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# THE COPYRIGHT PROTECTABILITY OF ARCHITECTURAL WORKS: THE ELEVENTH CIRCUIT WALKS A THIN LINE

THOMAS COMMONS<sup>†</sup>

## INTRODUCTION

In response to the rapid literary growth during the 1800's, the Swiss Government invited various countries to meet in Berne, Switzerland, in an attempt to establish international copyright unification.<sup>1</sup> These meetings spawned the Berne Convention of 1886 (the "Convention"), which served as an international agreement to protect literary and artistic property.<sup>2</sup> Its most recent revision in 1971 extended the convention's protection to "authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union."<sup>3</sup>

For over a century, the United States refused to accede to the Convention due to philosophical differences between the U.S. copyright system and the system enacted by the Convention.<sup>4</sup> The United States was mainly concerned that the Convention violated the Constitution, which expressed that enactment of copyright law should be meant for the benefit of the public.<sup>5</sup> As the United States experienced rapid technological growth, U.S. copyright law evolved, making it easier for the United States to come into compliance with the Convention.<sup>6</sup> The United States ultimately acceded to the Convention in 1988.<sup>7</sup>

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<sup>1</sup> Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 12–13 (1988).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 41.

<sup>4</sup> *Id.* at 67–68.

<sup>5</sup> *Id.* at 68 n.462.

<sup>6</sup> *Id.* at 67–68.

<sup>7</sup> *Id.* at 67.

The United States's compliance with the Berne Convention has left United States Federal Courts with the troubling issue of how much protection architectural works should be afforded.<sup>8</sup> If the copyright protection is too narrow, the law may create an insufficient incentive for architects to invest in creating innovative designs due to lack of protection from infringement.<sup>9</sup> Conversely, if copyright protection is too broad, the result may allow architects to possess too broad a monopoly over certain innovative designs.<sup>10</sup>

The issue has led to a recent ruling by the United States Court of Appeals for the Second Circuit, which created a circuit split with the Eleventh Circuit.<sup>11</sup> The Eleventh Circuit has concluded that architectural works are only subject to thin copyright protection,<sup>12</sup> whereas the Second Circuit has concluded that architectural works should receive full protection under copyright law.<sup>13</sup>

Part I of this Note discusses the history of copyright legislation in the United States regarding architectural works, as well the applicability of copyright law generally. Part II discusses the circuit split between the Eleventh and Second Circuits with regard to how much protection architectural works should be afforded. Part III analyzes the benefits and shortcomings of both approaches and how other courts should ultimately adopt the Second Circuit's approach. This Note argues that the Second Circuit's approach is supported not only by statutory language and legislative history, but also by public policy and constitutional considerations, as well.

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<sup>8</sup> See *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 103–04 (2d Cir. 2014); *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919 (11th Cir. 2008).

<sup>9</sup> Stephen D. Milbrath, *The 11th Circuit's New Copyright Standard for Architectural Works*, 83 NOV FLA. B.J. 49, 50–51 (2009).

<sup>10</sup> *Id.* at 51.

<sup>11</sup> *Zalewski*, 754 F.3d at 103–04.

<sup>12</sup> *Intervest Constr., Inc.*, 554 F.3d at 919.

<sup>13</sup> *Zalewski*, 754 F.3d at 103–04; see *Rolwes Co. v. Barnes*, No. 4:14CV1045, 2014 WL 3701039, at \*3 (E.D. Mo. July 25, 2014) *amended by* No. 4:14CV1045, 2014 WL 4966071 (E.D. Mo. Oct. 2, 2014).

## I. BACKGROUND

### A. *History of Copyright Legislation*

Under the Copyright Act of 1976, architectural plans fell within the definition of “pictorial, graphic, or sculptural work[s],”<sup>14</sup> which included two and three-dimensional designs but did not extend protection to works that were considered “useful articles.”<sup>15</sup> The Act defined a “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.”<sup>16</sup> Courts have reasoned that “if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements.”<sup>17</sup> As a result, architectural works received very limited protection under the Act.<sup>18</sup> This is due to the fact that architectural works are almost always constructed with functional utility in mind as the basis for the structure.

In response to joining the Berne Convention, Congress passed the Architectural Works Copyright Protection Act of 1990.<sup>19</sup> The purpose of the Act was to create “a new category of protect[a]ble subject matter for architectural works.”<sup>20</sup> 17 U.S.C. § 101 now defines architectural works as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”<sup>21</sup>

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<sup>14</sup> ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 500 (Vicki Been et. al. eds., 6th ed. 2012).

<sup>15</sup> *Id.* at 482. The legislative history explains that the definition of “pictorial, graphic, and sculptural works” was intended by the Committee to “draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design.” H.R. REP. NO. 94-1476, at 54–55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667–68; *see* MERGES ET AL., *supra* note 14, at 483.

<sup>16</sup> H.R. REP. NO. 94-1476, at 55, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668.

<sup>17</sup> *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987).

<sup>18</sup> MERGES ET AL., *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> Vanessa N. Scaglione, *Building Upon the Architectural Works Protection Copyright Act of 1990*, 61 *FORDHAM L. REV.* 193, 193 (1992).

<sup>21</sup> 17 U.S.C. § 101 (2012).

## B. Copyright Law Generally

Over the years, courts have implemented various doctrines to determine whether one's work is copyrightable. Traditionally, copyright law has been meant to "promote the [p]rogress of [s]cience and useful [a]rts" by awarding protection to original works of original expression.<sup>22</sup> Perhaps the most significant doctrine that limits the copyrightability of works is the idea-expression dichotomy. Under Title 17, full copyright protection is given to original works of authorship, but the protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>23</sup> While one's original expression is protected under copyright law, the ideas relating to such expression are not.<sup>24</sup>

Another such application that a court will use is the merger doctrine.<sup>25</sup> The doctrine establishes that "when there is only one or but a few ways of expressing an idea, then courts will find that the idea behind the work merges with its expression and the work is not copyrightable."<sup>26</sup> Courts will also look to see if the

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<sup>22</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>23</sup> 17 U.S.C. § 102(a)–(b) (2012). See *Sparaco v. Lawler, Matusky, Skelly, Eng'rs LLP*, 303 F.3d 460, 469 (2d Cir. 2002). The court in *Sparaco* applied the idea-expression dichotomy and held that an architectural plan for a building did not consist only of general ideas, but included "specific expression and realization of those ideas." *Id.* The court went on to explain that there is no "simple bright-line test" to determine at what point an abstract idea becomes one's original expression. *Id.* As a result, the court must examine the issue on a case-by-case basis. *Id.*

<sup>24</sup> MERGES ET AL., *supra* note 14, at 481; see *Baker v. Selden*, 101 U.S. 99, 102 (1879); *Sparaco*, 303 F.3d at 469. In *Baker*, the author of a book, which outlined the art of book-keeping, brought suit for copyright infringement against a defendant who had instituted the book's teachings into their own book-keeping. 101 U.S. at 100. The court found that there was no infringement, holding that while "no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practise and use the art itself which he has described and illustrated therein." *Id.* at 104.

<sup>25</sup> See MERGES ET AL., *supra* note 14, at 481; see generally *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967). In *Morrissey*, the court was asked to examine the plaintiff's copyright of a set of rules, which were used for a sales promotional "sweepstakes" that involved the participant disclosing their social security number. *Id.* at 676. The court found that the rules could not be protected under copyright law based on the merger doctrine. *Id.* at 678. The court reasoned that "[w]hen the uncopyrightable subject matter is very narrow, so that 'the topic necessarily requires' . . . if not only one form of expression, at best only a limited number, [permitting a copyright] . . . 'could exhaust all possibilities of future use of the substance.'" *Id.* (citations omitted).

<sup>26</sup> MERGES ET AL., *supra* note 14, at 481 (emphasis omitted).

work in question is in the “public domain.”<sup>27</sup> While copyright law protects “original works of authorship,” it does not protect other aspects of the work that are in the public domain and “free for others to draw upon.”<sup>28</sup> Such aspects include “the history [the work] describes, the facts it mentions, and the ideas it embraces.”<sup>29</sup> Finally, courts will apply the “scènes-à-faire” doctrine.<sup>30</sup> The doctrine states that elements, which are “standard” or “indispensable” with regard to a given topic, fall outside the scope of copyright protection.<sup>31</sup> For example, cowboys and bank robbers in an American western film are standard elements and therefore receive no protection.<sup>32</sup>

Generally, when bringing a claim for copyright infringement, one must prove two main elements.<sup>33</sup> The plaintiff must prove (1) ownership of a valid copyright, and (2) “copying of constituent elements of the work that are original.”<sup>34</sup> At issue with regard to copyright infringement of architectural works is, what constitutes “too much copying,” and what aspects of the work are considered the architect’s original expression.<sup>35</sup> Not all copying is automatically considered infringement because not all aspects of a copyrighted work are protected under copyright law.<sup>36</sup>

A copyrighted work may consist of both original copyrightable elements and uncopyrightable, unoriginal elements. Any copying of the unprotected elements will not be considered infringement.<sup>37</sup> The similarity between works may derive only from unprotected elements, so when examining whether the works are “substantially similar,” the court must confine itself to the similarities that exist with regard to the protected elements of the works.<sup>38</sup> To determine if the works are substantially similar, courts employ the “ordinary observer

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<sup>27</sup> *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 345.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 348.

<sup>38</sup> *Id.*

test.<sup>39</sup> Under the test, the two works are substantially similar if “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.”<sup>40</sup> When applying the ordinary observer test, courts have established that the work should be examined as a whole, rather than focus solely on the differences between the works.<sup>41</sup>

When determining whether there is copyright infringement, it is essential to identify what type of work is allegedly being copied since different types of works receive different levels of protection. In *Feist Publications, Inc. v. Rural Telephone Service Co. Inc.*, the United States Supreme Court established that compiled works should receive only “thin” copyright protection.<sup>42</sup> Thin protection has traditionally protected only against verbatim reproduction of the original work.<sup>43</sup> The protection is limited due to the fact that the range of possible expression is narrow.<sup>44</sup> Under Title 17, compiled works or compilations are defined as “work[s] formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>45</sup> Title 17 further requires that the compiled work be original in order to receive any protection under copyright law.<sup>46</sup>

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<sup>39</sup> *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001); *Knitwaves, Inc. v. Lollytogs Ltd. Inc.*, 71 F.3d 996, 1002 (2d Cir. 1995); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). It is worth noting that “[t]he copying need not be of every detail so long as the copy is substantially similar to the copyrighted work.” *Comptone Co., Ltd. v. Rayex Corp.*, 251 F.2d 487, 488 (2d Cir. 1958).

<sup>40</sup> *Boisson*, 273 F.3d at 272; *Knitwaves, Inc.*, 71 F.3d at 1002. Whether an ordinary observer would find the two works to be substantially similar is a question of fact best left for the jury to decide. See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010). The jury must determine if an “ordinary, reasonable observer viewing the works in their totality would perceive the allegedly infringing work to be substantially similar to the copyrightable portions of the plaintiff’s work.” 1 WILLIAM C. HOLMES, *INTELLECTUAL PROPERTY AND ANTITRUST LAW* § 4:15, *ELEMENTS OF AN INFRINGEMENT CLAIM; “SUBSTANTIAL SIMILARITY” TEST* (2015).

<sup>41</sup> *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109–10 (9th Cir. 1970).

<sup>42</sup> 499 U.S. 340, 349 (1991).

<sup>43</sup> See *Sun Media Sys., Inc. v. KDSM, LLC*, 564 F. Supp. 2d 946, 978 (S.D. Iowa 2008); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994).

<sup>44</sup> *Apple Computer, Inc.*, 35 F.3d at 1446.

<sup>45</sup> 17 U.S.C. § 101 (2012).

<sup>46</sup> 17 U.S.C. § 102(a) (2012).

In *Feist Publications Inc.*, a telephone utility company brought a copyright infringement suit against the publisher of a telephone directory for using the utility company's local white page listings.<sup>47</sup> Plaintiff had taken the telephone listings from the defendant's local telephone book and included those listings in their area-wide telephone directory.<sup>48</sup> The listings were a list of names in alphabetical order along with each person's respective telephone number.<sup>49</sup> The court ultimately held that the alphabetical listing of names with corresponding telephone numbers received no protection under copyright law because the listings "lack[ed] the modicum of creativity necessary to transform mere selection into copyrightable expression."<sup>50</sup>

## II. CIRCUIT SPLIT

Should architectural works also be considered compilations? The United States Court of Appeals for the Eleventh Circuit answers that question in the affirmative, finding that architectural works should only receive thin protection because they resemble compilations. The Second Circuit, on the other hand, disagrees, explaining that architectural works are an art form and should be afforded full protection under copyright law.

### A. *The Eleventh Circuit's Thin Protection Approach*

In *Oravec v. Sunny Isles Luxury Ventures, L.C.*, the Eleventh Circuit attempted to develop a procedure for properly analyzing when an architectural work has been infringed.<sup>51</sup> There, the plaintiff had developed a design for a high-rise building, which incorporated alternating concave and convex segments and elevator cores, which protrude through the roofline of the building.<sup>52</sup> The plaintiff then brought suit for copyright infringement after seeing advertisements, which depicted the renderings for the defendant's new residential high-rise building.<sup>53</sup> When analyzing if there was infringement, the court

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<sup>47</sup> 499 U.S. at 344.

<sup>48</sup> *Id.* at 343.

<sup>49</sup> *Id.* at 342.

<sup>50</sup> *Id.* at 362.

<sup>51</sup> 527 F.3d 1218 (11th Cir. 2008).

<sup>52</sup> *Id.* at 1226.

<sup>53</sup> *Id.* at 1225–26.



focused on the differences between the two buildings.<sup>54</sup> In particular, the court looked to the differences in the elevator towers between the two buildings.<sup>55</sup> The plaintiff's elevator towers were free standing and were located within the "alternating concave and convex sections" of the building,<sup>56</sup> while the defendant's elevator towers were located completely within the structure.<sup>57</sup> The plaintiff's elevator towers were also cylindrical and grouped in the center of the building, whereas the defendant's elevator towers were oval in shape and spread out evenly throughout the building.<sup>58</sup> Finally, the terraces in the plaintiff's design were full wraparound terraces, creating the appearance of a smooth surface, while the defendant's building consisted of individual terraces, which created a jagged look.<sup>59</sup> The Eleventh Circuit ultimately concluded that no reasonable jury could find the two works substantially similar due to the striking differences between the two.<sup>60</sup>

The Eleventh Circuit took its analysis of the copyright protectability of architectural works a step further in its seminal case, *Intervest Construction, Inc. v. Canterbury Estate Homes, Inc.*<sup>61</sup> There, a builder who held the copyright for a floor plan of a four-bedroom house brought a copyright infringement action against a competing builder.<sup>62</sup> Both floor plans were for a four bedroom house that covered approximately the same square footage and contained a two-car garage, living room, dining room, family room, foyer, master bathroom, kitchen, second bathroom, nook, and porch.<sup>63</sup> The placement of "entrances, exits, hallways, openings, and utilities" was also the same in both plans.<sup>64</sup>

When conducting its infringement analysis, the court found that "the definition of an architectural work closely parallels that of a 'compilation' under the statute," because architectural works are the "arrangement and coordination of . . . common elements,"

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<sup>54</sup> *See id.* at 1227.

<sup>55</sup> *Id.* at 1226.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1227.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1226.

<sup>61</sup> 554 F.3d 914 (11th Cir. 2008).

<sup>62</sup> *Id.* at 916–17.

<sup>63</sup> *Id.* at 916.

<sup>64</sup> *Id.*

such as doors, windows, and walls.<sup>65</sup> As a result, the Eleventh Circuit found that architectural works should be considered compiled works, which, under *Feist*, receive only thin copyright protection.<sup>66</sup> The court went on to note that, at the summary judgment stage, a judge is “better able to separate original expression from the nonoriginal elements of a work,” than the jury.<sup>67</sup>

The court found numerous subtle differences between the two designs.<sup>68</sup> For example, the court noticed that the doors to one of the bedrooms opened in opposite directions.<sup>69</sup> The court also noticed that a closet within the bedroom of the plaintiff’s house ran the length of the wall, while the closet in the defendant’s design was “deeper, smaller, and occupie[d] only a corner of the bedroom.”<sup>70</sup> Finally, the defendant’s home design contained a “bonus room” above the garage, while the plaintiff’s design did not have any such room.<sup>71</sup> The court concluded that, since the plaintiff’s work should only be afforded thin protection, summary judgment should be granted in favor of the defendant due to the differences between the two works.<sup>72</sup>

Similarly, in *Miller’s Ale House, Inc. v. Boynton Carolina Ale House, LLC*, a restaurant operator sued for copyright infringement against a competing restaurant regarding the establishment’s interior layout.<sup>73</sup> The plaintiff argued that the defendant copied their restaurant floor plan because defendant’s “rectangular bar at the center of the restaurant, booth seating,” high-top tables, kitchen and freezer area, and restrooms were all arranged in the same way as their own floor plan.<sup>74</sup> Following the precedent set in both *Oravec* and *Intervest*, the Eleventh Circuit upheld summary judgment in favor of the defendant, stating that “modest dissimilarities are more significant than they may be in other types of art works.”<sup>75</sup> The court noted that

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<sup>65</sup> *Id.* at 919.

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

<sup>67</sup> *Id.* at 920.

<sup>68</sup> *Id.* at 916–18.

<sup>69</sup> *Id.* at 917.

<sup>70</sup> *Id.*

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

<sup>72</sup> *Id.* at 921.

<sup>73</sup> 702 F.3d 1312, 1324 (11th Cir. 2012).

<sup>74</sup> *Id.* at 1326.

<sup>75</sup> *Id.* (quoting *Howard v. Sterchi*, 974 F.2d 1272, 1276 (11th Cir. 1992)).

the arrangement of the pool tables and video games within each restaurant was different, and that the defendant's restaurant had outside seating, while plaintiff's restaurant did not.<sup>76</sup> In addition to focusing its analysis on the difference between the two works, the court acknowledged that the thin protection afforded to architectural works was insufficient to support the plaintiff's infringement claim.<sup>77</sup>

Applying the test established in *Intervest*, the district court in *Jeff Benton Homes v. Alabama Heritage Homes, Inc.* also upheld summary judgment in favor of the defendant on a copyright infringement claim.<sup>78</sup> The plaintiff constructed residential homes and held the copyright on two home designs.<sup>79</sup> Plaintiff sued the defendant, a competing homebuilder, for infringement based on the defendant's home design.<sup>80</sup> The court acknowledged that there were "undeniable similarities" between the two designs, explaining that the plans "share the same basic configuration of entrance foyer, living room, dining room, family room, and kitchen."<sup>81</sup> Additionally, the court found that the master bath in both the defendant's and plaintiff's designs contained "a double vanity, garden tub, separate shower, and separate water closet, and each master suite contain[ed] either one larger or two smaller walk-in closets."<sup>82</sup> Nevertheless, the court concluded that the differences between the two designs were "of the same scale as the differences between the [plaintiff's] and [defendant's] plans discussed in the . . . *Intervest* decision."<sup>83</sup> In particular, the court looked to: (1) the differences in "the layout of the master suite"; (2) the differences in interior door and ceiling designs; (3) the "differences in window placement[;] [(4)] [the] presence of a walk-in pantry in only the [defendant's design]"; (5) the absence of a hallway leading to the master suite in the plaintiff's design; (6) the differences in interior wall angles; and (7) the different entry points to the guest bathroom.<sup>84</sup> As a result, the court reached the same conclusion as the court in

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<sup>76</sup> *Id.* at 1327.

<sup>77</sup> *Id.*

<sup>78</sup> 929 F. Supp. 2d 1231, 1255 (N.D. Ala. 2013).

<sup>79</sup> *Id.* at 1245, 1247.

<sup>80</sup> *Id.* at 1246.

<sup>81</sup> *Id.* at 1253.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1254.

<sup>84</sup> *Id.*

*Intervest*.<sup>85</sup> The court upheld summary judgment in favor of the defendant because the differences between the works precluded an infringement claim.<sup>86</sup>

### B. *The Second Circuit's Traditional Approach*

The Second Circuit, on the other hand, has adopted a different methodology with regard to the copyright protectability of architectural works. In *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*,<sup>87</sup> the court was tasked with determining the proper method for examining copyright infringement of an architectural design. It concluded that the overall expression of the two works, rather than the differences between the two works, should be the driving force when determining if there is infringement.<sup>88</sup> There, the plaintiff and defendant agreed to submit a joint proposal for a complex, which consisted of a residential high-rise tower, retail space at the base of the tower, a new pedestrian plaza, a public park, and an aboveground parking garage.<sup>89</sup> The plaintiff subsequently registered his designs with the United States Copyright Office.<sup>90</sup> A dispute between the parties eventually led to a termination of their relationship, and the defendants later hired a different firm to proceed with the project.<sup>91</sup> The plaintiff then brought suit, stating that the defendants unlawfully used the plaintiff's copyrighted designs.<sup>92</sup>

When determining whether there was infringement, the court refused to accept that it was “required to dissect [the works] into their separate components, and compare only those elements which are in themselves copyrightable.”<sup>93</sup> The court instead focused on “comparing the contested design’s ‘total concept and overall feel’ with that of the allegedly infringed work.”<sup>94</sup> Focusing on the work as a whole rather than just keying in on the differences is essential because “the defendant may

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> 602 F.3d 57 (2d Cir. 2010).

<sup>88</sup> *Id.* at 66.

<sup>89</sup> *Id.* at 60.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 66 (alteration in original).

<sup>94</sup> *Id.* (citations omitted).

infringe on the plaintiff's work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff's work of art . . . are considered in relation to one another."<sup>95</sup> The court ultimately affirmed the grant of defendant's motion to dismiss because "no more was taken than ideas and concepts."<sup>96</sup> This is due to the fact that the features which the defendant allegedly misappropriated were merely "common to countless other urban high-rise residential developments."<sup>97</sup>

In its seminal case, the Second Circuit, in *Zalewski v. Cicero Builder Development, Inc.*, declined to find that architectural works should only receive thin protection, and expanded upon the idea set forth in *Gaito*, that the overall work must be examined when determining infringement.<sup>98</sup> There, a self-employed architect granted licenses to the defendants to use several of plaintiff's designs.<sup>99</sup> After the licenses had expired, the defendants continued to use and customize plaintiff's designs.<sup>100</sup> The plaintiff brought suit against the defendants for copyright infringement, and the district court granted the defendant's motion for summary judgment.<sup>101</sup>

On appeal, the Second Circuit rejected the Eleventh Circuit's theory that architectural works should be considered compilations.<sup>102</sup> The court pointed to the fact that "architectural works and compilations are not the only works that are defined with reference to their discrete—and perhaps uncopyrightable—elements."<sup>103</sup> It went on to note that classifying architectural

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

<sup>96</sup> *Id.* at 68.

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

<sup>98</sup> 754 F.3d 95, 103–04 (2d Cir. 2014).

<sup>99</sup> *Id.* at 98.

<sup>100</sup> *Id.* at 98–99.

<sup>101</sup> *Id.* at 99. The District Court found that "the overwhelming majority of the similarities can be attributed to the fact that both plaintiffs' and defendants' works are heavily influenced by, and incorporate hallmark features of, Colonial architecture." *Zalewski v. T.P. Builders, Inc.*, 875 F. Supp. 2d 135, 153 (N.D.N.Y. 2012) *aff'd sub nom.* *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95 (2d Cir. 2014).

<sup>102</sup> *Zalewski*, 754 F.3d at 104.

<sup>103</sup> *Id.* Despite the fact that literary works such as books and periodicals are made up of individual words and numbers, none of which are copyrightable on their own, the resulting product still receives full copyright protection. *Id.*; see *Softel, Inc. v. Dragon Med. & Sci. Comm'n's, Inc.*, 118 F.3d 955, 964 (2d Cir. 1997).

works as compilations “obscures the real issue.”<sup>104</sup> Every work of art is made up of uncopyrightable elements to some degree; the issue that must be addressed when handling a copyright infringement claim is what aspects of the work “originated with the author.”<sup>105</sup> The court ultimately concluded that copyrights for architectural works should be treated the same as copyrights in other works, pointing to legislative history to support its assertion.<sup>106</sup> When handling unique areas of creative expression, such as architecture, the court should merely apply the “usual copyright doctrines of merger, public domain, and scènes-à-faire to these new circumstances.”<sup>107</sup>

Despite disagreeing with the Eleventh Circuit’s approach, the court still affirmed a grant of summary judgment in favor of the defendant.<sup>108</sup> Although the plaintiff did add his own expression to the work, only “very close copying” would have infringed on the plaintiff’s design because plaintiff’s original contribution to the pre-existing colonial style was only slight.<sup>109</sup> The defendant only copied the generalities that are found in a colonial style home and did not use any of the plaintiff’s original expression.<sup>110</sup> While both designs included the “hallmark features of[] Colonial architecture,” the court found significant differences between the dimensions and shapes of the rooms, the overall square footage of the homes, the window and door placement, the pitch and size of the roofs, and the layout of the rooms when comparing the two designs.<sup>111</sup>

The decision leaves other circuits with the question of whether or not one will actually reach a different result if the Second Circuit’s approach is applied rather than the test set out by the Eleventh Circuit. While it appears from subsequent decisions coming out of the Eleventh Circuit that the *Intervest* standard has the propensity to dispose of an infringement claim

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<sup>104</sup> *Zalewski*, 754 F.3d at 104.

<sup>105</sup> *Id.*; see *Rolwes Co. v. Barnes*, No. 4:14CV1045, 2014 WL 3701039, at \*3 (E.D. Mo. July 25, 2014) amended by No. 4:14CV1045, 2014 WL 4966071 (E.D. Mo. Oct. 2, 2014).

<sup>106</sup> *Zalewski*, 754 F.3d at 104.

<sup>107</sup> *Id.* at 105.

<sup>108</sup> *Id.* at 107.

<sup>109</sup> *Id.*

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

<sup>111</sup> *Zalewski v. T.P. Builders, Inc.*, 875 F. Supp. 2d 135, 153 (N.D.N.Y. 2012) *aff’d sub nom. Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95 (2d Cir. 2014).

before it reaches trial,<sup>112</sup> it remains to be seen whether the Second Circuit's approach will lead to the same result. While in theory it would appear as though the Second Circuit's approach could lead to more cases being decided by jury, the evolution of copyright law as a whole may prevent such an outcome. This concern will be discussed in detail in the following section.

The first court to follow the Second Circuit's approach was the United States District Court of Missouri, Eastern Division.<sup>113</sup> In *Rolwes Co. v. Barnes*, the plaintiff, a homebuilder, held the copyright for his "Rockport design" of a single family home.<sup>114</sup> He subsequently brought suit for copyright infringement after the defendant began construction of ten homes.<sup>115</sup> Evidence was submitted that the defendants photocopied the plaintiff's designs when applying for permits.<sup>116</sup> The plaintiff also submitted evidence that the defendant submitted the plans in a redrawn handwritten form with the plaintiff's name removed when applying for other permits.<sup>117</sup>

Applying the approach set forth in *Zalewski*, the court recognized that it must "determine what aspects of Plaintiff's Rockport design, if any, are copyrightable, and whether [the] defendants' designs feature substantially similar features."<sup>118</sup> The court initially rejected the plaintiff's argument that the placement of the stairs for the basement and the open kitchen entry were unique to the Rockport design.<sup>119</sup> The hallmark of the plaintiff's Rockport design is that it contains two ancillary bedrooms in the front of the house, and a master bedroom in the rear of the house.<sup>120</sup> The ancillary bedrooms are not connected with the master bedroom via hallway and the master bedroom is

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<sup>112</sup> See *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 920 (11th Cir. 2008); *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1324 (11th Cir. 2012); *Jeff Benton Homes v. Ala. Heritage Homes Inc.*, 929 F. Supp. 2d 1231, 1255 (N.D. Ala. 2013); *Sieger Suarez Architectural P'ship, Inc. v. Arquitectonica Int'l Corp.*, 998 F. Supp. 2d 1340, 1350 (S.D. Fla. 2014).

<sup>113</sup> *Rolwes Co. v. Barnes*, No. 4:14CV1045, 2014 WL 3701039, at \*3 (E.D. Mo. July 25, 2014) *amended by* No. 4:14CV1045, 2014 WL 4966071 (E.D. Mo. Oct. 2, 2014).

<sup>114</sup> *Id.* at \*1.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*3.

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

<sup>120</sup> *Id.* at \*2.

accessed from a separate entryway in the great room of the house.<sup>121</sup> The court, nevertheless, found that the defendant copied the “unique and copyrightable aspects” of the plaintiff’s design, after applying traditional copyright doctrines.<sup>122</sup> The court noted that having the ancillary bedrooms in the front of the house, which are not connected to the master bedroom via hallway, and having access to the master bedroom through the great room at the rear of the house were unique expressions created by the plaintiff, which should be protected.<sup>123</sup> As a result, the plaintiff’s motion for a preliminary injunction was granted “[b]ecause both parties [were] in agreement that the location of the bedrooms, which are serviced by two separate hallways, in 1700 square foot house is unique to the Rockport design.”<sup>124</sup>

### III. ANALYSIS OF THE COMPETING APPROACHES

This Note argues that, as other circuits come across the same issue and are faced with a choice of what standard they should apply, they should adopt the United States Court of Appeals for the Second Circuit’s approach to the copyright protectability of architectural works. The rationale behind the Second Circuit’s approach is expressly rooted in Title 17 and supported by legislative history.<sup>125</sup> Additionally, the Eleventh Circuit’s belief that architectural works should only receive thin protection runs the risk of infringing upon the constitutional rights of architects. The approach makes the judge the fact finder, potentially depriving the plaintiff of their right to a jury trial.<sup>126</sup> Finally, courts should avoid the Eleventh Circuit’s approach because of the resultant public policy implications. Thin protection creates an insufficient incentive for architects because it may encourage them to become hesitant to invest significant time and money into their work.<sup>127</sup> Ultimately, the

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

<sup>122</sup> *Id.* at \*4.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*3.

<sup>125</sup> *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 103–04 (2d Cir. 2014); *see* 17 U.S.C. § 101 (2012); H.R. REP. NO. 101-735, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6935.

<sup>126</sup> *Milbrath*, *supra* note 9, at 51.

<sup>127</sup> *Id.* at 50–51.



United States Supreme Court or Congress must set the record straight and clarify the copyright protectability of architectural works.

A. *Statutory Support*

Both Circuits claim support for their respective approaches within the Architectural Works Copyright Protection Act of 1990. Meant to put the United States in compliance with the Berne Convention,<sup>128</sup> the Act specifically defines “architectural work” as a term completely separate from a “compilation” or “collective work.”<sup>129</sup> Despite this distinction, the Eleventh Circuit in *Intervest* argued that “the definition of architectural work[s] closely parallels that of a ‘compilation’” and therefore both should receive the same level of protection.<sup>130</sup> The Eleventh Circuit keyed in on the description of a compilation, which are works “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,” and argued that architectural works are formed in a largely similar manner.<sup>131</sup> The Second Circuit addressed this argument by pointing directly to the statute.<sup>132</sup> While both “architectural works” and “compilations” can be defined as “arrangement[s],” and both are made up of “standard elements,” other fully protected works are also defined while referencing their uncopyrightable elements.<sup>133</sup> Title 17 defines “motion pictures” as a “series of related images,” and “literary works” as works “expressed in words, numbers or other verbal or numerical symbols or indicia.”<sup>134</sup> Images, words, and numbers are all standard uncopyrightable elements, yet motion pictures and literary works enjoy full protection under copyright law.<sup>135</sup> Therefore, the argument that architectural works should,

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<sup>128</sup> MERGES ET AL., *supra* note 14, at 500.

<sup>129</sup> 17 U.S.C. § 101 (2012).

<sup>130</sup> *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919 (11th Cir. 2008).

<sup>131</sup> *Id.*

<sup>132</sup> *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 104 (2d Cir. 2014).

<sup>133</sup> *Id.*; *see* § 101.

<sup>134</sup> § 101.

<sup>135</sup> *Zalewski*, 754 F.3d at 103–04.

like compilations, receive only thin protection due to the similarities between the two definitions seems to fail when examining the definitions of other works under Title 17.

It is worth noting that 17 U.S.C. § 120 makes certain qualifications to the protection of architectural works.<sup>136</sup> Title 17 states that the copyright protection of an architectural work is not meant to prevent others from making pictures, paintings, or photographs of an ordinarily visible building.<sup>137</sup> The statute also authorizes alterations or destruction of the building without the need for the copyright owner's consent.<sup>138</sup>

### B. Legislative History

The Second Circuit's approach also finds support from legislative history. The court in *Zalewski* looked specifically to House Report 101-735,<sup>139</sup> where the Committee of the Judiciary provided commentary regarding the 1990 amendment of Title 17 relating to architectural works.<sup>140</sup> While examining the characteristics of architecture, the committee drew comparisons to poetry.<sup>141</sup> The committee looked to a quote by Ada Louise Huxtable,<sup>142</sup> who stated, "architects can make 'poetry out of visual devices, as a writer uses literary or aural devices. As words become symbols, so do objects; the architectural world is an endless source of symbols with unique ramifications in time and space.'"<sup>143</sup> The Committee went on to cite Frank Lloyd

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<sup>136</sup> 17 U.S.C. § 120 (2012).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> 754 F.3d at 104.

<sup>140</sup> H.R. REP. NO. 101-735, at 11–14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6942–45.

<sup>141</sup> *Id.* at 6943–44.

<sup>142</sup> Ada Louise Huxtable was known as the first full-time architecture critic. David W. Dunlap, *Ada Louise Huxtable, Champion of Livable Architecture, Dies at 91*, N.Y. TIMES (Jan. 8, 2013), <http://www.nytimes.com/2013/01/08/arts/design/ada-louise-huxtable-architecture-critic-dies-at-91.html>. Huxtable was a Pulitzer Prize winning journalist for *The New York Times*, known specifically for her commentaries on architecture. *Id.* Her work drew mainly upon the social aspects of architecture and how the structures represent "the collective spirit that we call society." *Id.*

<sup>143</sup> H.R. REP. NO. 101-735, at 12–13, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6943–44. The Committee stressed the importance of architecture in people's daily lives, "not only as a form of shelter or as an investment, but also as a work of art." *Id.* at 6943. It is an art form that "performs a very public, social purpose." *Id.* They went on to recognize that "[b]uildings will always remain the most valuable aspect in a people's environment, the one most capable of cultural reaction." *Id.* The Committee then

Wright, who declared, "the design of a work of architecture is a 'writing' under the Constitution and fully deserves protection under the Copyright Act."<sup>144</sup> Finally, the Committee noted that architectural works "stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal."<sup>145</sup>

The Committee's examination of the issue of whether there should be limitations on injunctive relief regarding infringement of architectural works furthers the conclusion that architectural works should receive full protection under copyright law.<sup>146</sup> When contemplating if there should be limitations on injunctive relief, the Committee weighed both the possibility that an infringing structure could cause "irreparable injury to the copyright owner" and the strong public policy in favor of not destroying useful buildings.<sup>147</sup> It was ultimately concluded that injunctive relief for infringement of architectural works should be governed by "general principles applicable to all categories of subject matter," and the complexities of granting the injunction will be determined on a case-by-case basis.<sup>148</sup>

Finally, the Committee concluded that "general standards of originality" should apply for architectural works, and that determinations of infringement of architectural works should "be made according to the same standard applicable to all other forms of protected subject matter."<sup>149</sup> The Committee went on to state that the language of the definition of architectural works, such as the nonprotectibility of "individual standard features" does not indicate that a "higher standard of similarity is required to prove infringement," or that protection is "limited to verbatim or near-verbatim copying."<sup>150</sup> Instead, the conclusion of the House Committee seems to indicate that copyrights for architectural works should be held to the same standard as other copyrights.

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provided the Capitol building as an example, explaining that it "serves as a strong symbol of our country's dedication to democracy." *Id.*

<sup>144</sup> *Id.* at 6944.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 6945.

<sup>149</sup> *Id.* at 6952.

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

The House Committee also explained the limitations on protection for architectural works set forth in 17 U.S.C. § 120.<sup>151</sup> With regard to subsection 120(a), which prevents copyright law for architectural works from extending to pictorial representations of the structure, the Committee explained that architectural works are a “public art form” and should be “enjoyed as such.”<sup>152</sup> The photography of architecture is used not only to memorialize one’s trip to a city, but also as a teaching mechanism in numerous scholarly books on architecture.<sup>153</sup> Permitting photography of architectural works does “not interfere with the normal exploitation of [such] works.”<sup>154</sup> The subsection was meant not only to comply with the Berne Convention, but also to “provide an exemption, rather than rely on the doctrine of fair use” when dealing with a claim for infringement regarding a photograph.<sup>155</sup> Subsection (b), which authorizes the destruction or alteration of the work without the architect’s consent, was meant by the legislature to expressly state that subsection 109(a)—which permits an owner of a phonorecord to “sell or otherwise dispose of the possession of that copy of phonorecord”—is meant to apply to architectural works.<sup>156</sup>

The House Report makes it clear that the intentions of the Committee are embodied in the Second Circuit’s approach. Rather than grant architectural works only thin protection, the Second Circuit recognized the legislature’s intention that there should not be a higher standard of similarity between the works to prove infringement.<sup>157</sup> As a result, the court in *Zalewski* concluded that the “usual copyright doctrines,” such as the doctrine of merger, public domain, scènes-à-faire, and the idea-expression dichotomy, should apply when examining copyright infringement of architectural works.<sup>158</sup> Applying thin protection would essentially protect architectural works only from verbatim copying, which goes beyond the intentions of the legislature.<sup>159</sup>

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<sup>151</sup> *Id.* at 6953.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 6953–54.

<sup>157</sup> *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 104 (2d Cir. 2014).

<sup>158</sup> *Id.* at 105.

<sup>159</sup> H.R. REP. NO. 101-735, at 21, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6952.

Furthermore, the Eleventh Circuit's focus on the dissimilarities between the original work and the work in question cuts directly against the legislative intent, which suggests that the overall design should be taken into account when evaluating the scope of protection. The House Committee suggested a two-part test for determining such scope.<sup>160</sup> The first step requires one to "determine whether there are original design elements present, including overall shape and interior architecture."<sup>161</sup> If there are in fact original design elements, one must determine if the elements are functionally required.<sup>162</sup> If not, then the work is protectable.<sup>163</sup> The Committee went on to state that the "aesthetically pleasing overall shape of an architectural work could be protected."<sup>164</sup> Rather than examining the overall design or similarities between both the original work and the work in question, the Eleventh Circuit has chosen to focus primarily on the differences between the works.<sup>165</sup> By comparing only the differences between two works, the Eleventh Circuit's approach has the potential to lose sight of the overall shape of the original work—a factor that the legislature suggested should be taken into account and protected.<sup>166</sup> Scholars have further concluded that, because courts have

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<sup>160</sup> *Id.* at 6951–52.

<sup>161</sup> *Id.* at 6951.

<sup>162</sup> *Id.* at 6951–52.

<sup>163</sup> *Id.* at 6952.

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

<sup>165</sup> *See* *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 921 (11th Cir. 2008) (holding that dissimilarities between the two floor plans were sufficient to conclude that "no reasonable, properly instructed jury could find the works substantially similar"); *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1226, 1228 (11th Cir. 2008) (holding that the "numerous significant differences" between the partially exposed elevator towers and the use of concave and convex sections was enough to conclude that the works were substantially similar); *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1324 (11th Cir. 2012); *Howard v. Sterchi*, 974 F.2d 1272, 1276 (11th Cir. 1992). Scholars have found the Eleventh Circuit's focus on the differences rather than the similarities "unorthodox." Milbrath, *supra* note 9, at 51.

<sup>166</sup> Courts have found that specifically focusing on dissimilarities is an improper approach when determining infringement. *See Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (holding that "[d]issection of dissimilarities is inappropriate because it distracts a reasonable observer from a comparison of the total concept and feel of the works"); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (finding that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate"); *Steven T. Lowe, Death of Copyright*, 33-NOV L.A. L. 32, 34 (2010).

applied only thin protection to architectural works, the Architectural Works Copyright Protection Act has not had a significant “impact on stimulating excellence in design in the United States,” like Congress intended.<sup>167</sup>

The Second Circuit’s approach, on the other hand, takes into account both the similarities and differences between the works, in accordance with the legislative history. In *Zalewski*, the court examined the “overall footprint” of the structure and found that the similarities between the two works stemmed only from the “generalities of the style.”<sup>168</sup> Rather than base judgment primarily upon the differences between works, the Second Circuit’s approach more adequately follows the intent of the legislature by examining the overall similarities between the works.<sup>169</sup>

### C. Public Policy Considerations

#### 1. Eleventh Circuit Approach Contrary to Public Policy

Furthermore, the Eleventh Circuit’s approach seems troublesome on public policy grounds. Article I, Section 8, Clause 8 of the Constitution grants Congress the power “[t]o promote the [p]rogress of Science and useful Arts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.”<sup>170</sup> The Supreme Court has stated that the purpose of granting an author a monopoly over her original expression “lie[s] in the general benefits derived by the public from the labors of authors.”<sup>171</sup> The monopoly over the expression “serves to induce release to the public of the products of his creative genius.”<sup>172</sup>

The issue still remains over how much protection original expression should be afforded. Granting broad protection to works may actually inhibit the progress of science rather than

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<sup>167</sup> David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made A Difference?*, 18 J. INTELL. PROP. L. 1, 59 (2010).

<sup>168</sup> *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 106–07 (2d Cir. 2014).

<sup>169</sup> *Id.*; see H.R. REP. NO. 101-735, at 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6952.

<sup>170</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>171</sup> *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); see *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 492 (1942); see also U.S. CONST. art. I, § 8, cl. 8.

<sup>172</sup> *Paramount Pictures*, 334 U.S. at 158.

promote it because a broad grant has the potential to diminish the “store of ideas” on which others should be free to build.<sup>173</sup> On the other hand, if copyright protection proves to be too narrow, then it has the potential to erode an author’s incentive to create and develop innovative works because the possibility of personal gain is greatly diminished.<sup>174</sup>

By applying thin protection to architectural works, the Eleventh Circuit runs the risk of creating an insufficient incentive for architects to design and create original structures. Since architectural works would only be protected from essentially verbatim copying under the Eleventh Circuit’s approach, potential infringers can create structures that are substantially similar to the original work, yet suffer no consequences. As a result, these potential infringers can avoid the costly process of designing an original structure by merely constructing a structure that is substantially similar to an original work that is already in existence. Architects will therefore be less likely to create an original expression, since substantially similar structures can be created without consequence.

## 2. Second Circuit Approach Advances Public Policy

On the other hand, one may argue that the Second Circuit’s approach provides architects with overbroad protection of their works, preventing, rather than promoting, the advancement of art and science. The argument fails because the Second Circuit took such considerations into account when developing its standard. The court in *Zalewski v. Cicero Builder Dev., Inc.* recognized that “[a]rchitects cannot claim that good engineering is original to them—or at least can get no copyright protection for it.”<sup>175</sup> Additionally, the Second Circuit’s approach determines copyright protectability on a case-by-case basis.<sup>176</sup> Applying the

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<sup>173</sup> *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1225 (11th Cir. 2008); see Milbrath, *supra* note 9, at 51.

<sup>174</sup> See *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013); Milbrath, *supra* note 9, at 50–51; Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 27 (2013).

<sup>175</sup> 754 F.3d 95, 106 (2d Cir. 2014); see Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 68 (2d Cir. 2010).

<sup>176</sup> *Zalewski*, 754 F.3d at 104–05; see *Rolwes Co. v. Barnes*, No. 4:14CV1045, 2014 WL 3701039, at \*3 (E.D. Mo. July 25, 2014) *amended by* No. 4:14CV1045, 2014 WL 4966071 (E.D. Mo. Oct. 2, 2014).

idea-expression dichotomy similarly prevents against overbroad protection of an architect's work.<sup>177</sup> The dichotomy ensures that only the architect's original expression is protected, not the generalized ideas and concepts surrounding the expression.<sup>178</sup> The court's application of the usual copyright doctrines of merger, public domain, and *scènes-à-faire* will also serve to ensure that only an architect's original expression will be protected.<sup>179</sup> Thus, adequate safeguards have been put in place by the Second Circuit to prevent protection of architectural works from extending too broadly and inhibiting the progression of art and science.

#### D. Constitutional Concerns

##### 1. Potential Infringement of Seventh Amendment Rights

The Eleventh Circuit's approach also has the potential to curtail a copyright holder's constitutional rights. The Seventh Amendment of the Constitution explicitly grants one the right to a trial by jury.<sup>180</sup> When handling copyright infringement issues, courts are in agreement that the issue of substantial similarity is a question of fact, and therefore summary judgment is traditionally frowned upon.<sup>181</sup> Courts view the jury as the proper decision maker when deciding if there is substantial similarity due to the "inherently subjective nature of the inquiry."<sup>182</sup>

Despite these considerations, in the Eleventh Circuit's seminal case, *Intervest Construction, Inc. v. Canterbury Estate Homes, Inc.*,<sup>183</sup> the judge decided that that the question of substantial similarity at the level of protectable expression regarding compilations is a question best answered by a judge at a summary judgment proceeding.<sup>184</sup> The judge essentially concluded that the question of potential infringement with regard to architectural works should be considered a question of

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<sup>177</sup> *Zalewski*, 754 F.3d at 105.

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

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

<sup>180</sup> U.S. CONST. amend. VII.

<sup>181</sup> *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1232 (11th Cir. 2010); *see Jones v. Blige*, 558 F.3d 485, 490 (6th Cir. 2009); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980).

<sup>182</sup> *Latimer*, 601 F.3d at 1232.

<sup>183</sup> 554 F.3d 914 (11th Cir. 2008).

<sup>184</sup> *Id.* at 920.



law, citing no relevant authority to support his assertion.<sup>185</sup> He justified his conclusion by explaining that “a judge is better able to separate original expression from the non-original elements of a work where the copying of the latter is not protectable and the copying of the former is protectable.”<sup>186</sup> He went on to note that the idea-expression dichotomy is difficult to apply because there is no bright-line test, and since the judge better understands the dichotomy, he is in a better position to make the determination.<sup>187</sup> The test for infringement is “more often correctly administered by a judge rather than a jury—even one provided proper instruction.”<sup>188</sup>

The opinion in *Intervest* is a profound departure from traditional copyright theory, which provides that the issue of substantial similarity is a question of fact for the jury to decide. The opinion effectively transfers decision-making power from the jury to the judge.<sup>189</sup> If the approach in *Intervest* is adopted, many copyright infringement cases, which would normally go to trial based on fact issues surrounding substantial similarity, would instead be resolved at the summary judgment level. The application prevents copyright owners from litigating their claims before a jury, potentially denying their Seventh Amendment right to a jury trial.

## 2. Second Circuit Avoids The Issue

One may argue that the Second Circuit's approach also has the potential to infringe on a copyright owner's Seventh Amendment rights, as evidenced by the court in *Zalewski* upholding summary judgment despite rejecting the Eleventh Circuit's approach. This argument fails because, while summary judgment may still be granted under the Second Circuit's approach, it should theoretically occur less often. This is due to the fact that granting thin protection makes it much easier for a court to conclude that there are no genuine issues of material fact. The heightened standard will compel more courts to grant

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

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* Scholars have interpreted the opinion as coming “close to adopting a de novo process for determining the substantial similarity issue.” Milbrath, *supra* note 9, at 51.

summary judgment than if normal copyright standards are applied. Since the Second Circuit applies traditional copyright doctrines rather than thin protection, the threshold to prove copyright infringement will be less onerous, and therefore summary judgment will be less appropriate more often.

For example, when a defendant moves for summary judgment on a copyright infringement claim, if thin protection is the standard, then the defendant need only prove that no reasonable jury could determine that the defendant copied the plaintiff's work verbatim.<sup>190</sup> Therefore, for a fact issue to exist, there must be enough evidence to establish that there was potentially verbatim copying. Evidence that the works were substantially similar will not be sufficient to survive summary judgment.<sup>191</sup> On the other hand, if traditional copyright doctrines are applied, the defendant not only has to show that there was no verbatim copying, but also he must show that a jury would not be able to find the two works to be substantially similar.<sup>192</sup> For a fact issue to exist under traditional copyright law, evidence of verbatim copying is not required, there must only be evidence that the two works were substantially similar.<sup>193</sup>

### 3. Constitutional Concerns with Copyright Law Generally

Although the Second Circuit's approach should, in theory, better protect an architect's Seventh Amendment right to a jury trial, recent developments within copyright law generally may erode such protection. Preventing one from exercising their Seventh Amendment right to a jury in a copyright infringement case is not an issue exclusive to architectural works.<sup>194</sup> Courts have begun to favor deciding all sorts of copyright infringement cases at the summary judgment level, "removing both experts and juries from the process entirely."<sup>195</sup> For example, courts have become "more willing to dismiss expert witnesses to screenplay copyright infringement claims and analyze the works themselves."<sup>196</sup> As a result, the judge is acting as a "self-

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<sup>190</sup> See FED R. CIV. P. 56(a).

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

<sup>194</sup> Lowe, *supra* note 166, at 32, 34.

<sup>195</sup> *Id.* at 36.

<sup>196</sup> *Id.*

appointed expert.”<sup>197</sup> Thus, the constitutional implications of court policy favoring summary judgment regarding copyright infringement stretch far beyond architectural works and should be remedied immediately.

#### CONCLUSION

When determining what degree of copyright protection architectural works should receive, federal courts should adopt the United States Court of Appeals for the Second Circuit's approach, which requires architectural works to be governed by the same standards as all other copyrights. The Second Circuit's approach is directly rooted in both the statutory language as well as in the legislative history, which suggests that architectural works should be treated the same as other copyrights. The Eleventh Circuit's approach, however, directly contradicts legislative history by suggesting that architectural works should only receive thin protection under copyright law because the definition of architectural works closely resembles the definition of a compilation. This approach not only cuts against legislative history, but also has the potential to deny a copyright holder's constitutional rights because thin protection increases the likelihood that a copyright infringement case will be decided at summary judgment rather than at trial.

Finally, affording architectural works only thin protection violates public policy, which seeks to encourage the advancement of art and science. The lack of protection has the ability to create an insufficient incentive for architects to create original works because their resulting product would receive little protection from potential copying. In contrast, the Second Circuit affords architectural works the same protection as other copyrights, avoiding Constitutional issues and maintaining the incentives for architects to continue to construct original structures. At this time, it is essential that the Supreme Court or Congress resolve this apparent disagreement between the circuits and determine the proper degree of protection that architectural works should be afforded.

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<sup>197</sup> *Id.*