

“FILTERING” COPYRIGHT INFRINGEMENT ANALYSIS IN ARCHITECTURAL WORKS

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This Note discusses a significant, yet seldom noticed, circuit split concerning which substantial-similarity test properly protects architectural works—a look-and-feel test, a compilation test, or the Altai test? This split has the potential to create radically different levels of protection for similar sets of architectural works. This Note argues that the primary difference among the different circuits and their treatment of the issue is how aggressively each court “filters” out copyright-unprotected elements. In making this argument, this Note discusses the legislative history of copyright law and “architectural works,” and examines the split among three different circuit courts. Ultimately, this Note suggests that courts apply the Second Circuit’s Altai test, administering a careful analysis to “filter” out unoriginal, standard elements of an architectural work that do not deserve copyright protection.

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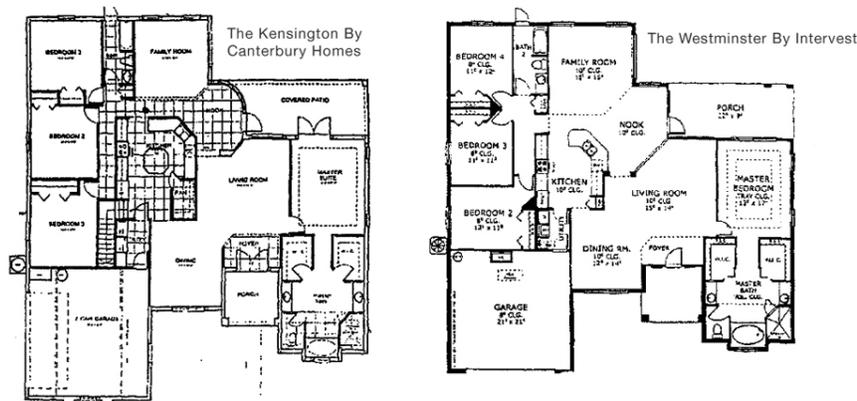
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I. INTRODUCTION

Intervest Floor Plan



Take a moment to examine these two floor plans. The floor plan for The Westminster was created in 1992 by Intervest Construction, Inc. (“Intervest”) while The Kensington was created in 2002 by Canterbury Estate Homes (“Canterbury”).¹ There are undeniably many similarities. They both have four bedrooms, a two-car garage, a living room, a dining room, a family room, a foyer, a master bathroom, a kitchen, a second bathroom, a nook, and a porch/patio. They share common elements such as doors, windows, walls, bathroom fixtures (a toilet, a tub, a shower, and a sink), kitchen fixtures (a sink, a counter, a refrigerator, stovetop, and pantry/cabinets), utility rooms and fixtures (a washer, a dryer, and a sink), and closets. The floor plans have approximately the same square footage, as is common for most houses, and similar placements of entrances, exits, hallways, openings, and utilities. Assuming Intervest has a valid copyright on The Westminster floor plan, did Canterbury’s The Kensington infringe on Intervest’s copyright? There are many similarities, but common sense suggests that plainly standard features that are commonplace in most houses do not deserve copyright protection. Features that are products of zoning or housing regulations should likewise not be protected since the architect included those features, not out of creativity or artistry, but out of regulatory compliance. Is it appropriate to consider floor plans

1. The two floor plans in this hypothetical fact pattern are entirely based on the facts of *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 916 (11th Cir. 2008).

like compilations of “individual standard features” such as “common windows, doors, and other staple building components[?]”² It is difficult to clearly define the level of protection a floor plan, design, building, or other architectural works deserves. There will inevitably be elements that are original or creative that deserve copyright protection and there will be elements that are standard or unoriginal that do not deserve copyright protection.

This Note sheds light on these questions that courts have struggled with in copyright infringement cases over architectural works. The subject of “architectural works” has only recently entered the realm of copyright protection under the Architectural Works Copyright Protection Act (“AWCPA”) in 1990.³ Over the past decade and a half since the AWCPA’s passage, a relatively unacknowledged circuit split over the standard to determine copyright infringement of architectural works has emerged.⁴ These circuit courts have tried to answer a fundamental question of how courts can find substantial similarity, and thus copyright infringement, between an allegedly copied architectural work and the protected architectural work.⁵

First, in *Nelson-Salabes, Inc. v. Morningside Holdings*, the U.S. Court of Appeals for the Fourth Circuit affirmed the U.S. District Court for the District of Maryland’s use of a look-and-feel test that incorporates an ordinary observer comparing architectural works—a test giving a high degree of protection.⁶ Second, in *Intervest Constuction, Inc. v. Canterbury Estate Homes, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit ruled that the statutory definition of “architectural works” is akin to the statutory definition of “compilations” and, therefore, applied a compilation test—a low form of copyright protection.⁷ Third, in *Zalewski v. Cicero Builder Dev. Inc.*, the U.S. Court of Appeals for the Second Circuit, rejecting the *Intervest* compilation analysis, emphasized that the comparison should only be reserved to copyright-protected elements of an architectural work, “filtering” out unoriginal copyright-unprotected elements.⁸ Here, the Second Circuit applied the *Altai* test, named after a Second Circuit computer program copyright case.⁹ In short, circuit courts have split on which substantial-similarity test properly protects architectural works—a look-and-feel test, a compilation test, or the *Altai* test. As suggested above, this circuit split may generate radically different levels of protection for similar sets of architectural works. This Note argues that the primary difference among these court opinions is how aggressively the courts “filter” out copyright-unprotected elements.¹⁰

Part II explores the history of copyright generally, the history of copyright protection for architectural works, and the relevant case law behind the

2. H.R. REP. NO. 101-735 (1990), reprinted in 1990 U.S.C.C.A.N. 6945, 6949.

3. The passage of the Architectural Works Copyright Protection Act (AWCPA) in 1990 is the first time Congress explicitly included architectural works as protected. 17 U.S.C. § 102 (2012).

4. See *infra* Section II.B.

5. See *infra* Part III.

6. 284 F.3d 505 (4th Cir. 2002).

7. 554 F.3d 914 (11th Cir. 2008).

8. 754 F.3d 95 (2d Cir. 2014).

9. See generally *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

10. *Id.*

circuit split.¹¹ Part III argues that the difference underlying the circuit court opinions is how aggressively each court “filters” out copyright-unprotected elements before the infringement analysis.¹² Part IV recommends that courts follow the *Zalewski* court and apply the *Altai* test, carefully analyzing each case to “filter” out unoriginal, standard elements of an architectural work that do not deserve copyright protection.¹³ Part V concludes and summarizes the findings of this Note.¹⁴

II. BACKGROUND

“A copyright is a property right in an original work of authorship that is fixed in tangible form.”¹⁵ It is a body of law that protects the ownership and use of literature, music, and other artistic works,¹⁶ and it grants exclusive rights to help enrich our society’s wealth of culture and information.¹⁷ Modern copyright law grants the author of an original work the right to prevent others from exploiting that work.¹⁸ Through this right to exclude, copyright law both protects and encourages the creation of artistic works.¹⁹

Part II surveys the brief history (both legislative and judicial) of copyright protection for architectural works. Section II.A will review the history of copyright protection of architectural works.²⁰ Section II.B will then delve into the relevant case law surrounding the proper standard to compare two pieces of architectural work.²¹ The first subsection will review the seminal case discussing the compilation doctrine and originality, *Feist v. Rural Telephone Service Company*.²² For the purposes of this Note, *Feist* serves as a backdrop and should not be considered a part of the three-decision circuit split.²³ The remaining portions of this Note will introduce the relatively unacknowledged circuit split that has occurred among the U.S. Court of Appeals: *Nelson-Salabes, Inc. v. Morningside Dev.*;²⁴ *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*;²⁵ and *Zalewski v. Cicero Builder Dev. Inc.*²⁶

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. AM. BAR ASS’N SECTION INTELLECTUAL PROP. LAW, WHAT IS A COPYRIGHT? 5 (2006).

16. ROBERT A. GORMAN, COPYRIGHT LAW 1 (2d ed. 2006).

17. *Id.*

18. 17 U.S.C. § 102 (2012).

19. Lisa A. Zakolski, *Copyright and Literary Property* 18 AM. JUR. 2D COPYRIGHT § 2 (2014) (explaining that while the short term effect of copyright law is to protect the economic interests of architects, the long term and real effect is to foster the public interest in stimulating more creative works).

20. See *infra* Section II.A.

21. See *infra* Section II.B.

22. 499 U.S. 340 (1991).

23. See *infra* Section II.A.

24. 284 F.3d 505 (4th Cir. 2002).

25. 554 F.3d 914 (11th Cir. 2008).

26. 754 F.3d 95 (2d Cir. 2014).

A. Architectural Works Copyright History

1. Before the Architectural Works Copyright Protection Act

The protection of artistic works finds roots in our very own U.S. Constitution—“The Congress shall have power . . . To promote the Progress of . . . useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”²⁷ Pursuant to this power, Congress enacted its first copyright statute, the Copyright Act of 1790.²⁸ Unsurprisingly, the protection of copyright has evolved substantially since then. Congress revamped federal copyright law twice—the Copyright Act of 1909, which was generally described as lacking “clarity, coherence, or precision,” and the Copyright Act of 1976, which resulted in the more precise laws under which we are governed today.²⁹

Despite the dramatic legal evolution of copyright protection, there was very little development in copyright protection for architectural works from the Copyright Act of 1790 until the Copyright Act of 1909.³⁰ This, however, makes sense. Copyright law must continuously keep up with the changes and innovations in technology and new media of expression.³¹ It is, therefore, expected to see minimal development in copyright protection for architectural works until the field started to flourish in the nineteenth century.³²

The Copyright Act of 1976 protects “original works of authorship fixed in any tangible medium of expression.”³³ These works expressly include “compilations,”³⁴ defined 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.”³⁵ It also established eight broad categories for copyright protection: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”³⁶ The last category is the one of most interest to us.

27. U.S. CONST. art. I, § 8, cl. 8.

28. 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 30–31 (1994).

29. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 7–11 (5th ed. 2010). The Copyright Act of 1976 governs the copyrighting of architectural works area of law today. When it is referenced throughout this Note, be aware that it refers not only to the Act itself but also to any amendments or additions made to it since its inception in 1976.

30. PATRY, *supra* note 28, at 36–56 (1994) (providing a list of amendments from the Copyright Act of 1790 to the Copyright Act of 1909, which included prints and notice, jurisdictional, deposit, or artistic and literary changes).

31. LEAFFER, *supra* note 29, at 4.

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

33. 17 U.S.C. § 102(a) (2012).

34. *Id.* § 103(a) (“[S]ubject matter of copyright as specified by section 102 includes compilations and derivative works . . .”).

35. *Id.* § 101.

36. *Id.* § 102(a).

Despite architecture's cultural value and importance, the idea of architectural works being protected by copyright law is a relatively new concept. American architecture flourished in the latter part of the nineteenth century and through most of the twentieth century, even though these structures received only second-class protection under U.S. copyright law until 1990.³⁷ The Copyright Act of 1909 did not include architectural works as copyrightable subject matter, and the Copyright Act of 1976, as it was first enacted, also did not mention architectural works.³⁸ Though the federal copyright statutes were silent on architectural works until 1990, it was well established that architectural plans, blueprints, and models were copyrightable under the Copyright Act of 1909's category of "drawings or plastic works of a scientific or technical character,"³⁹ and later as "pictorial, graphic, and sculptural works" under the Copyright Act of 1976.⁴⁰

Despite their lower-class status, architectural works were still considered copyrightable works in some instances.⁴¹ Unauthorized copying of floor plans or blueprints amounted to copyright infringement,⁴² but most courts held that plans were not infringed when used, without the architect's permission, to construct the buildings they depicted.⁴³ Additionally, there was pushback in protecting architectural works since they inherently contained utilitarian concepts.⁴⁴ These utilitarian concepts, according to critics, were supposed to fall under a category called "useful articles."⁴⁵ It is imperative to note that useful articles do not have copyright protection because their utility heavily weighs in favor of the public's interest in accessing them against the architect's interest in protecting his own works.⁴⁶ As an additional justification, copyright protection for a useful article, like a building method, could potentially create a mo-

37. Shipley, *AWCPA at Twenty*, *supra* note 32, at 3.

38. LEAFFER, *supra* note 29, at 130–31; David E. Shipley, *Copyright Protection for Architectural Works*, 37 S.C. L. REV. 393, 395 (1986) [hereinafter Shipley, *Copyright Protection*].

39. Pub. L. 60–349, ch. 320, sec. 5(i), 35 Stat. 1075, 1077.

40. 17 U.S.C. § 102(a)(5) (2012).

41. *DeSilva Const. Corp. v. Herald*, 213 F. Supp. 184, 193 (M.D. Fla. 1962) ("Although not mentioned expressly in a separate category in the statutes, architectural plans (including drawings and models) are clearly copyrightable under the present copyright laws under the specified class of drawings or plastic works of scientific or technical nature.").

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

43. *Compare Scholz Homes, Inc. v. Maddox*, 379 F.2d 84, 87 (6th Cir. 1967), with *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 899 (5th Cir. 1972). *See also* LEAFFER, *supra* note 29, at 130–31 ("[C]opyright in architectural plans or models did not convey a right to control their use."); Shipley, *Copyright Protection*, *supra* note 38, at 403–06.

44. *See* U.S. COPYRIGHT OFFICE, THE REPORT OF THE REGISTER OF COPYRIGHT ON WORKS OF ARCHITECTURE, at i–ii (June 19, 1989) [hereinafter U.S. COPYRIGHT OFFICE] (outlining arguments against Congress explicitly protecting "architectural works" in the Copyright Act of 1976).

45. Pub. L. 94–554, sec. 101, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 (2012)) (defining "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.").

46. *Donald Frederick Evans & Assocs., Inc. v. Cont'l Homes, Inc.* 785 F.2d 897, 901 n.7 (11th Cir. 1986); *Norris Indus., Inc. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918, 923 (11th Cir. 1983) (holding wire-wheel covers did not qualify as fine or applied artwork and were not separable artistic aspects that would overcome their utilitarian aspects).

nopoly.⁴⁷ Courts have historically offered little protection to architectural works by denying protection because they were useful articles or because they were not physically separable from their useful counterparts.⁴⁸ Courts have struggled with utilizing a separability test.⁴⁹

Nevertheless, there have been calls advocating for recognition of architectural works as explicitly copyrightable subject matter so that architects can gain protection comparable to what copyright law afforded creators of other artistic and sculptural works,⁵⁰ and that enhanced protection would promote progress in the profession.⁵¹

2. *The Berne Convention for the Protection of Literary and Artistic Works*

Meanwhile, in Europe, the expansion of copyright protection started earlier with the Berne Convention of 1886.⁵² Its purpose was to extend copyright protection to all literary and artistic works of creators from countries that were members of the Berne Convention.⁵³ Authors of artistic works received automatic protection even if their works were not published.⁵⁴ The Berne Convention also provided protection for authors who were not citizens of a member country, but who published their works in a member country.⁵⁵ It is evident that architectural works published in a Berne member country received more copyright protection than the U.S. copyright law afforded.⁵⁶ The Berne Convention, most importantly, protects buildings and other structures located in a Berne member country.⁵⁷ A big caveat of the Berne Convention protection is that it also allows governments to permit reproduction of a work without the creator’s consent.⁵⁸

The United States did not join the Berne Convention until it enacted the Berne Convention Implementation Act of 1988.⁵⁹ In doing so, the United States adopted a number of the Berne Convention’s moral-rights policies for

47. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.A.06 (2015) (criticizing the court in *Baker v. Sleden*, 101 U.S. 99 (1879), arguing that “[i]t is this dichotomy that permits the copying of a system or method *per se*, as long as the copier steers clear of the particular expression employed by the copyright claimant.”).

48. See *Norris*, 696 F.2d at 924; *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 915 (2d Cir. 1980).

49. See *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 420–21 (2d Cir. 1985) (Newman, J., dissenting) (distinguishing the idea of physical separability and conceptual separability and also suggesting that the utilitarian and artistic design features of a work are easily distinguishable, or conceptually separable).

50. Shipley, *Copyright Protection*, *supra* note 38, at 444–45.

51. *Id.* at 448.

52. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treat Do. No. 99-27 828 U.N.T.S 221.

53. *Id.* art. 2 § 6 (stating that the works explained in the article shall be protected in all member countries for the benefit of the author).

54. *Id.* art. 3 § 1 (stressing the significance of providing protection for works even if they are never made public or for architectural plans used to construct a building).

55. *Id.*

56. *Id.*

57. *Id.* art. 4(b) (Article 4 differs from U.S. copyright law, which does not give copyright protection for nonlivable structure).

58. *Id.* art. 9(2) (The legislation to circumvent the lack of creator’s consent for reproduction of the artistic work is subject to the requirement that the “reproduction does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”). *Id.*

59. The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

authors.⁶⁰ Legislators argued that one of the main objectives of the Berne Implementation Act of 1988 was to protect American products, covered by U.S. copyright law, from exploitation when exported to Berne member countries.⁶¹ In response to joining the Berne Convention, Congress made alterations to its copyright laws to fit more in line with the Berne Convention requirements.

3. *The Architectural Works Copyright Protection Act (“AWCPA”)*
Enactment

In 1990, Congress changed the copyright status of architectural works by passing the AWCPA.⁶² Congress passed the AWCPA as part of the United States’ adherence to the Berne Convention for the Protection of Literary and Artistic Works.⁶³ Article 2(1) of the Convention requires not only protection for architectural plans and drawings, but also for the built designs of structures.⁶⁴ Under U.S. copyright law, architectural plans and drawings were clearly protected, but buildings were not.⁶⁵ Congress, therefore, sought to expand copyright protection to architectural works to “stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal.”⁶⁶

The AWCPA established “architectural works” as a new category of protectable subject matter in § 102(a)(8)⁶⁷ and defined it 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.”⁶⁸ For example, copyright protection does not extend to common windows that are used in the plan.⁶⁹ The term “design of a building” is intended both to describe the protected work of intellectual property (the design) and to distinguish that work from its material

60. William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373, 375 (1995) (stating that the United States was attempting to move from a more utilitarian ideology to a more moralistic attitude geared toward protecting the rights of authors and creators).

61. S. REP. NO. 100-352, at 2 (1988), as reprinted in 1988 U.S.C.C.A.N. 3706, 3707 (“At a time when United States is suffering a large overall trade deficit, works protected by copyright—such as books, sound recording, motion pictures, and computer software—routinely generated a trade surplus.”).

62. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (1990).

63. The United States joined the Berne Convention in 1989, and Congress passed the AWCPA to comply with the treaty obligations. CRAIG JOYCE ET. AL., COPYRIGHT LAW 204 (7th ed., 2006).

64. See U.S. COPYRIGHT OFFICE, *supra* note 44, at 141-56 for a review of protection for these works under the Berne Convention. One clear consequence, however, of joining the Berne Convention was that the United States could not satisfy the explicit treaty obligations with respect to architectural works through *sui generis* protection, since architectural works are specifically enumerated in article 2(1) of the Convention as a species of “literary and artistic works.” *Id.* at 141.

65. See generally *id.* at 71-140.

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

67. 17 U.S.C. § 102(a)(8) (2012).

68. *Id.* § 101.

69. See H.R. REP. NO. 101-735 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, at 6949 (specifying that copyright protection does not include the protection for standard, unoriginal features such as common windows, doors, and other components because granting copyright protection over those simple, basic materials would go against the innovation of an architect).

embodiment (the building) to remove any doubt that the legislation protects artistic elements in constructed architectural works.⁷⁰

Recall that the Copyright Act of 1976 protects “original works of authorship fixed in any tangible medium of expression.”⁷¹ The “fixation” requirement is satisfied not only by embodying the work in a building, but also by embodying it in “any tangible medium of expression, including plans, drawings, blueprints, and computer disks.”⁷² These additional forms of fixation were added out of fear that if an architectural work could only be fixed in a building, there would be no liability where an infringer scooped the architect by constructing the building first.⁷³ Before, architectural works were sometimes considered “useful articles,” and courts were unable to separate them from their useful counterparts or struggled with utilizing a separability test.⁷⁴ With the AWCPA, Congress sought to set aside architectural works as a protected subject matter, avoiding the separability issue altogether. Before Congress added “architectural works” as statutorily copyright-protected subject matter, there was an internal Copyright Office debate over whether architectural works were protected under the Copyright Act of 1976 as passed and the proper standard of conceptual separability to be applied to pictorial, graphic, and sculptural works embodied in useful articles.⁷⁵ The Copyright Act of 1976 House Report regarding the separability analysis of architectural works stated:

A special situation is presented by architectural works. An architect’s plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend upon the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to the structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.⁷⁶

In response, the U.S. Copyright Office interpreted this piece of legislative history to mean:

70. See also *Architectural Design Protection: Hearing on H.R. 3990 and H.R. 3991 Before the H. Subcomm. On Courts, Intellectual Property, and the Admin. of Justice of the H. Judiciary Comm.*, 101st Cong. 115-16, 144 (1990) [hereinafter *Architectural Design Hearing*].

71. 17 U.S.C. § 102(a) (2012).

72. Congress considered, but rejected, providing a special definition for publication of architectural works, indicating instead that the general definition of publication in § 101 would apply. See THE HOUSE REPORT, *supra* note 2, at 6955.

73. *Id.* at 6950.

74. See *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 414–15 (2d Cir. 1985); *Norris Indus., Inc. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 924 (11th Cir. 1983); *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 915 (2d Cir. 1980).

75. See U.S. COPYRIGHT OFFICE, *supra* note 44, at i–vii, 199–217; *Architectural Design Hearing*, *supra* note 70, at 63.

76. H.R. REP. NO. 94-1476, at 55 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5668.

1. Architectural plans and drawings are protected without the need for a separability analysis;
2. Protection for architectural structures is available under the following circumstances:
 - a. Purely nonfunctional or monumental structures are protected without the need for a separability analysis;
 - b. Artistic sculpture or decorative embellishment added to a structure is (generally) protected under a separability test.⁷⁷

The separability doctrine was employed to determine whether an architectural work was artistic or utilitarian by examining its individual parts.⁷⁸ With the AWCPA, the House Judiciary Committee report stated:

By creating a new category of protectable subject matter in subsection 102(a)(8), and, therefore, by deliberately not encompassing architectural works as pictorial, graphic, and sculptural works in existing section 102(a)(5), the copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles.⁷⁹

The result is that buildings are not to be considered “useful articles”⁸⁰ and the separability standard is not to be applied in determining whether an architectural work is protected.

B. The Case Law

This Section surveys the case law following the AWCPA. First, the *Feist* decision serves as a backdrop to the originality requirement—the touchstone of copyright protection—and the compilation doctrine, the basis of one of the tests applied by the Eleventh Circuit in copyright infringement cases for architectural works. Sections II.B.2–4 will survey each of the circuit decisions.⁸¹ The circuit decisions will show three different substantial-similarity tests—a look-and-feel test, a compilation test, and the *Altai* test. As Part III will discuss, the primary difference among the three tests is how aggressively a court “filters” out the unoriginal, standard, and copyright-unprotected elements from its copyright infringement analysis.

77. U.S. COPYRIGHT OFFICE, *supra* note 44, at 204.

78. *Carol Barnhart*, 773 F.2d at 418 (explaining the concept of the separability doctrine and how the courts applied it).

79. H.R. REP. NO. 101-735 (1990), *reprinted in* 1990 U.S.C.A.N. 6935, 6951; *see also* 136 CONG. REC. E259 (daily ed. Feb. 7, 1990) (remarks of Mr. Kastenmeier on introducing H.R. 3990) (“Fully in keeping with the minimalist approach, this bill makes only those changes necessary for compliance, and it does so in straightforward language, free for [sic] entanglement in the controversy over design protection and useful articles.”).

80. *See* 17 U.S.C. § 101 (2012) (providing definition of “useful articles”).

81. *See infra* Sections II.B.2–4.

I. Feist v. Rural Telephone Service Company

The U.S. Supreme Court addressed what is actually protected,⁸² what constitutes infringement,⁸³ and what qualifies as an original work⁸⁴ in *Feist v. Rural Telephone Service Company*.⁸⁵ The Supreme Court reversed the grant of summary judgment and found no copyright infringement because the selection, coordination, and arrangement of Rural Telephone Service Company’s (“Rural”) white pages did not satisfy the minimum constitutional standards of copyright protection.⁸⁶ In doing so, the Court affirmed that a copyright was a reward of originality, not hard work.⁸⁷ The Court established that originality “remains the touchstone of copyright protection today.”⁸⁸ It is the very “premise of copyright law.”⁸⁹ With this principle in mind, the Court did establish that compilations can achieve copyright protection:

Factual compilations . . . may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and involve a minimum degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.⁹⁰

The Court concluded that copyright with respect to factual compilation is “thin” because “no matter how original the format . . . the facts themselves do not become original through association.”⁹¹

The central question was whether Rural selected, coordinated, or arranged these uncopyrightable facts—names, towns, and telephone numbers—in an original way.⁹² The Court concluded that it did not.⁹³ Rural simply published the most basic information about each person who applied for telephone service. This “lack[ed] the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it

82. *Feist v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)) (explaining that the only portions of a work that are copyrightable are those that are original, or work that is independently thought of and created by the author as opposed to copied from different works).

83. *Id.* at 361 (stating that ownership of a valid copyright and the copied elements must have been the unique and original to the creator in order for an infringement to occur).

84. *Id.* (describing an “original” work as one that has not been copied from another and one that has a minimal amount of creativity).

85. *Id.* at 340.

86. *Id.* at 363–64.

87. *Id.* at 373–74.

88. *Id.* at 347.

89. *Id.* (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981)).

90. *Id.* at 348.

91. *Id.*

92. *Id.* at 362.

93. *Id.* Although Rural decided to alphabetize the listings to produce its compilation, “there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.” *Id.* at 363.

original.”⁹⁴ The coordination and arrangement of facts, additionally, are devoid of creativity since the white pages only list them in alphabetical order.⁹⁵ In sum, “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.”⁹⁶ The protection accorded to compilations is “thin.”⁹⁷ To infringe, the defendant must copy the compilation’s original elements exactly or almost exactly.⁹⁸

2. *The Fourth Circuit and the Look-and-Feel Test*

The discussion of the first test—a look-and-feel test—will rely heavily on the District Court of Maryland’s opinion in *Nelson-Salabes, Inc. v. Morningside Holdings* due to the district court’s more extensive discussion.⁹⁹ The Fourth Circuit, in *Nelson-Salabes, Inc. v. Morningside Dev., LLC*,¹⁰⁰ affirmed the relevant part of the District Court of Maryland’s decision, but with no language explicitly dedicated to the use of the look-and-feel test.

Developers hired Nelson-Salabes, Inc. (“Nelson-Salabes”) to provide architectural works for a proposed assisted-living facility.¹⁰¹ Nelson-Salabes created four drawings depicting the footprint, floor plans, and elevations of the Satyr Hill site.¹⁰² The drawings were integrated into the overall development plan and submitted to the county for approval.¹⁰³ Following the approval, the original developers sold the project to Morningside Holdings (“Morningside”), which already owned other assisted-living centers.¹⁰⁴ Morningside chose not to proceed with Nelson-Salabes as the architect.¹⁰⁵ In response, Nelson-Salabes informed the managing agent for Morningside that he “could proceed with another architect, but if he did so, he could not use Nelson-Salabes’s design, including the footprint and elevations.”¹⁰⁶ The new architects Morningside hired were told to design the Satyr Hill site to conform with another Morningside assisted-living center.¹⁰⁷ They were given Nelson-Salabes’s plans and the approved development plan, and submitted new amended development plans based on “minor footprint revisions” and “minor changes to architectural elevations of buildings.”¹⁰⁸ Afterward, Nelson-Salabes filed a copyright infringement complaint alleging that Morningside copied the footprint and exterior elevations from Nelson-Salabes’s architectural designs and plans.¹⁰⁹

94. *Id.* at 362–63.

95. *Id.* at 363.

96. *Id.*

97. *Id.* at 349.

98. *Id.*

99. No. Civ.B–98–2226, 2001 WL 419002, at *1 (D. Md. Feb. 16, 2001), *aff’d in part, vacated in part sub nom.*, *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505 (4th Cir. 2002).

100. 284 F.3d 505 (4th Cir. 2002).

101. *Nelson-Salabes*, 2001 WL 419002, at *1.

102. *Id.*

103. *Id.* at *2.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at *3.

108. *Id.*

109. *Id.*

To prevail in a copyright infringement case, the plaintiff must establish: (1) ownership of a valid copyright and (2) unauthorized copying of the protected work.¹¹⁰ First, the district court found that Nelson-Salabes’s “combination of common features such as a Y-shaped footprint, bay windows, the octagonal silo entrance, and gables created a unique design.”¹¹¹ Because “Nelson-Salabes’s selection and arrangement of common architectural features [was] unique and exhibit[ed] artistic expression” it owned a valid copyright in its architectural work.¹¹²

Second, the district court stated that “the plaintiff may raise a presumption of copying by proving through circumstantial evidence (1) that the defendants had access to the copyrighted work and (2) that the alleged copy is *substantially similar* to the original work.”¹¹³ Access to copyrighted designs was not disputed.¹¹⁴ The district court also found that the plaintiff sufficiently proved that the two designs were extrinsically substantially similar.¹¹⁵ The district court further explained that:

[C]ertain differences between the designs slightly affect the feel, such as the use of different windows, the use of brick instead of siding in certain areas, and different roofs on the bay windows. Despite these differences, however, the two designs still had the same overall feel based on the same combination of the unique features, including the octagonal silo entrance, the bay windows on the ends, and the protruding gables.¹¹⁶

In other words, instead of focusing on the relatively minor differences, the court centered on the “total concept and feel.”¹¹⁷

On appeal, the Fourth Circuit affirmed the district court’s decision in part, and vacated in part and remanded.¹¹⁸ The Fourth Circuit affirmed the district court’s decision that Morningside was liable for infringing Nelson-Salabes’s copyright.¹¹⁹ The defendants did not appeal the district court’s use of a look-and-feel test used by the district court, but, instead, appealed on other grounds.¹²⁰ However, the district court’s adoption of a look-and-feel test did not elicit a response from the Fourth Circuit. So, while the Fourth Circuit did not explicitly mention the words “total concept and feel,” the court’s silence at least suggests an implied adoption of the test. The Fourth Circuit did affirm the

110. Towler v. Sayles, 76 F.3d 579, 581 (4th Cir. 1996).

111. *Nelson-Salabes*, 2001 WL 419002, at *4.

112. *Id.*

113. *Id.* (emphasis added) (citing *Keeler Brass Co. v. Cont’l Brass Co.*, 862 F.2d 1063, 1065 (4th Cir. 1988)) (emphasis added).

114. *Id.* at *4.

115. *Id.* at *5.

116. *Id.*

117. *Id.* (citing *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996)).

118. *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 518 (4th Cir. 2002).

119. *Id.* at 514.

120. *Id.* at 513 (“They assert that Morningside Holdings did not infringe on the [*Nelson-Salabes*] Drawings; that Morningside Holdings’s ownership of the Project is an insufficient basis to establish copyright infringement; that any of [the managing agent’s] conduct which constituted copyright infringement was carried out in his capacity as an employee of Morningside Development only, and not in connection with his position at Morningside Holdings.”).

district court's decision that Morningside is liable for copyright infringement.¹²¹

3. *The Eleventh Circuit and a Compilation Test*

The hypothetical posed at the beginning of this Note is based on the facts given in the U.S. Court of Appeals for the Eleventh Circuit's opinion from *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*¹²² There, two floor plans were at issue: The Westminster by Intervest Construction, Inc. ("Intervest") and the allegedly infringing floor plan, The Kensington by Canterbury Estate Homes, Inc. ("Canterbury").¹²³ The district court granted summary judgment for Canterbury holding that, as a matter of law, no reasonable fact finder could conclude that The Kensington was substantially similar to The Westminster.¹²⁴ Canterbury appealed, arguing that the district court employed a heightened substantial-similarity standard by overemphasizing the differences between the two floor plans.¹²⁵

On appeal, the Eleventh Circuit affirmed the district court's grant of summary judgment but did so using a new substantial-similarity test. The court began by looking at the statutory definition of an "architectural work"—"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."¹²⁶ Relying on legislative history and the statutory language, the court determined that the definition of an architectural work closely parallels that of a compilation.¹²⁷ Under the statute, a compilation is "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."¹²⁸

The arrangement and coordination of those common elements such as rooms, windows, doors, and other staple building components could be entitled to copyright protection.¹²⁹ The court relied on *Warren Publishing, Inc. v. Microdos Data Corp.*,¹³⁰ in which the Eleventh Circuit previously held that all copyrighted works are either "creative, derivative, [or] compiled."¹³¹ According to *Intervest*, each kind of protectable work gets varying levels of protection.¹³² The court concluded that architectural works fall into the "compiled" category, and is thus only entitled to "thin" copyright protection based on their

121. *Id.* at 518.

122. *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 916 (11th Cir. 2008).

123. *Id.* at 916.

124. *Id.*

125. *Id.*

126. *Id.* (quoting 17 U.S.C. § 101 (2008)).

127. *Id.* at 919.

128. *Id.* (quoting 17 U.S.C. § 101 (2008)).

129. *Id.* at 919.

130. 115 F.3d 1509, 1515 n.16 (11th Cir. 1997).

131. *Intervest*, 554 F.3d at 919 n.3.

132. *Id.*

“arrangement and coordination” of unoriginal and uncopyrightable elements.¹³³ “Thus, when viewed through the narrow lens of compilation analysis[,] only the original, and thus protected[,] arrangement and coordination of spaces, elements[,] and other staple building components should be compared.”¹³⁴ The court took the opportunity to further explain why it is appropriate for judges to rule out substantial similarity in cases where no reasonable jury could conclude otherwise:

[A] judge is better able to separate original expression from the nonoriginal elements of a work where the copying of the latter is not protectable and the copying of the former is protectable. The judge understands the concept of the idea/expression dichotomy and how it should be applied in the context of the works before him. . . . Because a judge will more readily understand that all copying is not infringement . . . the “substantial-similarity” test is more often correctly administered by a judge rather than a jury—even one provided proper instruction. The reason for this is plain—the ability to separate protectable expression from non-protectable expression is, in reality, a question of law or, at the very least, a mixed question of law and fact. It is difficult for a juror, even properly instructed, to conclude, after looking at two works, that there is no infringement where, say, 90% of one is a copy of the other, but only 15% of the work is protectable expression that has not been copied.¹³⁵

The Eleventh Circuit noted that the district court did compare the protectable aspects of the two floor plans, focusing on the narrow arrangement and coordination of standard architectural features.¹³⁶ The court stated that the district court essentially made the same ruling that the Eleventh Circuit made earlier in *Oravec v. Sunny Isles Luxury Ventures, L.C.*¹³⁷ “At the level of protected expression, the differences between the designs are so significant that no reasonable, properly instructed jury could find the works substantially similar.”¹³⁸

4. *The Second Circuit and the Altai test*

Under facts similar to *Intervest*, the U.S. Court of Appeals for the Second Circuit examined *how* to “filter” out the copyright-unprotected elements in architectural works in *Zalewski v. Cicero Builder Dev. Inc.*¹³⁹ Although not explicitly mentioned, the Second Circuit’s analysis echoes that of a previous Second Circuit case: *Computer Associates International, Inc. v. Altai, Inc.*¹⁴⁰

133. *Id.* at 919.

134. *Id.*

135. *Id.* at 920 (citations omitted).

136. *Id.* at 921.

137. 527 F.3d 1218 (11th Cir. 2008).

138. *Intervest*, 554 F.3d at 921 (citing *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1227 (11th Cir. 2008)).

139. 754 F.3d 95, 103 (2d Cir. 2014).

140. *See* 982 F.2d 693 (2d Cir. 1992).

a. *Altai*

The Second Circuit was asked challenging legal copyright questions regarding the growing field of computer science in 1994. Among other questions, the case dealt with “whether and to what extent the non-literal aspects of a computer program, that is, those aspects that are not reduced to written code, are protected by copyright.”¹⁴¹ In *Altai*, despite a complete rewrite of the computer program code, can there be substantial similarity as to the computer program’s “general flow charts as well as the more specific organization of inter-modular relationships, parameter lists, and macros[?]”¹⁴² The court used a three-step test to determine substantial similarity: (1) abstraction, (2) filtration, and (3) comparison. The court described the three-step test as:

In ascertaining substantial similarity under this approach, a court would first break down the allegedly infringed program into its constituent structural parts. Then, by examining each of these parts for such things as incorporated ideas, expression that is necessarily incidental to those ideas, and elements that are taken from the public domain, a court would then be able to sift out all non-protectable material. Left with a kernel, or possible kernels, of creative expression after following this process of elimination, the court’s last step would be to compare this material with the structure of an allegedly infringing program. The result of this comparison will determine whether the protectable elements of the programs at issue are substantially similar so as to warrant a finding of infringement.¹⁴³

According to the court, “[t]his approach breaks no new ground; rather, it draws on such familiar copyright doctrines as a merger, *scenes a faire*, and public domain.”¹⁴⁴ “Filtration” serves “the purpose of defining the scope of plaintiff’s copyright.”¹⁴⁵

In this *Altai* test, the court “filters” out copyright-unprotected elements that include: elements dictated by efficiency, elements dictated by external factors, and design elements taken from the public domain.¹⁴⁶ Elements dictated by efficiency, meaning expression necessarily incidental to the idea being expressed, should be denied copyright protection.¹⁴⁷ The underlying principle is the same as the merger doctrine—under which there is no copyright protection for an expression that is “merged” with the idea itself, meaning there is essentially only one way to express an idea.¹⁴⁸ In the context of computer programs, “the concept of efficiency is akin to deriving the most concise logical proof or formulating the most succinct mathematical computations.”¹⁴⁹ Therefore, “efficiency concerns may so narrow the practical range of choice as to make only

141. *Id.* at 696.

142. *Id.* at 702.

143. *Id.* at 706.

144. *Id.*

145. *Id.* at 707 (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475 (9th Cir. 1992)).

146. *Id.*

147. *Id.* at 707–08.

148. *Id.* at 708.

149. *Id.*

one or two forms of expression workable options.”¹⁵⁰ The Second Circuit endorsed the application of the merger doctrine to effectively “filter” copyright-unprotected elements in computer programs.¹⁵¹ Elements dictated by external factors are also not copyright-protected, similar to the *scènes à faire* doctrine. In computer programs,

a programmer’s freedom of design choice is often circumscribed by extrinsic considerations such as (1) the mechanical specifications of the computer on which a particular program is intended to run; (2) compatibility requirements of other programs with which a program is designated to operate in conjunction; (3) computer manufacturers’ design standards; (4) demands of the industry being serviced; and (5) widely accepted programming practices within the computer industry.¹⁵²

Elements dictated by these standard techniques originate from external factors and not from the programmer. Finally, elements taken from the public domain are not protected as “[s]uch material is free for the taking and cannot be appropriated by a single author even though it is included in a copyrighted work.”¹⁵³ The Second Circuit determined that elements from the public domain deserve no copyright protection, and, thus, a court must “filter” out these elements in its copyright infringement analysis.¹⁵⁴

While not citing *Altai*, the Second Circuit’s analysis in *Zalewski* echoed the same “filtration” analysis, focusing on “filtering” out the elements that do not deserve copyright protection.

b. *Zalewski*

Under similar facts as *Intervest*, the Second Circuit examined *how* to separate the protectable from the unprotectable in architectural works in *Zalewski v. Cicero Builder Development Incorporated*.¹⁵⁵ The plaintiff, James Zalewski, was an architect who created and then licensed designs for homes to construction companies.¹⁵⁶ Zalewski alleged that these companies infringed on his copyright in his designs by using them outside the scope of the license and after the license had expired.¹⁵⁷ The district court granted summary judgment for the defendants on some claims.¹⁵⁸ On appeal, the Second Circuit affirmed the relevant part of the district court’s ruling, holding that any copying of Zalewski’s designs extended only to copyright-unprotected elements of his works.¹⁵⁹

In the Second Circuit, a *prima facie* case for copyright infringement must allege three things: (1) the work is protected by a valid copyright, (2) the de-

150. *Id.*

151. *Id.* at 709.

152. *Id.* at 709–10.

153. *Id.* at 710.

154. *Id.*

155. 754 F.3d 95, 103 (2d Cir. 2014).

156. *Id.* at 98.

157. *Id.*

158. *Id.*

159. *Id.*

fendant copied the work, and (3) the copying was wrongful.¹⁶⁰ The court utilized the ordinary-observer test for substantial similarity: “whether ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.’”¹⁶¹ The court stressed that the substantial-similarity test is reserved for evaluating the similarities between protected elements of a work and another work.¹⁶²

The defendants argued that the Second Circuit should adopt a compilation test, but the court rejected the Eleventh Circuit’s reasoning.¹⁶³ Per *Zaleski*, “[e]very work of art will have some standard elements, which taken in isolation are uncopyrightable, but many works will have original elements—or original arrangements of elements.”¹⁶⁴ The court further explained that other copyrightable subject matters had similar language:

For example, the statute defines “Literary works” as “words, numbers, or other . . . symbols” arranged in “books, periodicals” or other media; “Sound Recordings” as “a series of musical, spoken, or other sounds”; a “computer program” as “a set of statements or instructions”; and “Motion Pictures” and “Audio Visual works” as “series of related images.”¹⁶⁵

Instead of focusing on whether an architectural work is a compilation, the court recognized that the central issue is “what in it originated with the author and what did not.”¹⁶⁶ In an architectural context, “[e]fficiency is an important architectural concern. Any design elements attributable to building codes, topography, structures that already exist on the construction site, or engineering necessity should therefore get no protection.”¹⁶⁷ Additionally, under the *scène à faire* doctrine, elements taken from recognized styles, such as colonial houses, deserve no protection.¹⁶⁸

Turning to the facts of the case, the court affirmed the district court’s grant of summary judgment since the defendants copied only the unprotected elements of his design.¹⁶⁹ The court stated:

First, many of the similarities are a function of consumer expectations and standard house design generally. Plaintiff can get no credit for putting a closet in every bedroom, a fireplace in the middle of an exterior wall, and kitchen counters against the kitchen walls. Furthermore, the overall footprint of the house and the size of the rooms are “design parameters” dictated by consumer preferences and the lot the house will occupy, not the architect. Finally, most of the similarities between Plain-

160. See *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139–41 (2d Cir. 1992); *Arnsetin v. Porter*, 154 F.2d 464, 468, 472–73 (2d Cir. 1946).

161. *Zaleski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (quoting *Laureyssens*, 964 F.2d at 140).

162. *Id.* at 101.

163. *Id.* at 103–04.

164. *Id.*

165. *Id.* (citing 17 U.S.C. § 101 (2012)).

166. *Id.*

167. *Id.* at 105.

168. *Id.*

169. *Id.* at 106.

tiff’s and Defendants’ designs are features of all colonial homes, or houses generally.¹⁷⁰

The court diverged from the *Nelson-Salabes* court and the *Intervest* court by “filtering” out the copyright-unprotected elements. In doing so, it became clear that “Plaintiff [made] no attempt to distinguish those aspects of his designs that were original to him from those dictated by the form in which he worked.”¹⁷¹ Because the homes fit the preexisting mold of colonial homes, the differences were much more significant.¹⁷² In fact, while the court did not accept architectural works as compilations, it did accept that “as long as Plaintiff adhered to a pre-existing style his original contribution was slight—his copyright very thin.”¹⁷³ The court went on to state that “[o]nly very close copying would have taken whatever actually belonged to Plaintiff.”¹⁷⁴

III. ANALYSIS

Relative to other works of art, the subject of “architectural works” has only recently entered the realm of statutory copyright protection.¹⁷⁵ Following the AWCPA, courts have diverged on what level of protection this subject deserves. A relatively unacknowledged circuit split emerged. In *Nelson-Salabes*, the Fourth Circuit affirmed the district court’s finding of copyright infringement, and the district court utilized a look-and-feel test to measure substantial similarity.¹⁷⁶ In *Intervest*, the Eleventh Circuit alternatively applied a compilation doctrine to architectural works, resulting in a “thin” protection where the defendant must copy the compilation’s original elements exactly or almost exactly to infringe.¹⁷⁷ Finally, in *Zalewski*, the Second Circuit rejected the conceptualization of architectural works as compilations and applied the *Altai* test, “filtering” out copyright-unprotected elements in the infringement analysis.¹⁷⁸

This Part argues that all three circuit decisions apply varying degrees of the *Altai* test. In other words, the circuit decisions differ on how aggressively a court “filters” copyright-unprotected elements. Section III.A argues that a look-and-feel test under-“filters”—meaning it “filters” out *some* very standard features like common windows and doors but lets the fact finder consider other standard elements that should not receive copyright protection.¹⁷⁹ Section III.B, on the other hand, argues that a compilation test over- “filters,” removing almost all features of an architectural work before the court conducts the infringement analysis, leaving copyright protection for architectural works

170. *Id.*

171. *Id.*

172. *Id.* at 107.

173. *Id.*

174. *Id.*

175. See 17 U.S.C. § 102 (2012) (including “architectural works” explicitly for the first time in the passage of the AWCPA in 1990).

176. *Nelson-Salabes, Inc. v. Morningside Holdings LLC*, No. 01–1369, 2001 WL 419002, at *5 (D. Md. Feb. 16, 2001), *aff’d in part, vacated in part sub nom.*, *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505 (4th Cir. 2002) (citing *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996)).

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

178. *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 105–06 (2d Cir. 2014).

179. See *infra* Section III.A.

“thin.”¹⁸⁰ Section III.C finally argues that the *Altai* test appropriately conducts an analysis on what elements should be copyright-protected and adequately “filters” out the copyright-unprotected elements.¹⁸¹

A. “Filtration” in a Look-and-Feel Test

The *Nelson-Salabes* court never used the word “filtration” in its analysis, but the court’s language identified that there are some elements of an architectural work that deserve protection and other elements that do not deserve protection.¹⁸² Because the court did not explicitly “filter” out the elements of the floor plan that were unprotected, however, any look-and-feel test employed is subject to several flaws and, therefore, not an appropriate measure of substantial similarity.

The district court held that:

[C]ertain differences between the designs slightly affect the feel, such as the use of different windows, the use of brick instead of siding in certain areas, and different roofs on the bay windows. Despite these differences, however, the two designs still have the same overall feel based on *the same combination of the unique features*, including the octagonal silo entrance, the bay windows on the ends, and the protruding gables.¹⁸³

In other words, instead of focusing on the relatively minor differences, the court centered on the “total concept and feel.”¹⁸⁴ By focusing on the “combination of unique features,” the court filtered out very standard individual features, such as common windows, doors, and other components, focusing its inquiry on what is copyright-protected elements.¹⁸⁵

Unfortunately, because the *Nelson-Salabes* court did not explicitly engage in the “filtration” analysis, this simple look-and-feel test is subject to several flaws. A look-and-feel analysis cannot, therefore be the sole answer. In the 1970s, long before the AWCPA, courts developed a look-and-feel test.¹⁸⁶ But the test has been applied to relatively simple works such as commercials, greeting cards, children’s books, and games.¹⁸⁷ It calls for the “ordinary observer” to determine whether there is substantial similarity of expression between two

180. See *infra* Section III.B.

181. See *infra* Section III.C.

182. See *Nelson-Salabes, Inc. v. Morningside Holdings*, No. Civ.B-98-2226, 2001 WL 419002 (D. Md. Feb. 16, 2001) (emphasis added), *aff’d in part, vacated in part sub nom.*, *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505 (4th Cir. 2002).

183. *Id.* at *5.

184. *Id.* (citing *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996)).

185. *Id.*

186. See *Reyhar v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976) (“Therefore, in addition to the essential sequence of events, we might properly consider the ‘total concept and feel’ of the works in question.”); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970) (“Proper analysis of a copyright problem regarding greeting cards requires that all elements of each card, including text, arrangement of text, artwork, and association between artwork and text, be considered as a whole.”).

187. NIMMER & NIMMER, *supra* note 47 § 13.03.

works.¹⁸⁸ The simplicity of the “total concept and feel” test, therefore, potentially harms both artistic expression and utilitarian concepts.¹⁸⁹

Criticism of a look-and-feel test has been generated for three major reasons.¹⁹⁰ First, the thought of implementing copyright protection for “concepts” may resemble protection of ideas, which has been explicitly denied.¹⁹¹ Second, the analysis uses an “ordinary observer” standard to determine whether substantial similarity exists between two works in their entirety without separating their elements.¹⁹² The ordinary observer may wrongly decide a case in two different ways. On one hand, analyzing two “architectural works” under a look-and-feel test can lead to a finding of substantial similarity even if the works appear similar because of common unprotectable items, thus harming the second architect and running contrary to legislative policy.¹⁹³ On the other hand, an ordinary observer can hurt the first architect too. An ordinary observer may conclude that the two aesthetically different works are not substantially similar even if the majority of the original copyrightable elements are substantially similar.¹⁹⁴ Third, the test does not consider the utilitarian aspects of architectural works—ignoring the negative implications of offering architects protection over their works regardless of how beneficial or useful they are to society.¹⁹⁵ By ignoring the utilitarian elements, courts may push copyright protection for architectural works back to when they were considered pictorial, graphic, and sculptural works.¹⁹⁶

To avoid these major criticisms of a look-and-feel test, some degree of “filtration” must be employed. The *Nelson-Salabes* court, at least, indicated that some elements deserve protection like the “combination of unique features,” while other elements, like common windows, doors, and other standard features, do not.¹⁹⁷ The court, however, failed to “filter” out other elements beyond just the common windows or doors. In this respect, the *Nelson-Salabes*

188. Sid & Marty Krofft Television Productions v. McDonald’s Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

189. See NIMMER & NIMMER, *supra* note 47, § 13.03[A][1][c] (2017) (the ordinary-observer test is destructive to our system of copyright because it would find no infringement even if there is nearly identical copying but no similar artistic expression in the eyes of a reasonable person).

190. Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 426 (1989).

191. NIMMER & NIMMER, *supra* note 47, § 13.03 [A][1][c] (2017).

192. *Id.* (identifying this as a problem because the “Total Concept and Feel” test was really meant for simple works and it would lead to an “abdication of analysis”).

193. See H.R. REP. NO. 101-735 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6949 (stating that common elements such as doors and windows are not copyrightable unless arranged in a unique way).

194. Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759, 765 (2d Cir. 1991) (suggesting that if the ordinary observer is disposed to overlook the differences between two works without explicitly setting out to find them, the works would be substantially similar. To the contrary, if the building appears different and the ordinary observer would overlook the similarities, there would be no infringement).

195. See Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 670 (2006) (suggesting that copyright protection in the United States is not a natural right, but is limited because of our interest in utility); see also Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1876 (1990).

196. See *supra* Section II.A.1 (explaining that architectural works were often times considered “useful articles” due to their utilitarian elements rather than artistic elements).

197. *Nelson-Salabes, Inc. v. Morningside Holdings*, No. Civ.B-98-2226, 2001 WL 419002, at *5 (D. Md. Feb. 16, 2001), *aff’d in part, vacated in part sub nom.*, *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505 (4th Cir. 2002).

court under-“filtered” the copyright-unprotected elements by failing to examine other elements that the Second Circuit picked up.¹⁹⁸ A simple look-and-feel test, therefore, has major weaknesses that do not properly protect architectural works.

B. “Filtration” in a Compilation Test

The *Intervest* court was the first court to introduce the compilation doctrine into the architectural works realm. Before, the compilation doctrine covered the most banal works; post-*Feist* decisions have validated copyright protection for a variety of works, such as a fabric design in the shape of a rose,¹⁹⁹ a computer user manual compiling facts for user interface,²⁰⁰ a quick-reference pocket guide for nurses,²⁰¹ and a guide to state tariffs charged on operating pay telephone companies.²⁰² This Section argues that a compilation test, adopted by the *Intervest* court, over-“filters” almost all elements of an architectural work, leaving the copyright protection expectedly “thin.” A compilation test assumes that all architectural works are like compilations and, therefore, fails to analyze which elements should be “filtered” out.

There is support that the AWCPA’s definition of “architectural works” envisioned a compilation analysis. The AWCPA’s definition of “architectural works” is “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.”²⁰³ As the *Intervest* court stated:

[T]he definition of an architectural work closely parallels that of a “compilation” under the statute, that is: “[A] work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”²⁰⁴

This parallel definition suggests that courts should treat architectural works and compilations similarly. The legislative history of the AWCPA further states:

The phrase “arrangement and composition of spaces and elements” recognizes that: (1) creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectable whole; (2) an architect may incorporate new, pro-

198. See *infra* Section III.C.

199. See *Folio Impressions*, 937 F.2d at 762.

200. See *Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1345–46 (5th Cir. 1994).

201. See *F.A. Davis Co. v. Wolters Kluwer Health, Inc.*, 413 F. Supp. 2d 507, 512 (E.D. Pa. 2005) (limiting the universe of all potentially relevant facts exemplifies “precisely the sort of creative choices that copyright law was intended to protect”).

202. See *U.S. Payphone, Inc. v. Executives Unlimited of Durham, Inc.*, Nos. 89-1081, 89-1085, 1991 U.S. App. LEXIS 7599, at *2 (4th Cir. 1991).

203. 17 U.S.C. § 101 (2012).

204. *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 544 F.3d 914, 919 (2d Cir. 2008) (quoting 17 U.S.C. § 101 (2012)).

tectible design elements into otherwise standard, unprotectible building features; and (3) interior architecture may be protected.²⁰⁵

In *Intervest*, the Eleventh Circuit determined that all copyrighted works are either “creative, derivative, [or] compiled.”²⁰⁶ Each kind of protectable work gets varying levels of protection.²⁰⁷ The court concluded that architectural works fall under the “compiled” category, and are, thus, only entitled to “thin” copyright based on their “arrangement and coordination” of unoriginal and uncopyrightable elements.²⁰⁸ “[W]hen viewed through the narrow lens of compilation analysis only the original, and thus protected arrangement and coordination of spaces, elements and other staple building components should be compared.”²⁰⁹ The court further stated that “a judge is better able to separate original expression from the nonoriginal elements of a work where the copying of the latter is not protectable and the copying of the former is protectable.”²¹⁰ The Eleventh Circuit went further to recognize the need to “filter” copyright-unprotected elements, but it assumed that the protection is always “thin” simply because the definition of “architectural works” parallels the definition of “compilations.”²¹¹ In a compilation test, a court’s “filtration” process is over-aggressive.²¹² It “filters” out almost every element of an architectural work—both those that deserve copyright protection and those that do not—before conducting an infringement analysis.²¹³ This expectedly leaves the copyright protection of *any* architectural work “thin.”²¹⁴ A compilation test, therefore, cannot properly protect architectural works.

There are many critics to paralleling architectural works to compilations.²¹⁵ According to the American Institute of Architects, many architects would find some striking points in the Eleventh Circuit’s *Intervest* opinion.²¹⁶ One point is that the court ruled that architectural works are like compilations and deserve “thin” protection.²¹⁷ The author was skeptical of the court’s reasoning: “One could perhaps draw the same conclusion about the works of Shakespeare—that they are only compilations because he merely selected and arranged the standard letters of the alphabet.”²¹⁸ The *Intervest* case is an example of how difficult it is to prove copyright infringement.²¹⁹ “It also suggests

205. H.R. REP. NO. 101-735 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6949.

206. *Intervest*, 554 F.3d at 919 n.3.

207. *Id.*

208. *Id.* at 919.

209. *Id.* at 919–20 (footnote omitted).

210. *Id.* at 920.

211. *Id.* at 919.

212. See Amanda Kolson Hurley, *New York Architect Loses Copyright Infringement Lawsuit*, ARCHITECT (June 12, 2014), http://www.architectmagazine.com/business/new-york-architect-loses-copyright-infringement-lawsuit_o.

213. See *id.*

214. See Vaughn Drozd, *The Building Blocks of Copyright Protection for Architectural Works: Roadblock of Masterpiece?*, 14 J. MARSHALL REV. INTELL. PROP. L. 607, 616, 616 n.74 (2015).

215. E.g., Gregory Hancks, *Copyright or Copying Wrong? Sixth in a Series*, THE AM. INST. ARCHITECTS, <https://web.archive.org/web/20161115155902/http://www.aia.org/practicing/AIAB082309> (last visited Mar. 15, 2017).

216. *Id.*

217. *Id.*

218. *Id.*

219. See Hurley, *supra* note 212.

that for architects, taking creative risks can, paradoxically, offer more security—at least in terms of their intellectual property.”²²⁰ In other words, the artistic and original elements deserve protection but not the standard unoriginal features. It is the encouragement of original works that is of key interest to copyright protection.²²¹

The *Intervest* court held that only the original, protected elements should be compared.²²² I agree, but a compilation test does not meet this goal. By assuming that the copyright protection of architectural works is “thin,” a compilation test will over-“filter” and remove elements that are truly original.

In sum, inherent in this analysis is the fact that the only comparison that is needed is the comparison of protected elements. Nonprotected elements must be “filtered” out. The major flaw of a compilation test, however, is its lack of guidance on how to identify the nonprotected elements that should be ignored. It over-“filters” out nearly every element in an architectural work except its overall compilation. The protection of an architectural work should not be presumed “thin.” A deeper analysis is needed.

C. “Filtration” in the *Altai* Test

This Section argues that the Second Circuit, in *Zalewski*, appropriately analyzed what elements do not deserve copyright protection and adequately “filtered” out those elements from the copyright infringement analysis—borrowing much of its analysis from a previous Second Circuit case, *Altai*.

The *Zalewski* court affirmed the district court’s grant of summary judgment because the defendants copied only the unprotected elements of his design.²²³ The court ignored many elements from its infringement analysis such as elements that were a “function of consumer expectations and standard house design generally[,]” design parameters “dictated by consumer preferences and the lot the house will occupy,” and elements that were “features of all colonial homes, or houses generally.”²²⁴ The *Zalewski* court never used the term, “filtration,” but its analysis echoed the analysis in *Altai*, which introduced the “filtration” step. “Filtration” serves “the purpose of defining the scope of plaintiff’s copyright.”²²⁵ In this *Altai* test, the court “filters” out copyright-unprotected elements that include: elements dictated by efficiency, elements dictated by external factors, and design elements taken from the public domain.²²⁶ The *Zalewski* court effectively applied the *Altai* test by “filtering” out

220. *Id.*

221. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) (“To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”).

222. *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919–20 (11th Cir. 2008) (footnote omitted).

223. *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 101–02 (2d Cir. 2014).

224. *Id.* at 106.

225. *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707 (2d Cir. 1992) (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475 (9th Cir. 1992)).

226. *Id.* at 707.

elements dictated by external factors such as consumer expectations, consumer preferences, the size of the lot, and the style of colonial homes.²²⁷

By falling back on *Altai*, the Second Circuit in *Zalewski* summed up the central issue—“[t]he challenge in adjudicating copyright cases is not to determine whether a work is a creative work, a derivative work, or a compilation, but to determine what in it originated with the author and what did not.”²²⁸ The Second Circuit recognized the need to “filter” out copyright-unprotected elements before conducting a copyright infringement analysis for architectural works.²²⁹

While the *Intervest* court did signify that the original compilation of standard features is copyright-protected, a compilation test misses the mark on the central issue by not explaining *how* to identify and “filter” out the copyright-unprotected elements. It is overly categorical in its insistence that copyrightable works must be split into different buckets—“a creative work, a derivative work, or a compilation[.]”²³⁰ Many copyrightable subjects can be creative, derived, compiled, or any combination of the three. The *Zalewski* court, in fact, recognized that “[e]very work of art will have some standard elements, which taken in isolation are un-copyrightable, but many works will have original elements—or original arrangements of elements.”²³¹ The court further explained that other copyrightable subject matters had similar language:

For example, the statute defines “Literary works” as “words, numbers, or other . . . symbols” arranged in “books, periodicals” or other media; “Sound Recordings” as “a series of musical, spoken, or others”; a “computer program” as “a set of statements or instructions”; and “Motion Pictures” and “Audio Visual works” as “series of related images.”²³²

The inquiry, therefore, centers on the “filtration” of the copyright-unprotected elements from the copyright-protected elements. Determining what is protected and what is not protected is the central issue and “[l]abeling architecture a compilation obscures the real issue.”²³³

In short, the *Intervest* court failed in this regard and made no attempt to identify what made a feature standard and unprotectable or what made a feature original and protectable. A court should not *assume* that architectural works deserve “thin” protection. If the majority of elements of the architectural work are deemed original artistic expressions that deserve protection, it would be illogical to still find that the architectural work deserves “thin” protection. Relying on the *Altai* test, the *Zalewski* court took great care and analysis in determining what elements deserved no copyright protection and should be “filtered” out. Part IV below puts forth a recommendation for courts to employ in architectural works copyright infringement cases that follows closely with the *Zalewski* opinion and the *Altai* test.

227. *Zalewski*, 754 F.3d at 106.

228. *Id.* at 104.

229. *Id.* at 102.

230. *Id.* at 104.

231. *Id.*

232. *Id.* (citing 17 U.S.C. § 101 (2012)).

233. *Id.* at 104.

IV. RECOMMENDATION

The protection of any work, including architectural works, finds roots in our very own U.S. Constitution—“To promote the Progress of . . . useful Arts[.]”²³⁴ More specifically, copyright protection promotes primarily two interests—the encouragement of original works and the free flow of ideas and information.²³⁵ To return to these interests, courts should explicitly seek to protect artistic original elements that are attributable to the architect and “filter” out unoriginal standard elements. This Part provides a recommendation for courts to overtly adopt a “filtration” step and guidance on what types of elements are copyright-unprotected and should not take any part in the copyright infringement analysis.

The heart of the copyrightability of “architectural works” (as well as any other copyright) is “to determine what in it originated with the author and what did not.”²³⁶ The three circuit court decisions show different viewpoints on how to approach architectural works after the AWCPA. Part III argued that these three circuit decisions differ primarily on how aggressively the courts “filtered” out copyright-unprotected elements.²³⁷ Part IV, now, recommends embracing the *Altai* test, following the *Zalewski* opinion. More specifically, Section IV.A will outline what kind of elements should not be copyright-protected and therefore “filtered.”²³⁸ Section IV.B will attempt to address and rebut another proposed framework.²³⁹

A. *The Altai Test*

While the three circuit court decisions employed the principles of the “filtration” analysis to varying degrees,²⁴⁰ courts should adopt the *Altai* test and follow the Second Circuit’s *Zalewski* opinion. Courts should explicitly adopt a “filtration” step, introduced by the *Altai* court, to remove elements that are copyright-unprotected from the copyright infringement analysis. Doing so will avoid under-“filtering,” like a look-and-feel test, or over-“filtering,” like a compilation test.²⁴¹ The Supreme Court’s landmark *Feist* case established that the *sine qua non* of copyright is originality.²⁴² To qualify for copyright protection, a work must be original to the author.²⁴³ The “filtration” analysis fundamentally asks the same question. Following the Second Circuit’s jurisprudence, courts should “filter” out copyright-unprotected elements that include:

234. U.S. CONST. art. I, § 8, cl. 8.

235. See *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”).

236. *Zalewski*, 754 F.3d at 104.

237. See *supra* Part III.

238. See *infra* Section IV.A.

239. See *infra* Section IV.B.

240. See *supra* Part III.

241. *Id.*

242. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

243. *Id.*

elements dictated by efficiency, elements dictated by external factors, and design elements taken from the public domain.²⁴⁴

First, following closely to the merger doctrine, an expression that is “merged” with the idea itself—meaning there is essentially only one way to express an idea—deserves no copyright protection.²⁴⁵ In the context of “architectural works,” if there are specific instructions that serve as the only means of accomplishing a task, later use should not amount to infringement.

Second, elements dictated by external factors should be “filtered.” Just like the *Zalewski* court, courts should find many elements that fit this prong of the “filtration” analysis. For example, design elements attributable to “building codes, topography, structures that already exist on the construction site, or engineering necessity” should not be copyright-protected because they are not original to the architect; rather, they are products of external factors.²⁴⁶ The court, in *Zalewski*, found that “the overall footprint of the house and the size of the rooms are ‘design parameters’ dictated by consumer preferences and the lot the house will occupy, not the architect.”²⁴⁷ Furthermore, elements taken from recognized styles (such as a neoclassical government buildings, colonial houses, modern high-rise office buildings, or gothic churches) deserve no protection. The *Zalewski* court identified many similar elements between the plaintiff’s designs and the defendants’ designs as features of colonial homes: “[s]o long as Plaintiff was seeking to design a colonial house, he was bound to certain conventions.”²⁴⁸ Collectively, if external factors dictate that an architect include certain elements, then those elements should not be protected as they are not original to the author.

Third, elements taken from the public domain should be “filtered.” Elements that have entered the public domain should be free for the taking and do not deserve copyright-protection.²⁴⁹

In all, these elements are not meant to be an exhaustive list of possible elements that should be “filtered” out of the copyright infringement analysis. The heart of the inquiry is “to determine what in it originated with the author and what did not.”²⁵⁰ “Filtration” serves “the purpose of defining the scope of plaintiff’s copyright.”²⁵¹ A totality-of-the-circumstances test must be considered, but these three types of elements bear primary consideration. By adopting the *Altai* test, courts will avoid under-“filtering,” like a look-and-feel test, or over-“filtering,” like a compilation test.²⁵² By explicitly using a “filtration” step, courts will purposefully identify elements that do not deserve copyright protection in architectural works.

244. *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 105 (2d Cir. 2014).

245. *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707 (2d Cir. 1992).

246. *Zalewski*, 754 F.3d at 105 (emphasis added).

247. *Id.* at 106.

248. *Id.*

249. *Id.*

250. *Id.* at 104.

251. *Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693, 707 (2d Cir. 1992) (internal quotation marks omitted) (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475 (9th Cir. 1992)).

252. *See supra* Part III.

B. Rebuttal to the Hybrid Approach

Another framework, the Hybrid Approach, has been proposed that sets a low substantial-similarity bar for primarily artistic works and a high substantial-similarity bar for primarily useful works.²⁵³ For primarily artistic works, a look-and-feel test sets a low bar that would adequately protect architect's artistic expression.²⁵⁴ This standard allows architects to protect their artistic expression without having to worry about subsequent creators making minimal changes to escape infringement.²⁵⁵ For useful works, on the other hand, a definite or literal similarity test is more appropriate, paralleling a compilation test.²⁵⁶ This test sets a high bar for substantial similarity for useful works but with minimal artistic expression.²⁵⁷ A compilation test will allow for maximum utility for the economy and society.²⁵⁸ An example of architectural works that address more of the utilitarian needs of architecture, instead of the artistic creativity, would be a cookie-cutter apartment building. These types of buildings are typically built to provide shelter at an efficient cost and not likely built for artistic aesthetics.²⁵⁹

Professor David E. Shipley has similarly observed that the “thin” copyright protection has been applied with a qualification—“[s]everal 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.”²⁶⁰ While a compilation test has been applied to many banal works, it has not successfully worked in all types of architectural works.²⁶¹ There are several decisions that 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.²⁶²

The fundamental problem with the Hybrid Approach is that it assumes that a look-and-feel test is appropriate for “primarily artistic” works and that a compilation test is appropriate for “primarily useful” works. As described above in the *Intervest* analysis,²⁶³ courts should avoid categorizing. A distinct bifurcation between “primarily artistic” works and “primarily useful” works will create two distinct spheres, neither of which will completely capture the value of any architectural work. Nearly every floor plan or building may draw some elements from building regulations (and thus unprotectable) and some elements from the architect himself (protectable). Very few architectural works

253. Drozd, *supra* note 214, at 624–25.

254. *Id.* at 624.

255. *Id.*

256. *Id.*

257. *Id.* at 625.

258. *Id.* at 626.

259. *Id.* at 625.

260. Shipley, *AWCPA at Twenty*, *supra* note 32, at 60.

261. *Id.*

262. *Id.*

263. *See supra* Section III.B.

will be “primarily artistic” enough to justify a categorical look-and-feel approach, and very few architectural works will be “primarily useful” enough to justify a categorical-compilation approach. The Hybrid Approach does push an “element separation” test (*i.e.*, “filtration” test) into the grey area, which is arguably substantial between artistic and useful works. Because most works have some elements that are artistic and original and some elements that are primarily useful, it makes more sense to use a “filtration” analysis at the onset instead of categorizing architectural plans as “primarily artistic” or “primarily useful.”

The *Intervest* court should not have categorized the protection that all architectural plans deserve as “thin” simply because of its close definition to compilations. Categorization will inadequately serve the interests of both society and architects. Instead, courts are better served to apply an *Altai*-“filtration” step and “filter” out copyright-unprotected elements such as: elements dictated by efficiency, elements dictated by external factors, and design elements taken from the public domain. Courts should also not limit themselves to these factors only because the central inquiry is “to determine what in it originated with the author and what did not.”²⁶⁴ This new framework recognizes the complexity of architectural works, and does not categorize.

V. CONCLUSION

Architecture is interwoven into the fabric of human history and culture.²⁶⁵ Since the beginning, the fundamental need for human shelter has created the perfect platform to stimulate the art of designing and constructing buildings.²⁶⁶ It comes to no surprise therefore that architectural works exist all around the globe, from the beginning of human civilization when the Ancient Wonders of the World were built to today when Modernism and Postmodernism works dominate.²⁶⁷ World War II hero and former Prime Minister of the United Kingdom, Sir Winston Churchill, once stated that “we shape our buildings and afterwards our buildings shape us.”²⁶⁸

Despite architecture’s importance to society, courts have split on what substantial-similarity test should be employed for copyright infringement cases with architectural works since the AWCPA.²⁶⁹ This Note argues that the primary difference among the circuit court decisions is how aggressively the court is “filtering” out copyright-unprotected elements. In *Nelson-Salabes*, the Fourth Circuit affirmed the district court’s look-and-feel test that under-“filtered” out very standard features, such as windows and doors, but let the

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

265. *Architecture & Copyright Controversies*, WORLD INTELL. PROP. ORG. (Sept. 2011), http://www.wipo.int/wipo_magazine/en/2011/05/article_0004.html.

266. *Id.*

267. *Id.*

268. *Churchill and the Commons Chamber*, PARLIAMENT.UK: LIVING HERITAGE, <http://www.parliament.uk/about/living-heritage/building/palace/architecture/palacestructure/churchill/> (last visited Sept. 14, 2017).

269. *See supra* Section II.B.

jury inappropriately consider other quite standard elements.²⁷⁰ In *Intervest*, the Eleventh Circuit alternatively utilized a compilation test that over-“filtered” out almost all features of an architectural work, leaving only “thin” protection, meaning the defendant must copy the compilation’s original elements exactly or almost exactly to infringe.²⁷¹ Finally, in *Zalewski*, the Second Circuit rejected the conceptualization of architectural works as compilations and applied the *Altai* test, critically analyzing and “filtering” out copyright-unprotected elements in the infringement analysis.²⁷²

In the end, artistic and original elements are protected while useful and unoriginal elements are not.²⁷³ In line with that principle, this Note further recommends following the *Zalewski* court’s analysis and applying an *Altai*-“filtration” step to “filter” out copyright-unprotected elements such as: elements dictated by efficiency, elements dictated by external factors, and design elements taken from the public domain. By avoiding a strict categorization, courts will avoid under-“filtering” or over-“filtering,” and critically analyze what elements truly deserve no copyright protection and should be “filtered” out. Doing so will appropriately balance the interests of both society (by not protecting utilitarian elements) and the individual architect (by protecting truly original artistic expression).

Judge Learned Hand recognized in an influential opinion: “Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*.”²⁷⁴ Similarly, no single test adequately encompasses appropriate copyright protection for architectural works; these inquiries must be *ad hoc*. By applying the above recommendation, courts will directly answer the central inquiry—“to determine what in it originated with the author and what did not.”²⁷⁵ Giving protection to original elements and denying protection to useful and unoriginal elements will further adhere to the Constitutional goal “[t]o promote the Progress of . . . useful Arts.”²⁷⁶

270. *Nelson-Salabes, Inc. v. Morningside Holdings*, No. Civ.B-98-2226, 2001 WL 419002, at *5 (D. Md. Feb. 16, 2001), *aff’d in part, vacated in part sub nom.*, *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505 (4th Cir. 2002) (citing *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996)).

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

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

273. *Id.*

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

275. *Zalewski*, 754 F.3d at 104.

276. U.S. CONST. art. I, § 8, cl. 8.