthorized use of the technical drawings to build the machine or device they depict is found to infringe the drawings, then the scope of copyright protection on the drawings has been improperly expanded to reach the non-copyrightable machine.<sup>224</sup> An architectural work, however, in contrast to a machine or functional device like a lawn mower or storage cabinets depicted in technical drawings, is copyrightable under the AWCPA even though it is functional.<sup>225</sup>

#### E. SECTION 120(A) AND UNAUTHORIZED PHOTOGRAPHS OF ARCHITECTURAL WORKS

The AWCPA expanded copyright protection for works of architecture, but these works do not really enjoy full copyright protection.<sup>226</sup> As discussed earlier, the portion of the Act codified at Section 120(b) limits the architect/copyright owner’s rights by providing that he or she cannot prevent the alteration or destruction of a building by its owners.<sup>227</sup> Section 120(a) provides another limitation on an architect’s rights in regard to a finished structure:

Pictorial representations permitted. The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.<sup>228</sup>

As applied, this limitation means that the architect/copyright owner would not have an infringement claim against *Architectural Digest* for publishing photographs of a house he or she designed, so long as the structure was visible from a public place.<sup>229</sup> The rationale for exempting pictorial representations is that the right to exploitation of architectural works is not harmed by allowing photographs and other representations. Architecture is a public art form, and prominent works are often photographed by tourists, architects, architectural

<sup>223</sup> 17 U.S.C. § 101 (2006).

<sup>224</sup> *Niemi v. Am. Axle Mfg. & Holding Co.*, No. 05-74210, 2006 U.S. Dist. LEXIS 50153 (E.D. Mich. July 24, 2006); *Nat’l Med. Care, Inc. v. Espiritu*, 284 F. Supp. 2d 424 (S.D. W. Va. 2003) (copyright on technical drawings depicting medicine cabinets does not extend to the structures built from those technical drawings).

<sup>225</sup> 17 U.S.C. § 101.

<sup>226</sup> *Leicester v. Warner Bros.*, 232 F.3d 1212, 1217 (9th Cir. 2000).

<sup>227</sup> See *supra* notes 202–09 and accompanying text (discussing the application of 17 U.S.C. § 120(b)).

<sup>228</sup> 17 U.S.C. § 120(a).

<sup>229</sup> *Cf. Landrau v. Solis Betancourt*, 554 F. Supp. 2d 102, 110–11 (D. P.R. 2007). The magazine article about the house also included photographs of the interior. The plaintiffs failed to allege that the defendant either made the photographs or published them. *Id.* at 111.

critics and others.<sup>230</sup> In addition, magazine articles and books on architecture routinely include photographs of structures.<sup>231</sup> This is great publicity for architects.

The best known case discussing this limitation on architectural copyright is *Leicester v. Warner Brothers*.<sup>232</sup> Andrew Leicester, an artist known for large scale public art, was retained by R&T Development Corporation to create a substantial artistic work that would become part of a new office building in downtown Los Angeles, a twenty-four story architectural work called the 801 Tower.<sup>233</sup> Leicester's work, titled *Zanja Madre* (Mother Ditch) told an allegorical story of the history of the city and its dependence on water from the mountains; he did this using a courtyard with a distinctive fountain from which water flowed through a channel representing the city's source of water in its early history.<sup>234</sup> Inside the perimeter of the courtyard were, among other things, two building towers and two towers with drill bits on top representing the city, and five more towers and gates formed a wall and entrance to the courtyard and the building.<sup>235</sup> Leicester's contract with R&T gave it a license to make reproductions of *Zanja Madre* in brochures, advertisements, catalogs, and similar publications, and Leicester promised not to make any duplicate, three-dimensional reproductions of the work.<sup>236</sup>

In 1994, Warner Brothers obtained permission from R&T to use the 801 Tower in filming "Batman Forever." Leicester and the building's architect were not consulted. The building, serving as the Gotham City Bank, is shown in the movie. Four of the distinctive towers in the streetwall portion of Leicester's work appear in several scenes in the movie, but the rest of the *Zanja Madre* was not in the film.<sup>237</sup> Leicester registered *Zanja Madre* with the Copyright Office as a sculptural work and sued Warner Brothers for infringement.<sup>238</sup> One of the issues was whether the Section 120(a) exemption for pictorial representations of architectural works applied to Warner Brothers' showing of *Zanja Madre* in the movie.<sup>239</sup>

The trial court determined that R&T's agreement with Leicester did not give it the right to sublicense Warner Brothers to make photographic or other pictorial representations of *Zanja Madre*.<sup>240</sup> However, it decided that the Section 120(a) exemption was applicable because Leicester's lantern towers and

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<sup>230</sup> H.R. REP., *supra* note 10, at 22.

<sup>231</sup> *Id.*

<sup>232</sup> 232 F.3d 1212 (9th Cir. 2000).

<sup>233</sup> *Id.* at 1214.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 1215.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

smoke towers had functional aspects designed to be part of the building, that they matched up with the building's architecture, and that the artistic works at the tops were incorporated in the tower's structure and design.<sup>241</sup> In essence, Leicester's artistic work was an integrated part of the architectural work.<sup>242</sup> The trial court also refused to treat Zanja Madre as conceptually separable from the building, like a gargoyle or a stained glass window, because the intent of Congress in enacting the AWCPA was to substitute a new kind of protection for architectural works for the previous protection sometimes afforded non-utilitarian sculpture incorporated into a building.<sup>243</sup>

The Ninth Circuit affirmed 2–1, with each judge writing an opinion. The major point of contention was whether the AWCPA should be construed to eliminate separate protection for sculptural works attached to buildings. Judge Rymer's opinion said that the trial court's finding that Leicester's work was part of the design plan for the building was well supported by the record.<sup>244</sup> The streetwall towers were part of the functional and architectural vocabulary of the building, and not conceptually separable sculptural works entitled to copyright protection.<sup>245</sup> "Because the streetwall towers are part of the architectural work, § 120(a) applies."<sup>246</sup>

The plaintiff argued that Congress did not abolish protection for pictorial, graphic, and sculptural works incorporated in buildings when it enacted the AWCPA. The court's response was that "[w]hether or not Leicester may have some other claim for a different infringement of his copyright in the Zanja Madre towers as a sculptural work, we believe he has none for a pictorial representation of the 801 Tower and its streetwall embodying a protected architectural work."<sup>247</sup>

Judge Tashima wrote a concurring opinion. He voiced disagreement with the conclusion that Leicester's streetwall towers were not conceptually separable from the architectural work, and agreed with the dissent's view that the lower court found only that the four towers at issue were a portion of the architectural work that included the building and the towers.<sup>248</sup> He also agreed with the district court's conclusion that Section 120(a) protected Warner's pictorial representation "in these factual circumstances, where a joint architectural/artistic work functions as part of a building."<sup>249</sup> The primary focus of his concurring opinion was to explain that the protection of

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 1217–19.

<sup>245</sup> *Id.* at 1219.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* (emphasis omitted) ("Otherwise, § 120(a)'s exemption for pictorial representations of buildings would make no sense.").

<sup>248</sup> *Id.* at 1221.

<sup>249</sup> *Id.* at 1222.

architectural works established by the AWCPA was now the exclusive remedy for pictorial, graphic, and sculptural works embodied functionally in a building.<sup>250</sup> Otherwise, the Section 120(a) exemption would be meaningless for that building if conceptual separability were applied. Judge Tashima believed that this reading effectuated “Congress’ intent to reject the conceptual separability test as a device for determining the scope of protection for architectural works.”<sup>251</sup>

Judge Fisher dissented because he believed that Leicester’s towers could be seen as conceptually separate from the building and thus entitled to full protection as a sculptural work under Section 102(a)(5). His contention was that the AWCPA did not eliminate separate protection for pictorial, graphic, and sculptural works that are part of, but conceptually separable from, an architectural work.<sup>252</sup> The opinion considered that the pre-AWCPA view was that conceptually separable sculptural works on buildings were copyrightable, that the AWCPA added protection for architectural works, that the AWCPA should not be read as eliminating protection for sculptural works incorporated in buildings, and that it would be odd to read the AWCPA as eliminating protection when Congress, at the same time it enacted the AWCPA, expanded protection for certain works of graphic and sculptural artists with the passage of the Visual Artists Rights Act (VARA).<sup>253</sup> In the absence of statutory language or clear legislative intent, Judge Fisher was unwilling to read the AWCPA as making what he deemed to be a “drastic change in the law” with respect to pictorial, graphic, and sculptural works.<sup>254</sup> He would have remanded the case for a thorough determination of conceptual separability.<sup>255</sup> If Leicester’s towers were determined to be separable, then Warner’s pictorial reproductions of them would not be exempt under Section 120(a) but instead would be infringing.<sup>256</sup>

Judge Fisher’s dissent is persuasive. VARA was enacted in the same year as the AWCPA, and it grants authors of works of visual art the right to prevent the destruction of a work of recognized stature.<sup>257</sup> More on point, it has sections dealing specifically with what should be done when a work of visual art has been incorporated in a building such that it cannot be removed without destroying or modifying the work, and the owner of the building wants to alter or tear down the building.<sup>258</sup> These provisions benefit both artists seeking to protect their rights and building owners attempting to notify these artists of

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<sup>250</sup> *Id.* at 1223–24.

<sup>251</sup> *Id.* at 1224 (“[I]t gives meaning and substance to the pictorial representation exemption . . .”).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1226–27.

<sup>254</sup> *Id.* at 1235.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> 17 U.S.C. § 106A(a)(3)(B) (2006).

<sup>258</sup> *Id.* § 113(d)(1), (d)(2). See also H.R. REP. NO. 101-514, at 3 (1990), reprinted in 1990 U.S.C.A.N. 6915 (discussing works incorporated in buildings).

proposed removals of their works, changes to the building, or both.<sup>259</sup> When VARA and the AWCPA are read together, it is reasonable to conclude that Congress did not treat architectural works as pictorial, graphic, or sculptural works in order to avoid entangling these works in the judicial disagreement over the separability test, but that it wanted qualifying works of visual art incorporated into buildings to be treated as pictorial, graphic, or sculptural works that may or may not be physically separable from the copyrightable architectural work.

## VI. GENERAL SCOPE OF PROTECTION ISSUES

The unauthorized reproduction, revision, or use of plans or blueprints presents a relatively simple infringement issue. If copyrighted blueprints are reproduced, modified, or used without the copyright owner's permission, then infringement has probably occurred. Though it is tempting to assume that substantial similarity of protected expression should rarely be an issue, this assumption is erroneous. An exact reproduction of plans ordinarily will infringe, but what if the defendant architect or builder makes substantial changes to the plaintiff's plans in order to satisfy his or her client's wishes, or makes changes so that the building will be a better fit with the client's lot, or both? In such a situation, there is copying, but is the defendant's building still substantially similar? What if a client wants a new home designed in a particular style—say, a Craftsman-style bungalow—and he takes his architect to look at an already-constructed home in that style; will a new home that evokes the Craftsman style of the existing home be regarded as substantially similar? Both of these hypothetical scenarios involve questions about the scope of copyright protection.

For purposes of these hypotheticals, assume that the plaintiff has established copyright ownership,<sup>260</sup> and that the defendant has copied the architectural work, perhaps by having access to the plans, viewing the completed structure (as in the above scenarios), or both.<sup>261</sup> The plaintiff has to prove that there is substantial similarity of protected expression,<sup>262</sup> because liability turns on

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<sup>259</sup> 17 U.S.C. § 113(d)(1), (d)(2). *See also* ShIPLEY letter, *supra* note 13, at 3 (general comments about architectural works and moral rights).

<sup>260</sup> *See, e.g.,* Richard J. Zitz, Inc. v. Pereira, No. 99-9399, 2000 U.S. App. LEXIS 22418 (2d Cir. Aug. 31, 2000) (plaintiff's claims for infringement were dismissed because plaintiff was not the author of plans submitted to Copyright Office and hence not copyright owner). *Cf.* Peter F. Gaito Architecture, L.L.C. v. Simone Dev. Corp., 91 U.S.P.Q.2d (BNA) 1537, 1540-41 (S.D.N.Y. 2009).

<sup>261</sup> *See* David & Goliath Builders, Inc. v. Elliott Constr., No. 05-C-494-C, 2006 U.S. Dist. LEXIS 34991, at \*6 (W.D. Wis. May 25, 2006) (comprehensive discussion supporting the finding that defendant copied plaintiff's architectural work).

<sup>262</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

whether there has been substantial reproduction of copyrightable material.<sup>263</sup> The fact that a building is copyrighted as an architectural work does not mean that every element is protected. The basic issues are what aspects or features of an architectural work are protectable, and to what extent those features are protected.<sup>264</sup> Copying constitutes infringement when there is substantial similarity between the defendant's work and protectable elements of the plaintiff's work.<sup>265</sup> Courts "have defined substantial similarity as existing 'where an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'"<sup>266</sup> It is necessary to determine "whether the similarities . . . are substantial from the point of view of the lay [observer] and whether those similarities involve copyrightable material."<sup>267</sup> Another way to express this is to ask whether the intended audience will see substantial similarities between the works.<sup>268</sup> This is not easy. As Learned Hand stated, "[t]he test for infringement of a copyright is of necessity vague."<sup>269</sup> Given the tremendous variety of works protected by copyright, and the different ways in which works can be infringed, this is not surprising.<sup>270</sup>

Determination of what constitutes infringement of a protected work requires careful analysis. There are two approaches followed by the courts in regard to infringement generally, not just with respect to architectural works. These are the subtractive, or analytical dissection approach, and the totality approach. The goal of both is the same: "to determine whether the defendant has appropriated an improper amount of the plaintiff's copyrightable expression."<sup>271</sup>

#### A. THE SUBTRACTIVE APPROACH

The subtractive or analytical dissection approach to the substantial similarity inquiry consists of two steps. The first step is to identify which aspects of the architect's work, if any, are protected by copyright. The second step, after subtracting the unprotected aspects of the work, is for the fact-finder to determine whether there are significant similarities between the protected aspects of the plaintiff's work and the allegedly infringing work.<sup>272</sup>

<sup>263</sup> JOYCE ET AL., *supra* note 14, at 647.

<sup>264</sup> Neil Boorstyn, Copyright Law Reporter at 18 n.4 (CCH 2011).

<sup>265</sup> Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 110 (2d Cir. 2001).

<sup>266</sup> Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218, 1224 (11th Cir. 2008) (quoting Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 829 (11th Cir. 1982)).

<sup>267</sup> *Id.* (quoting Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1248 (11th Cir. 1999)).

<sup>268</sup> JOYCE ET AL., *supra* note 14, at 644.

<sup>269</sup> Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.).

<sup>270</sup> JOYCE ET AL., *supra* note 14, at 644–45.

<sup>271</sup> *Id.* at 650.

<sup>272</sup> *Id.* at 647.

The first step requires excluding ideas<sup>273</sup> and those unprotectible elements that fall under doctrines like *scenes a faire*.<sup>274</sup> However, the risk of a rigorous application of the subtractive approach is in missing the protectable forest for the unprotectible trees, and in failing to recognize that there can be protectable authorship in how an architect selects and arranges components and features.<sup>275</sup> In this regard, the Copyright Act's definition of architectural work states that protection does not extend to individual, standard features, but it does cover the overall form of the work as well as the arrangement and composition of spaces and elements in the design.<sup>276</sup> Another way to say this is that an architectural work includes the design's overall form, the arrangement and composition of spaces in the design, and the arrangement and composition of the design's elements, minus individual, standard features like "common windows, doors and other staple building components."<sup>277</sup> This arguably means that the sum of an architectural work can be greater than its constituent parts, and that it would be a flawed analysis to assert that a work as a whole is unprotectable because each of its elements is unoriginal.<sup>278</sup> Moreover, given the AWCPA's definition of architectural work, it would seem that an overly-rigorous application of the subtractive approach that is too vigorous would be improper because it arguably ignores the architect's copyrightable selection and arrangement of unprotectible features.<sup>279</sup> The cases, discussed below, show that this is easier said than done.

Once all of the unprotected aspects of the architectural work are excluded, the second step in the subtractive approach is to determine whether the remaining elements of the allegedly infringing work are substantially similar to the protected elements in the plaintiff's work.<sup>280</sup> This means that the court or the jury must do a side-by-side comparison of the works to determine whether the alleged infringing work is so similar to the plaintiff's work that an ordinary,

<sup>273</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991); *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224–25 (11th Cir. 2008).

<sup>274</sup> *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982), *superseded by statute on other grounds*, Fed. R. Civ. P. 52(a) (amended 1983). *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423 (7th Cir. 1985) (recognizing that *scenes a faire* refers to incidents, character, or settings which are, as a practical matter, indispensable, or at least standard, in the treatment of a topic). The doctrine also encompasses elements that are dictated by external factors. *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396, 401 (5th Cir. 2000).

<sup>275</sup> *See, e.g., Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) (explaining that the way an author puts together a number of unprotectable elements can be a protected work).

<sup>276</sup> 17 U.S.C. § 101 (2006). *See also supra* notes 132–52 and accompanying text.

<sup>277</sup> *Newsam, supra* note 31, at 1115 (quoting H.R. REP., *supra* note 10, at 18).

<sup>278</sup> *Lombardi v. Whitehall XII/Hubert St. L.L.C.*, 95 U.S.P.Q.2d (BNA) 1151, 1164 (S.D.N.Y. 2010).

<sup>279</sup> *Id.* *See also Warner Bros., Inc. v. Am. Broad., Cos.*, 720 F.2d 231, 243 (2d Cir. 1983); *Metcalf*, 294 F.3d at 1074.

<sup>280</sup> *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002).

reasonable person (average lay observer) would conclude that the defendant unlawfully appropriated the plaintiff's protected expression.<sup>281</sup>

If the alleged infringing structure does not utilize any protected aspects of the plaintiff's structure, then there is no infringement. For example, a modest ranch-style home will have protected and unprotected features, and a finding of infringement would not be appropriate where the only similarities between the plaintiff's work and the defendant's allegedly infringing home design are unprotectable elements.<sup>282</sup> Copying a home's façade, ornamental designs, and distinctive color schemes might infringe, but infringement cannot be inferred merely from the fact that the alleged infringing home has the same number of bathrooms, a kitchen, a central staircase, and a garage, because these are unprotectable standard features.<sup>283</sup>

#### B. THE TOTALITY APPROACH

The totality approach adapts for litigation purposes the principle that unprotected elements can be selected and arranged to create a copyrightable work, and that infringement can be found when the plaintiff's work and the alleged infringing work have the same concept and feel.<sup>284</sup> A leading totality approach case is *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* in which the McDonaldland television commercials with Ronald McDonald and Mayor McCheese were held to have infringed the plaintiff's H.R. Pufnstuf television show.<sup>285</sup> The commercials and the show were not organized or structured the same way, but they did have the same concept and feel in terms of atmosphere and overall approach: both were set in imaginary worlds with anthropomorphic plants, animals, and other creatures; both had the same topographical features; and both had forests of talking trees and human faces. In addition, the characters were similar, both works had mayors with large

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<sup>281</sup> *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508–09 (7th Cir. 1994).

<sup>282</sup> *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 12 (Fed. Cl. 2005).

<sup>283</sup> *David & Goliath Builders, Inc. v. Elliott Const.*, No. 05-C-494-C, 2006 U.S. Dist. LEXIS 34991 (W.D. Wis. May 25, 2006) (finding disputed issues of material fact regarding whether defendant copied façade and floor plan of plaintiff's "Cobblestone Ranch" and whether interior features of home and other building details were copied and therefore denying defendant's motion for summary judgment); *Home Design Services, Inc. v. David Weekley Homes, L.L.C.*, 548 F. Supp. 2d 1306, 1313 (M.D. Fla. 2008) (floor plans for single family residences were generally similar but there were striking differences as to square footage, kitchens, number of closets, location of sinks, and corridors separating fourth bedroom from family room).

<sup>284</sup> *JOYCE ET AL.*, *supra* note 14, at 648–49 (discussing *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970) and *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977)). See also *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir. 1976) (here the works had a different feel but that court made the point that a children's story whose sequence of events was not copyrightable could still be infringed by other forms of inexact copying).

<sup>285</sup> 562 F.2d 1157.

heads and wide mouths, “Keystone cop”-like characters, mad scientists, and multi-armed evil creatures.<sup>286</sup>

Even though the *Krofft* litigation would probably come out the same way if the subtractive approach had been followed, the totality approach risks overprotection, because in protecting a work’s concept and feel, there is a risk of improperly extending protection to ideas.<sup>287</sup> The totality approach “ ‘invite[s] an abdication of analysis’ because ‘feel’ can seem a ‘wholly amorphous referent.’ ”<sup>288</sup> Moreover, not all aspects of a particular style or look are necessarily entitled to copyright protection. For example, Frank Lloyd Wright is associated with the Prairie School of architecture, and many of his works have a particular look—many people can identify a Wright-designed home. However, based on the AWCPA’s legislative history, it is doubtful that Congress intended to afford protection to the standard or common aspects of the Prairie School style of architecture—elements of that look which might be regarded as architectural *scenes a faire*. An architect should be able to evoke a particular style or look without risking infringement, just as a painter ought to work in the hard-edge style without infringing Piet Mondrian or Robert Indiana.

### C. COMBINING THE APPROACHES

The U.S. Court of Appeals for the Second Circuit combined these two approaches to substantial similarity analysis in *Tufenkian Import/Export Ventures, Inc., v. Einstein Moomjy, Inc.*<sup>289</sup> The court acknowledged that the total concept and feel standard alone might lead to erroneous protection of ideas<sup>290</sup> and then stated:

[O]ur caselaw is not so incautious. Where we have described possible infringement in terms of whether two designs have or do not have a substantially similar “total concept and feel,” we generally have taken care to identify precisely the particular aesthetic decisions—original to the plaintiff and copied by the defendant—that might be thought to make the designs similar. . . .<sup>291</sup>

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<sup>286</sup> *Id.* at 1167 n.9.

<sup>287</sup> *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003).

<sup>288</sup> 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][c] (2003), *quoted in*, *Tufenkian*, 338 F.3d at 134.

<sup>289</sup> 338 F.3d 127 (2d Cir. 2003) (involving the alleged infringement of plaintiff’s carpet design that combined two public domain designs).

<sup>290</sup> *Id.* at 134.

<sup>291</sup> *Id.*

The court went on to say that total concept and feel inquiry functions to remind the court that although it is important to first dissect the plaintiff's work into its component parts in order to determine what is not original, "infringement analysis is not simply a matter of ascertaining similarity between components viewed in isolation" because a work can be infringed by ways other than verbatim copying.<sup>292</sup> The competing works must be analyzed closely "to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is to something in the original that is free for the taking."<sup>293</sup>

It has been suggested that the Second Circuit's reintroduction of total concept and feel, as limited by the necessary dissection of the plaintiff's work into component parts in order to set the bounds of protected authorship, should work with architecture. This is because much of what an architect does involves selecting materials from the public domain and combining them to create a copyrightable whole.<sup>294</sup> There are several decisions, discussed in the following subsections, that seem to apply this merged test. This test does not, however, necessarily make the plaintiff architect's case any easier.

#### D. FUNCTIONALITY AS A LIMIT ON THE SCOPE OF PROTECTION

One of the reasons for treating architecture separately from pictorial, graphic, and sculptural works was to avoid entangling these works in the heated disagreement over how to apply the separable and independent test to pictorial, graphic, and sculptural works embodied in useful articles.<sup>295</sup> Still, according to the AWCPA's legislative history, functionality must not be ignored in evaluating the scope of protection for architectural works.<sup>296</sup> The House Report on the AWCPA envisions a two-step process for determining functionality: first, determine whether there are any original design elements, including the overall shape and interior design; second, if there are original elements, then it is necessary to determine whether those elements are functionally required. Only those design elements not functionally required are protectable without regard to physical or conceptual separability. Unlike industrial design, the aesthetically pleasing overall shape of a structure can be protected.<sup>297</sup> The House Report contains the following explanation of this two-step analysis for determining the scope of protection:

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<sup>292</sup> *Id.* (emphasis omitted).

<sup>293</sup> *Id.* at 134–35.

<sup>294</sup> JOYCE ET AL., *supra* note 14, at 704 n.1.

<sup>295</sup> H.R. REP., *supra* note 10, at 20 (discussing why architectural works were not placed under 17 U.S.C. § 102(a)(5)—the pictorial, graphic, and sculptural works category).

<sup>296</sup> *Id.* at 21.

<sup>297</sup> *Id.* at 20–21. See also Newsam, *supra* note 31, at 1079.

Functional considerations may, for example, determine only particular design elements. Protection would be denied for the functionally determined elements, but would be available for the nonfunctional determined elements. Under such circumstances, the 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. Evidence that there is more than one method of obtaining a given functional result may be considered in evaluating registrability or the scope of protection.<sup>298</sup>

Thus, Congress provided some general guidance in the Copyright Act and its legislative history about what should and should not be protected in an architectural work, but it has otherwise left to the courts the determination of the scope of protection.<sup>299</sup> It is reasonable to speculate about whether this has been easy for the courts. In a 1961 report, the Register of Copyrights recommended against extending protection to the design of functional architectural structures because of the difficulty of distinguishing between the functional and artistic features of a design.<sup>300</sup> Is it any easier for a court to determine if a particular aspect of an architectural work is or is not functional than it is for a court to resolve whether an artistic feature on a useful article, like a belt buckle or a mannequin, is physically or conceptually separable?<sup>301</sup>

## VII. AS APPLIED—JUDICIAL RESOLUTION OF SCOPE OF PROTECTION ISSUES

### A. RESIDENTIAL HOMES

*Richmond Homes Mgmt., Inc. v. Raintree, Inc.* has a thorough and relatively early interpretation of the impact of the AWCPA.<sup>302</sup> The parties were competitors in the Charlottesville, Virginia housing market, and the claim was that the

<sup>298</sup> H.R. REP., *supra* note 10, at 21.

<sup>299</sup> LEAFFER, *supra* note 1, at 132; Newsam, *supra* note 31, at 1115. See also JOYCE ET AL., *supra* note 14, at 644 (“The inability to be specific [about what constitutes infringement generally] is the reason that Congress chose not to define infringement in the statute, but instead to leave the matter to ad hoc determination by the courts.”).

<sup>300</sup> HOUSE JUDICIARY COMM. 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 15–16, *reprinted in* 2 Studies on Copyright 1199 (1961).

<sup>301</sup> Newsam, *supra* note 31, at 1080. See, e.g., *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980); *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 (7th Cir. 2004).

<sup>302</sup> 862 F. Supp. 1517 (W.D. Va. 1994), *aff’d in part, rev’d in part on other grounds*, 66 F.3d 316 (4th Cir. 1995).

copyright on the plaintiff's architectural work, a residential home called the Louisa, was infringed by the defendant's residential home called the Rockford.<sup>303</sup> There was substantial evidence of copying, and the exhibits introduced at the trial showed that the Rockford interiors, and all of the exteriors except one, were substantially similar to the Louisa. "The family room [was] located in the same place, with virtually identical dimensions; door and window placements [were] substantially similar, as [were] the location and sizes of rooms and closets. On the exterior, to the untrained eye, the original McCormick home and the Louisa were identical."<sup>304</sup>

Regarding the validity and scope of the plaintiff's copyright in the Louisa model, the court correctly noted that the level of originality required for copyright is not high, that protection for an original house design is not precluded because the design is utilitarian, and that although the underlying unoriginal component parts of a creation are not subject to protection, the creator's selection and arrangement of those parts may be original and protectable.<sup>305</sup> The court explained that:

[b]y extending copyright protection to architectural structures . . . the [AWCPA] brought architectural structures within the confines of existing copyright standards for creative works. Thus, architectural works need no longer serve primarily nonfunctional, creative purposes, akin to sculptures, but protection extends to the most mundane, functional products of modern commercial architecture so long as the minimal originality requirement of copyright law is met. Now structures, as well as plans, are subject to the same copyright protection. Moreover, structures and plans, such as those of the Louisa, may be protected irrespective of their functional purpose.<sup>306</sup>

These are expansive statements about the copyrightability of architectural works, but they really do not say much about the scope of that copyright. Moreover, defendant's Rockford model was very similar to the plaintiff's Louisa model in both interior and exterior design. The homes appeared to be virtually identical, and a customer who thought he had purchased the Louisa had in fact purchased the Rockford.<sup>307</sup> Even a thinly-protected compilation is infringed when an unauthorized reproduction is virtually identical.<sup>308</sup> The subtraction and

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<sup>303</sup> *Id.* at 1520.

<sup>304</sup> *Id.* at 1521.

<sup>305</sup> *Id.* at 1523.

<sup>306</sup> *Id.* at 1525 (citations omitted).

<sup>307</sup> *Id.* at 1521.

<sup>308</sup> *See, e.g., Skinder-Strauss Assocs. v. Mass. Continuing Legal Educ., Inc.*, 914 F. Supp. 665, 673 (D. Mass. 1995) (plaintiff may have to show near identity between works); *Apple Computer*,

totality approaches were not needed in this case because the defendant's copying of plaintiff's architectural work was almost verbatim.

The compilation analogy has been used in other cases involving residential homes and, as seen in the *Richmond Homes* litigation, the plaintiff often has to show near identity between his architectural work and the defendant's in order to succeed due to the thin scope of copyright protection.<sup>309</sup> For example, in litigation over plans for residences with four bedrooms, the dissimilarities between the works with respect to how the parties had coordinated non-original, commonplace, and elementary components caused the trial court to decide that no reasonable observer could conclude that the works were substantially similar.<sup>310</sup>

The trial court's grant of summary judgment for the defendant was affirmed, with the Court of Appeals noting that when the scope of copyright protection is thin, the substantial similarity inquiry is narrowed.<sup>311</sup> In essence, when copyright on an architectural work is thin, the offending work has to be virtually identical to the plaintiff's work in order to be deemed infringing.<sup>312</sup> The scope of protection was thin because these were relatively simple architectural works in which the plaintiff architect had coordinated unprotectable, commonplace components to make a copyrightable whole. The authorship was in that coordination of the elementary components but, once those components were dissected out, there was not much creativity. Moreover, the defendant had coordinated similar unprotectable components in a different way. In affirming, the Eleventh Circuit expressed a preference for summary judgment in cases involving protected and unprotected aspects because a judge understands the dichotomy between ideas and expression, and appreciates that not all copying is infringement.<sup>313</sup>

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Inc. v. Microsoft Corp., 35 F.3d 1435, 1439 (9th Cir. 1994) (virtual identity may have to be shown).

<sup>309</sup> See, e.g., *Interinvest Constr., Inc. v. Canterbury Estate Homes*, 554 F.3d 914 (11th Cir. 2008).

<sup>310</sup> *Id.* at 918.

<sup>311</sup> *Id.* at 919 (citing *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters.*, 945 F.2d 509, 514 (2d Cir. 1991)). See generally Shipley, *supra* note 139.

<sup>312</sup> See *Howard v. Sterchi*, 974 F.2d 1272, 1276 (11th Cir. 1992) (although floor plans were visually similar and the layouts generally the same, the dissimilarities such as roof lines, bay windows, and dimensions were significant—the court noted that there are a limited number of ways to divide a rectangle and stated that “modest dissimilarities are more significant than they may be in other types” of works); *Home Design Servs., Inc. v. David Weekley Homes, L.L.C.*, 85 U.S.P.Q.2d (BNA) 1889, 1894 (M.D. Fla. 2008) (citing *Howard*, 974 F.2d 1272 while noting generally the same overall layout in the four bedroom, two bath homes, but finding striking differences in floor plans and façades, determining the absence of substantial similarity, and granting summary judgment).

<sup>313</sup> *Interinvest*, 554 F.3d at 920.

## B. CONDOMINIUMS

The basic approach, involving identification of the protected components of the plaintiffs and defendant's structures and then doing a comparison, has been followed in litigation involving condominiums. For instance, in *Chirco v. Rosewood Village, L.L.C.*,<sup>314</sup> the court compared the plaintiffs' Aberdeen design and the defendants' Rosewood Village design:

Both have an "H-shaped" footprint, twelve units arranged as four first-floor and eight second-floor units, architectural fronts and rears identical to each other, direct entry from the garage, etc. . . . In short, the designs share the same basic footprint and configuration. However, there are substantial differences as well. As shown by the overlays attached to Mr. Merz's affidavit, the rooflines of the buildings, viewed from both the front and the side, bear no resemblance whatsoever. Further, the facades of the two buildings appear from the overlays to bear numerous dissimilarities. In addition to the differing rooflines, the doors, windows, chimneys, and balconies are placed differently. In fact . . . there is not a single door, window, or other aspect of the Rosewood building that lines up with the Aberdeen building . . . no reasonable fact finder could conclude based on a comparison of the two designs as a whole that defendants' design is "strikingly similar" to plaintiffs' design.<sup>315</sup>

The court concluded that the plaintiffs had failed to produce sufficient evidence on the questions of access and similarity to permit a rational finder of fact to conclude that defendants had copied the plaintiffs' plans. It granted summary judgment for the defendants.<sup>316</sup> Since there was weak evidence of access and few similarities between the condominiums, there was no reason for the court to worry about the subtraction test or the totality test; the plaintiff failed to prove copying.<sup>317</sup>

The court also said that the required similarity analysis is conducted from the perspective of the intended audience: "the lay public, in which case the finder of fact's judgment should be from the perspective of the lay observer or . . . the reasonable person."<sup>318</sup> This is also called the ordinary observer test:

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<sup>314</sup> No. 03CV72145DT, 2005 U.S. Dist. LEXIS 43748 (E.D. Mich., Mar. 22, 2005).

<sup>315</sup> *Id.* at \*23–24.

<sup>316</sup> *Id.* at \*25–27.

<sup>317</sup> *Id.* at \*26.

<sup>318</sup> *Id.* at \*21 (quoting *Kohus v. Mariol*, 328 F.3d 848, 857 (6th Cir. 2003)). The court later reconsidered the grant of summary judgment for defendants, finding genuine issues of material fact as to access, substantial similarity under the overall concept and feel test, and defendants' independent creation of its designs. Case 2:03-cv-TR145-OPH, Document 195, filed September

two works will be regarded as substantially similar where an ordinary observer, unless he sets out to detect disparities, would be disposed to overlook them, and regard the aesthetic appeal of the two works as the same.<sup>319</sup>

### C. MORE COMPLEX STRUCTURES

There has been infringement litigation over complex structures like high-rise buildings with residential and commercial space. In *Peter F. Gaito Architecture v. Simone Development Corp.*, the plaintiff's plans for the \$175,000,000 Church Street Project in New Rochelle, New York included a 34-story glass tower condominium with 421 rooms, an eight-story mid-rise residential building, a series of shops set in attached low-rise buildings at street level with 44,200 square feet of retail space, and other structural features.<sup>320</sup> Even though the plaintiff and defendant had worked together in bidding on this project before the defendant terminated the relationship and hired another firm, and even though there were many similarities between plaintiff's design and defendant's re-design, the court dismissed the plaintiff's infringement claim because it did not state a claim for relief that was plausible on its face.<sup>321</sup> The Court of Appeals for the Second Circuit affirmed, saying it was proper for the district court to make a determination of substantial similarity on a motion to dismiss.<sup>322</sup>

The plaintiffs alleged several similarities, like identical floor areas, number of parking spaces, the provision of a public plaza, the use of public art, and the orientation of the buildings to ensure water views.<sup>323</sup> The court said that but for floor area and number of parking spaces, these features were common to urban high-rise developments and could not be protected by copyright because they were abstract ideas and concepts.<sup>324</sup>

In addition, the court carefully compared the respective designs:

Plaintiffs' design includes an apparently glass-roofed penthouse extending for substantially the full length of the longer dimension of the top of the building, whereas SLCE's re-design contains no comparable superstructure. Plaintiffs' design includes vertically

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28, 2006 (E.D. Mich.). See also *Chirco v. Gateway Oaks, L.L.C.*, No. 02-CV-73188, 2005 U.S. Dist. LEXIS 43081 (E.D. Mich. Aug. 26, 2005) (same plaintiffs but different defendants, with issues of fact as to substantial similarity between plans; court rules that plaintiff's Knollwood building design is not entitled to copyright protection).

<sup>319</sup> *Lombardi v. Whitehall XII/Hubert St., L.L.C.*, 95 U.S.P.Q.2d (BNA) 1151, 1163 (S.D.N.Y. 2010).

<sup>320</sup> 91 U.S.P.Q.2d (BNA) 1537, 1538–39 (S.D.N.Y. 2009), *aff'd*, 602 F.3d 57 (2d Cir. 2010).

<sup>321</sup> *Id.* at 1542.

<sup>322</sup> *Gaito*, 602 F.3d at 69.

<sup>323</sup> *Gaito*, 91 U.S.P.Q.2d (BNA) at 1541.

<sup>324</sup> *Id.*

spaced wave-like decorative ribbons extending across the broad face of the high-rise building, whereas SLCE's re-design has no similar ornamentation. In plaintiffs' design, the high-rise building does not appear to have balconies on its broad side, whereas SLCE's re-design includes balconies on the broad side at each floor of the building. . . . The overall visual impressions of the two designs are entirely different. No reasonable juror would be "disposed to . . . regard their aesthetic appeal as the same."<sup>325</sup>

Since there was no substantial similarity between the protectable elements of the designs, the plaintiffs had failed to state a claim for copyright infringement.<sup>326</sup> Much of the Second Circuit's opinion, affirming the dismissal of the complaint, focused on the propriety of resolving the issue of substantial similarity of protected expression at the pleading stage without the aid of discovery.<sup>327</sup> The court said that it was not required to dissect works into their components and to compare only those elements that are copyrightable. Rather, it was guided by comparing the total concept and overall feel of the plaintiff's work with that of the defendant's allegedly infringing work. Here

it is patent that the overall visual impressions of the two designs are entirely different. . . . Upon examining the "total concept and feel" of the designs with "good eyes and common sense" . . . we confidently conclude that no "average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."<sup>328</sup>

In affirming the dismissal in *Gaito*, the Second Circuit discussed its earlier decision to affirm a summary judgment for the defendants in *Attia v. Society of the New York Hospital*.<sup>329</sup> In this opinion the court said that even if copying was

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 1542.

<sup>327</sup> Nothing in this opinion should be read to upset these

settled principles, or to indicate that the question of non-infringement is always properly considered at the pleadings stage without the aid of discovery. But where, as here, the district court has before it all that is necessary to make a comparison of the works in question, we see no error in the district court's decision to resolve the question of substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss.

*Gaito*, 602 F.3d at 65.

<sup>328</sup> *Id.* at 67. See also *Lombardi v. Whitehall XII/ Hubert Street, L.L.C.*, 95 U.S.P.Q.2d (BNA) 1151, 1164 (S.D.N.Y. 2010) (the defendants' element by element approach, to support their argument that plaintiff's work as a whole was unprotectable, was flawed; the court said it would not dissect the works at issue into separate components and compared only the copyrightable elements).

<sup>329</sup> *Gaito*, 91 U.S.P.Q.2d (BNA) at 1541-42; 201 F.3d 50 (2d Cir. 1999).

assumed, the similarities between plaintiff's preliminary drawings and defendants' schematic drawings were uncopyrightable ideas and concepts.<sup>330</sup> The project at issue in *Attia* was the expansion and modernization of New York Hospital's facilities located at the edge of the East River and 68th Street in Manhattan. One of the proposals called for the use of air rights over F.D.R. Drive along the riverbank, and the plaintiff architect was hired to develop a series of drawings and sketches to present the concept of constructing a new building on a platform above the highway.<sup>331</sup> The plaintiff was then asked to work with one of the defendants, another architectural firm, to develop these ideas, but the relationship terminated and the plaintiff was paid \$500,000 for his services.<sup>332</sup> The hospital eventually initiated a competition to select the architect who would design and build the project, and a joint venture that included the firm that had worked with the plaintiff on the preliminary concept drawings was selected.<sup>333</sup>

Several years later, after reading an article in the New York Times about the plans, the plaintiff sued for infringement. The trial court, in granting summary judgment for defendants, found that differences between the designs "embrace what are indisputably basic features of hospital operation and logistics. Discounting these features simply transforms plaintiff's work into an unrealized concept or idea, and hence not copyrightable."<sup>334</sup> In affirming, the Second Circuit stated:

The problem of distinguishing an idea from its expression is particularly acute when the work of "authorship" is of a functional nature, as is a plan for the accomplishment of an architectural or engineering project. As a generalization, to the extent that such plans include generalized notions of where to place functional elements, how to route the flow of traffic, and what methods of construction and principles of engineering to rely on, these are "ideas" that may be taken and utilized by a successor without violating the copyright of the original "author" or designer.<sup>335</sup>

The plaintiff cited a long list of elements that the defendants had taken from his preliminary drawings, such as placement of the building over F.D.R. Drive, use of a three-story truss to transfer weight, insertion of a connecting roadway between 68th and 70th Streets, and placement of the mechanical floor in the

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<sup>330</sup> *Attia v. Society of the New York Hospital*, 201 F.3d 50, 55 (2d Cir. 1999).

<sup>331</sup> *Id.* at 51.

<sup>332</sup> *Id.* at 51–52.

<sup>333</sup> *Id.* at 52.

<sup>334</sup> *Id.* at 53 (quoting from the trial court's memorandum order).

<sup>335</sup> *Id.* at 55.

same location in the new building.<sup>336</sup> The court said that these elements were no more than ideas and concepts. “We find no instance in which Defendants have copied particularized expression that commands protection under the copyright law.”<sup>337</sup> This is a variation on the merger of idea and expression doctrine: there were several design problems (ideas) which had to be resolved in order to meet the client’s needs and demands, and most architects would have handled these problems the same way (as there are a limited number of ways to express these ideas).

The Eleventh Circuit’s decision in *Oravec v. Sunny Isles Luxury Ventures, L.C.* came out the same way, affirming the grant of summary judgment for the defendants.<sup>338</sup> The plaintiff alleged that the Trump Buildings in Sunny Isles Beach, Florida infringed his design for a high rise building featuring “the use of alternating concave and convex segments and elevator cores protruding through the building’s roofline.”<sup>339</sup> In particular, the plaintiff listed ten elements present in both his design and the Trump Buildings:

- (1) alternating concave and convex sections; (2) three prominent elevator shafts that protrude above the roof of the building; (3) rounded building ends; (4) constant radius curves; (5) holes in the building; (6) a twin tower design; (7) see-through floor plans; (8) a circular plaza; (9) a central fountain; and (10) a rooftop pool and landscape elements.<sup>340</sup>

The court of appeals acknowledged that the Trump Buildings also had alternating concave and convex sections and three partially exposed elevator towers extending above the buildings’ rooflines, but proceeded to set forth a list of dissimilarities that were evident from comparing the plaintiff’s designs with the defendants’ buildings.<sup>341</sup> For example, the plaintiff’s floor plan design measured 320 feet long and 42 feet wide, with a ‘banana shaped’ curve, while the plans for Trump Buildings had a more rectilinear shape and measured 260 feet long and 72 feet wide at their narrowest points. The designs of the respective elevator towers were significantly different, and their tops were sloped differently, so that the Trump Buildings’ towers gave the effect of smokestacks on a cruise ship, while the plaintiff’s were horizontal on top.<sup>342</sup>

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<sup>336</sup> *Id.* at 55–56.

<sup>337</sup> *Id.* at 56. *But see* *Sparaco v. Lawler, Matusky & Skelly Eng’s, L.L.P.*, 303 F.3d 460, 468–69 (2d Cir. 2002) (distinguishing *Attia* and holding that plaintiff’s site plan specified more than vague general indications of shape and placement of elements and was thus copyrightable).

<sup>338</sup> 527 F.3d 1218 (11th Cir. 2008).

<sup>339</sup> *Id.* at 1220–21 (the Trump Buildings are the Trump Palace and the Trump Royale, twin high rise condominiums).

<sup>340</sup> *Id.* at 1225–26.

<sup>341</sup> *Id.* at 1226–28.

<sup>342</sup> *Id.* at 1226–27.

Other elements identified by the plaintiff, such as rounded building ends, a rooftop pool, and landscape elements, were treated by the court as either ideas or individual standard features. Moreover, they were expressed differently in the Trump Buildings.<sup>343</sup>

The court emphasized that the similarities were “only at the broadest level of generality,” and that to afford protection to the “concept of a convex/concave formula or in that of using three external elevator towers that extend above the roof . . . would extend the protections of copyright law well beyond their proper scope.”<sup>344</sup> Affording copyright protection to the plaintiff’s selection of design elements “would effectively bar all other architects from incorporating these concepts into new and original designs.”<sup>345</sup> That result would diminish the number of ideas and concepts available for future works.<sup>346</sup>

It is evident that the Eleventh Circuit broke the plaintiff’s work down into several components, explained how some aspects of the design were ideas or design elements that other architects needed to use (arguably *scenes a faire*), noted the many differences between the designs, and found that some features were expressed much differently in the Trump Buildings. It concluded, on summary judgment, that the plaintiff could not prove substantial similarity of protected expression.

#### D. SUCCESS STORIES OR WITHSTANDING SUMMARY JUDGMENT

Given the limited scope of copyright protection for most architectural works, it is reasonable to ask whether plaintiff architects can ever win, or at least survive a defendant’s motion for summary judgment, absent clear evidence of almost verbatim reproduction of his or her design. The answer is “yes.” It is reasonable to infer, based on the decisions concerning infringement of designs for a condominium complex, high rise buildings, and a large addition to a hospital,<sup>347</sup> that an architect who designs a fairly complex structure, like a skyscraper, can tread close to infringement if he or she borrows too much. Specifically, if his or her building goes beyond merely having similar elements to those found in another architect’s design, and uses similar concepts to give the same overall visual impression as that other architect’s building, there might be infringement. In short, problems might arise if the respective designs for the complex buildings have the same look and feel.

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<sup>343</sup> *Id.* at 1227.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 1228.

<sup>346</sup> *Id.* The court also held that the plaintiff could not claim architectural work protection by having registered his designs as a pictorial, graphic, and sculptural work. *Id.* at 1231.

<sup>347</sup> See *supra* notes 313–46 and accompanying text.

*Sturdza v. United Arab Emirates* is an interesting case involving complex buildings with a similar look and feel.<sup>348</sup> The plaintiff, Elena Sturdza, and one of the defendants, Angelos Demetriou, entered designs in a competition held by the United Arab Emirates (UAE) for a new embassy and chancery.<sup>349</sup> The UAE gave all competitors a program manual that specified certain requirements and explained that it was seeking a “‘modern sophisticated multi-use facility expressing the richness and variety of traditional Arab motifs.’”<sup>350</sup> Sturdza won the competition and, over the next two years, exchanged numerous contract proposals with the UAE, but communications eventually broke down.<sup>351</sup> About a year later, Sturdza saw the design that the UAE had submitted to the National Capital Planning Commission. She discovered that it was Demetriou’s design, but not the one he had initially submitted in the competition. She felt that he had “‘copied and appropriated many of the design features that had been the hallmark of her design,’” so she sued the UAE and Demetriou for copyright infringement and other claims.<sup>352</sup>

In reversing the lower court’s grant of summary judgment for the defendants, and concluding that Sturdza’s claim of substantial similarity presented genuine issues of material fact, the court of appeals repeated the familiar general descriptions of the substantial similarity inquiry, brought out that protection does not extend to *scenes a faire*,<sup>353</sup> and said that the substantial similarity determination requires comparison of the two works’ individual elements in isolation as well as their overall look and feel.<sup>354</sup> It added that summary judgment is traditionally frowned upon in copyright litigation.<sup>355</sup>

The court of appeals agreed with the lower court that the embassy’s overall volume, backyard garden, and atrium should be excluded from the substantial similarity comparison along with elements like domes, wind-towers, parapets, arches, and Islamic patterns, which amounted to unprotectable ideas in and of themselves.<sup>356</sup> It also said that the Islamic patterns could be characterized as *scenes a faire*, but added that Sturdza’s expression of these elements was protectable.<sup>357</sup>

The district court had engaged in a careful comparison of the works and an analysis of how Sturdza’s and Demetriou’s designs had used elements like

<sup>348</sup> 281 F.3d 1287, 1291 (D.C. Cir. 2002).

<sup>349</sup> *Id.* at 1291–92.

<sup>350</sup> *Id.* at 1292 (quoting a letter from the UAE Ambassador).

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 1292–93 (quoting Sturdza’s first amended complaint).

<sup>353</sup> *Id.* at 1295–96. These are incidents, characters, or settings which are, as a practical matter, indispensable or standard in the treatment of a given topic. Computer program features dictated by manufacturer design standards have been treated as *scenes a faire*.

<sup>354</sup> *Id.* at 1296 (citing *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001)).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 1297.

<sup>357</sup> *Id.*

domes, wind-towers, parapets, arches and Islamic patterns, and concluded that the designs were “decidedly different.”<sup>358</sup> The court of appeals parted ways with the lower court on this point. It believed the district court overlooked the way in which the defendant’s design expressed architectural concepts quite similar to those in Sturdza’s work, and it also saw significant similarities in the overall look and feel of the designs.<sup>359</sup> It then engaged in its own meticulous comparison of the ways in which the two architects expressed several architectural concepts, examining how the defendant’s dome design created effects similar to Sturdza’s dome, how the wind-towers appeared similar when viewed from the front, and how the respective parapets had a similar look and feel.<sup>360</sup>

The court of appeals saw no indication that the lower court had considered the buildings’ overall look and feel. The court was “struck by the significant extent to which Demetriou’s design resembles Sturdza’s.”<sup>361</sup> The buildings’ contours were “virtually identical,” both buildings had a pyramid-like clustering of arches around the front entrances, and there were other general similarities.

Finally, Demetriou achieves the “Islamic” effect sought by the UAE by expressing and combining his wind-towers, arches, dome, parapet, and decorative patterning in ways quite similar to Sturdza’s expression and combination of these elements. To sum up, we think Demetriou’s design, though different in some ways from Sturdza’s . . . is sufficiently similar with respect to both individual elements and overall look and feel for a reasonable jury to conclude that the two are substantially similar.<sup>362</sup>

This opinion, like the *Tufenkian* decision discussed above,<sup>363</sup> uses both the analytical dissection and total concept and feel approaches to determine the scope of protection for Sturdza’s design and the reasonableness of a claim for substantial similarity of protected expression. The court correctly acknowledges that unprotectable features, *scenes a faire*, and standard elements can be selected and arranged by the architect to make a copyrightable architectural work that might be infringed by a reproduction that is significantly less than verbatim.

Another case applying the total concept and feel test is *Shine v. Childs*.<sup>364</sup> Here also the plaintiff architect withstood a motion for summary judgment.<sup>365</sup>

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 1297–98.

<sup>360</sup> *Id.* at 1298–99.

<sup>361</sup> *Id.* at 1299.

<sup>362</sup> *Id.*

<sup>363</sup> See *supra* notes 289–94 and accompanying text.

<sup>364</sup> 382 F. Supp. 2d 602, 612 (S.D.N.Y. 2005).

<sup>365</sup> *Id.* at 605.

The plaintiff took a studio class on skyscrapers in 1999 as part of his Masters program at the Yale School of Architecture. His major project was a design proposal for a skyscraper that would be built adjacent to a proposed stadium on the West Side of Manhattan. His preliminary model, titled Shine '99, had a tower that "taper[ed] as it rises, with 'two straight, parallel, roughly triangular sides, connected by two twisting facades, resulting in a tower whose top [is] in the shape of a parallelogram.'"<sup>366</sup> He later developed a more sophisticated model of his design, called Olympic Tower; "a twisting tower with a symmetrical diagonal column grid, expressed on the exterior . . . that follows the twisting surface created by the floor plates' geometry."<sup>367</sup> In December of 1999, Shine presented these designs, as well as models, renderings, floor plans, and elevations, to a jury of architectural experts that included David Childs from the Skidmore, Owings & Merrill (SOM) architectural firm. The reaction of these experts was very positive, and a large photographic rendering of Shine's Olympic Tower appeared in the school's alumni magazine along with favorable quotes from jury members, including Childs.<sup>368</sup>

Four years later, Childs and SOM presented a proposal for the Freedom Tower that would be built in lower Manhattan at the World Trade Center site. Plaintiff Shine was not the only person who thought Freedom Tower was substantially similar in form and shape to Shine '99, and seemed to have borrowed the structural grid from his Olympic Tower; people at Yale also noticed the similarities because one of Shine's original models was retrieved from storage and placed on the desk of the dean of the architecture school.<sup>369</sup> Shine registered his architectural works with the Copyrighted Office and sued Childs and SOM for copyright infringement.

In ruling on the defendants' motion for summary judgment, the court had no reservations about concluding that both Shine '99 and Olympic Tower were worthy of protection under the AWCPA<sup>370</sup> and sufficiently original to be entitled to copyright protection.<sup>371</sup> The defendants conceded access, and based on the affidavits of the experts for both sides, the court ruled that there were no similarities between Shine '99 and Freedom Tower probative of actual copying,

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 606.

<sup>369</sup> *Id.* at 606–07.

<sup>370</sup> *Id.* at 609. The court said that standard elements in Shine '99 may not be worthy of protection, "but the arrangement and composition of the various elements in the model do at least arguably constitute the 'design of a building' under the AWCPA." The same was true of his Olympic Tower.

<sup>371</sup> *Id.* at 610–11. Twisting towers had been built before, as have towers with diamond-windowed facades and support grids like Shine's Olympic Tower, but "defendants do not present any evidence that the particular combinations of design elements in either . . . are unoriginal."

but that there was an issue of material fact as to whether Childs had copied Shine's Olympic Tower.<sup>372</sup>

The court proceeded to determine whether reasonable jurors could find substantial similarity between these architectural works. This was an issue of first impression in the Second Circuit at the time. Total concept and feel was regarded as the dominant standard in the circuit, and the court concluded that this standard was "appropriate for architectural works, because the AWCPA protects the 'overall form' of architectural designs in addition to their individual copyrightable elements."<sup>373</sup> The court also said that it used a reasonable, ordinary observer test guided by common sense.<sup>374</sup> With all of this in mind, the court concluded that observers would likely disagree as to whether there was substantial similarity between the towers. Accordingly, defendants' summary judgment motion was denied as to Shine's Olympic Tower.<sup>375</sup> The court said:

Any lay observer examining the two towers side by side would notice that:

(1) each tower has a form that tapers and twists as it rises, (2) each tower has an undulating, textured diamond shaped pattern covering its façade, and (3) the façade's diamond pattern continues to and concludes at the foot of each tower, where one or more half diamond shapes open up and allow for entry. The [sic] combination of these elements gives the two towers a similar 'total concept and feel' that is immediately apparent even to an untrained judicial eye.<sup>376</sup>

In ruling against the defendants' motion for summary judgment, the court explained and relied upon the test announced in *Tufenkian* that combined the analytical dissection and total concept and feel approaches in determining substantial similarity.<sup>377</sup>

There are, however, limits to how far the total concept and feel standard can be pushed. If, after analytical dissection, there are but a few protected elements in a copyrighted architectural work, the plaintiff architect will have to show near-verbatim copying in order to succeed, even when both works evoke the

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<sup>372</sup> *Id.* at 612. This also meant that defendants' summary judgment motion was granted as to Shine '99.

<sup>373</sup> *Id.* at 614. The court explained this standard by discussing and quoting at length from the Second Circuit's decision in *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134–35 (2d Cir. 2003). In that case, the total concept and feel standard was applied to carpet designs.

<sup>374</sup> *Shine*, 382 F. Supp. at 615.

<sup>375</sup> *Id.* at 616.

<sup>376</sup> *Id.* at 615.

<sup>377</sup> *Id.* at 614. The court discussed and quoted at length from the Second Circuit's decision in *Tufenkian*, 338 F.3d at 134–35.

same style or school of architecture. This is shown by the decision by the United States Court of Federal Claims in *Trek Leasing, Inc. v. United States*.<sup>378</sup> The plaintiff constructed a building for lease by the United States Postal Service (USPS) as a post office. It claimed that its copyright in this architectural work was infringed by a post office constructed for the USPS in another town. The copyright claim related to the exterior façade and shell of the building and not to its floor plans or footprint because these were standard with the USPS.<sup>379</sup> The building's shell was in the Pueblo Revival style, and the plaintiff admitted that some of its design decisions were influenced by economic factors instead of aesthetics.<sup>380</sup> The alleged infringing post office was built in the same style, and defendant conceded a general intent to make a similar structure<sup>381</sup> so copying was not an issue.<sup>382</sup>

The critical issue was whether plaintiff could prove substantial similarity of protected expression. The court said it could not look for protected expression in the mere presence of the elements of the Pueblo Revival style. Rather, it had to “determine whether the use of the elements of the style was original” as well as consider the impact of external factors on the scope of plaintiff's architectural work copyright.<sup>383</sup> The court said that once it determined the protectable aspects of the plaintiff's design, it would then make the comparison with defendant's structure. It noted that this approach was similar to the test applied with regard to computer programs, and to the analysis followed by the D.C. Circuit in *Sturdza*.<sup>384</sup>

The parties agreed that the hallmarks of the Pueblo Revival style included “a flat roof with parapet, stepped-back roof lines, wood canales, apparent wood lintels, outside walls made of stone, heavy massing, and muntins used for the glazing on doors and windows.”<sup>385</sup> The court then stated that “[t]he hallmarks of a popular architectural style, as such, are not protectable” because (1) the definition of architectural work does not extend to standard features, (2) the interplay of the idea/expression dichotomy and the merger doctrine, and (3) *scenes a faire*.<sup>386</sup> When the plaintiff's work was carefully examined by the court in light of these principles, it was clear that it had few protectable elements. In

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<sup>378</sup> 66 Fed. Cl. 8 (Fed. Cl. 2005).

<sup>379</sup> *Id.* at 10 & n.2.

<sup>380</sup> *Id.* at 12.

<sup>381</sup> *Id.* at 11.

<sup>382</sup> *Id.* The court noted that Nimmer said that using a copyrighted work as model, template, or even inspiration could be cause for inferring copying.

<sup>383</sup> *Id.* at 12.

<sup>384</sup> *Id.* (citing several appellate court decisions involving computer programs as well as *Sturdza v. United Arab Emirates*, 281 F.3d at 1295 (involving the alleged infringement of the design for an embassy building)). See also *supra* notes 348–64 and accompanying text.

<sup>385</sup> *Trek Leasing*, 66 Fed. Cl. at 13.

<sup>386</sup> *Id.*

other words, the copyright on this architectural work was thin.<sup>387</sup> The court then went through an exhaustive substantial similarity analysis, applying both the ordinary and more discerning observer tests, and compared elements like stone and mortar, canals, muntins, ceilings and porches, and overall structure.<sup>388</sup> It concluded that there was little original work that the defendant could have copied, and that the similarities between the structures were attributable to USPS requirements and the Pueblo Revival style. The “lack of substantial similarity, under the heightened more discerning observer test, between the remaining parts of the original work and those of the allegedly infringing work, makes clear that there was not copyright infringement in this case.”<sup>389</sup>

### VIII. CONCLUDING OBSERVATIONS

The AWCPA has been interpreted and applied by many federal courts since it was enacted in 1990. In passing this legislation, Congress determined that a work of architecture is a “writing” under the Constitution fully deserving of copyright protection, and that affording protection “should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal.”<sup>390</sup> I agree that works of architecture, both plans and completed buildings, deserve protection as works of authorship under the Copyright Act but I am reluctant to reach a conclusion on whether the AWCPA has had much of an impact on stimulating excellence in design in the United States. I am inclined to say that it has not made much of a difference one way or the other, primarily because the scope of protection for most architectural works is very thin.

My general observations about the impact of the AWCPA are as follows:

- (1) Courts have not had much difficulty deciding whether or not a particular structure is a building that falls within the AWCPA’s definition of architectural work.
- (2) Consistent with pre-1990 decisions, the courts have afforded protection to fairly simple plans and designs provided such plans are more refined than rudimentary ideas and concepts. There is not a constructability test for copyright protection.

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<sup>387</sup> *Id.* at 17. The court added that the lack of protected elements in plaintiff’s design was emphasized to an even greater extent after accounting for testimony by defendant’s expert. *See also id.* at 18. The work “is composed almost entirely of elements that originate in either the USPS drawings or the BIA Pueblo Revival architectural style.”

<sup>388</sup> *Id.* at 18–23.

<sup>389</sup> *Id.* at 23.

<sup>390</sup> H.R. REP., *supra* note 10, at 12.

- (3) Disputes over who owns the copyright on plans and blueprints were often litigated before 1990 and they have remained common after the passage of the AWCPA.
- (4) Suits alleging infringement of plans and blueprints are litigation staples today as they were before 1990. The significant change made by the AWCPA in regards to an architect's rights in plans and blueprints is that it is now firmly established that the unauthorized use of plans to build the structure they depict is an infringement.
- (5) The limitations on the architect's exclusive rights in Section 120(a) permitting unauthorized photographs of buildings that are ordinarily visible from a public place and in Section 120(b) authorizing the owner of a building to alter or destroy it without the architect's permission seem clear enough standing alone but neither limitation has been subject to much litigation. It is uncertain whether these limitations are restricted, if at all, by provisions in the Visual Artists Rights Act of 1990 that afford protection to certain works of visual art that are incorporated into buildings.
- (6) The scope of protection for most architectural works is thin. This means that an architect who is alleging that the copyright on a relatively simple structure like a home or a condo complex has been infringed must prove near identity between his or her architectural work and the alleged infringing work.

My observation regarding “thin” copyright protection for architectural works comes with a qualification. Several decisions show that with more complex structures like a skyscraper or a large office building, the totality approach to determining substantial similarity arguably affords “thicker” protection, at least when the plaintiff's complex building has a distinctive appearance or style. For example, Frank Gehry's massive, titanium clad Guggenheim Museum in Bilbao, Spain, with its “torqued and sensually curving pillars that support the glass-and-steel ceiling,” has a unique look and feel that does not seem to fit in a particular school style.<sup>391</sup> Copyright arguably affords it much more protection than Renzo Piano's more rectilinear Merrill Collection building in Houston, Texas.<sup>392</sup>

There are, however, limitations on the reach of the totality approach due to the importance of subtracting unprotectable elements from the architectural work that allegedly has been infringed. The totality approach should be used in

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<sup>391</sup> Matt Tyrnauer, *Architecture in the Age of Gehry*, VANITY FAIR, Aug. 2010, at 156.

<sup>392</sup> *Cf. id.*

conjunction with the subtractive approach to determine substantial similarity while simultaneously adhering to the AWCPA's definition of architectural work. Any features associated with a particular style or school of architecture should be subtracted from the substantial similarity comparison of architectural works because they are unprotectable due to the idea/expression dichotomy, the merger, and the *scenes a faire* doctrines or because the elements should be regarded as unprotectable individual standard features of that style.

Although I am hesitant to say whether or not the AWCPA has stimulated excellence in design or encouraged creativity by architects, I am comfortable saying that this statute has generated litigation. The number of opinions involving infringement of architectural works that were reported prior to 1990 seems small in comparison to the number of cases that have interpreted and applied the AWCPA during the last twenty years. It has generated additional work for lawyers and, at the same time, has perhaps given architects some leverage or bargaining power when they believe that another architect has borrowed far too much from one of their designs. Of course, threats of litigation and possible settlements do not necessarily mean that the upset architect would have been successful had he or she actually sued and gone to trial. As noted above, most architect plaintiffs face a daunting task because ordinarily they will have to show close to verbatim copying in order to be successful due to the thinness of their architectural work copyright.

