Copyright Protection for Architectural Works

David E. Shipley

University of Georgia School of Law, shipley@uga.edu
COPYRIGHT PROTECTION FOR ARCHITECTURAL WORKS

DAVID E. SHIPLEY*

TABLE OF CONTENTS

I. INTRODUCTION ..................................... 394
II. THE COPYRIGHTABILITY OF PLANS ................ 396
III. AN ARCHITECT’S RIGHTS IN PLANS .......... 400
    A. The Right to Reproduce ................... 400
    B. The Right to Control Use ............... 401
       1. The Impact of Baker v. Selden on the Right to Control Use ............... 406
       2. Limiting the Impact of Baker v. Selden .... 410
IV. THE COPYRIGHTABILITY OF STRUCTURES .......... 417
    A. An Architect’s Unprotectible Ideas .......... 419
    B. The Useful Article and Utilitarian Function Limitations ................. 422
V. THE CASE FOR AN EXPANSIVE DEFINITION OF THE COPYRIGHTABLE FEATURES IN A STRUCTURE ... 428
    A. Accommodating Expanded Protection Within the Copyright Act .......... 432
       1. The Limitations in Section 113 ......... 432

* Professor of Law, University of South Carolina School of Law, Columbia, South Carolina. B.A. 1972, Oberlin College; J.D. 1975, University of Chicago.
Architecture is the most commonly experienced and pervasive of all the arts. The creative efforts of architects culminate in structures used for shelter, pleasure, business, entertainment, and transportation. Architects express their design concepts in sketches, elevations, floor plans, working drawings, specifications, renditions, and three-dimensional models. Their labors in shaping the ideas for a building from rough conceptions into plans and then into completed structures are similar to the efforts of other creators. An architect is as much an author as is a sculptor or a dramatist. His plans, renditions, and the resulting structure will ordinarily show originality and will reflect his personality. As Justice Holmes stated, "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright  


2. Hellmuth, supra note 1, at 71. Cf. Katz, Copyright Protection of Architectural Plans, Drawings and Designs, 19 LAW & CONTEMP. PROBS. 224, 229-30 (1954). See also SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., STUDY NO. 27 ON THE COPYRIGHT LAW REVISION, Copyright in Architectural Works (Comm. Print 1961), [hereinafter cited as Study No. 27] reprinted in 1 STUDIES ON COPYRIGHT 87 (1963). This study, one of thirty-four reports prepared by the Copyright Office as groundwork for the Copyright Office Revision Report, states that architectural works include the drawings, plans, and models for a structure and the structure itself. Study No. 27 at 67. The plans are a step in the total creative process.
unless there is a restriction in the words of the act."

The Copyright Act of 1909 did not include architectural plans, blueprints, or designs in its classes of copyrightable subject matter; nor does the 1976 Act explicitly mention architectural works. This continuing statutory silence, however, does not preclude all protection for architectural works. It is well established, for example, that plans are copyrightable "writings." Less clear, however, is whether copyright protection extends to the use of plans without actual copying or to the structures depicted by the plans.

Although copyright protection is available for several forms of architectural expression, a variety of restrictions have been imposed that severely limit its adequacy. These limitations present serious problems because architects, like other creators,


5. Hellmuth, supra note 1, at 170. See 17 U.S.C. § 5(i) (1973)(providing protection for "drawings or plastic works of a scientific or technical character").


7. Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (5th Cir. 1972); 1 M. Nimmer, supra note 6, § 2.08[D][2], at 2-105; Study No. 27, supra note 2, at 69; Katz, supra note 2, at 229-37 (discussing common-law copyright protection for plans); Cornell Note, supra note 3, at 84, 96-97. See also infra notes 10-29 and accompanying text. It is important to note that the terms "drawings" and "plans" as used herein cover several of the ways in which architects express their ideas, but are not broad enough to encompass every form of architectural expression. Sketches, designs, blueprints, electrical and mechanical drawings, specifications, elevations, graphics, and models are some of the various media of expression used by architects. Katz, supra note 2, at 230; Study No. 27, supra note 2, at 67. See, e.g., Schuchart & Assocs. v. Solo Serve Corp., 220 U.S.P.Q. (BNA) 170, 173 n.2 (W.D. Tex. 1983).

8. See infra notes 151-84 and accompanying text.
need to be rewarded for their ingenuity and effort. Without adequate copyright incentives, progress in this important art form might be retarded. This article discusses the nature and scope of the protection that copyright affords to architectural works and the several limitations on this protection. Initially, it considers the copyrightability of plans and the architect's right to control their reproduction in copies and their use in the construction of the buildings depicted. The article then analyzes the copyrightability of structures and discusses the rights that an architect has in a completed building. In the course of this analysis, the article also proposes several theories for architects to assert against the unauthorized copying and use of their creative works.

II. THE COPYRIGHTABILITY OF PLANS

The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." Accordingly, the Copyright Act provides that "protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise com-

9. Cf. Cornell Note, supra note 3, at 81, 91-94 (discussing the economic rationale for protection). The American copyright doctrine, based upon the Constitution's copyright clause, holds that the public interest in the creation and dissemination of intellectual works justifies the toleration of the copyright monopoly. The interests and rights of the public, however, are paramount and are accorded primacy over the secondary concerns of the creators. Abrams, Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection, 1983 Sup. Ct. Rev. 509, 510. Thus, it is necessary to recognize that if the scope of protection is too broad, creative efforts by others might be discouraged. Accordingly, a tension in copyright law results from the attempt to balance two competing policies: providing incentives for authors to create and protecting the public's interest in access to and use of intellectual creations. This tension, recognized two centuries ago by Lord Mansfield in Sayre v. Moore, 102 Eng. Rep. 139, 140 (1785), is inherent in copyright and intellectual property law generally. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Morrison v. Solomons, 494 F. Supp. 218, 225 (S.D.N.Y. 1980); Baird, Common Law Intellectual Property and the Legacy of International News Service v. Associated Press, 50 U. Chi. L. Rev. 411, 415 (1983). This tension is apparent also in the sphere of architectural works, where the need for incentives arguably conflicts with the need to imitate or borrow from previous architectural works. Cornell Note, supra note 3, at 91-94.

Copyrightable subject matter encompasses not only literary works, but also "any physical rendering of the fruits of creative or aesthetic labor." Courts interpreting the 1909 Act have held that architectural plans are protectible under section 5(i) as drawings or plastic works of a scientific or technical nature, and several commentators have argued that protection also might be appropriate under the "works of art" classification in section 5(g).

The classes of works specified in section 5 of the 1909 Act are now covered in the aggregate by the categories of copyrightable subject matter set forth in section 102(a) of the 1976 Act. This listing includes "pictorial, graphic, and sculptural works," which encompass two- and three-dimensional works of fine, graphic, and applied art, charts, technical drawings, diagrams, and models. The 1976 Act’s legislative history clearly establishes that architectural plans and drawings are protected by

12. Goldstein v. California, 412 U.S. 546, 661, reh’g denied 414 U.S. 883 (1973); A. Latman, The Copyright Law 18 (5th ed. 1979). Architecture is both a “useful art” and a “science.” The courts have interpreted these expressions, as well as the terms “writings” and “authors,” expansively. See, e.g., Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033 (1984)(operating system software is copyrightable); Mazer v. Stein, 347 U.S. 201 (1954) (statuette used as lamp base is copyrightable); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)(photographs are copyrightable). See also Cal. Comment, supra note 1, at 471-73. The first copyright statute, enacted in 1790, included maps and charts as protectible subject matter. An 1802 amendment added prints, and three-dimensional works became protectible when coverage was extended to the fine arts (e.g., “statue, statiuary, and... models or designs intended to be perfected as works of the fine arts.” Copyright Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212). The 1909 comprehensive revision substituted “works of art” for the term “fine art,” and continued the trend toward broader coverage. See Hauhart, The Eternal Wavering Line—The Continuing Saga of Mazer v. Stein, 6 Hamline L. Rev. 95, 97 (1983).
13. See, e.g. Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (5th Cir. 1972); N. Boorstin, Copyright Law § 2:25, at 76 (1981); 1 M. Nimmer, supra note 6, § 2.08[D], at 2-104 & n.163; Hellmuth, supra note 1, at 173; Cal. Comment, supra note 1, at 475, 480.
15. 17 U.S.C. § 102(a)(5)(1982). Since architects’ creations fall within the § 102(a)(5) category of “pictorial, graphic, and sculptural works” and have functional applications, it is necessary to consider the impact of the Act’s “useful article” and “utilitarian function” limitations. See infra notes 151-84 and accompanying text.
16. Id. § 101 (definition of “pictorial, graphic, and sculptural works”).
The two essential requirements for protection—originality and fixation in a tangible medium of expression—are easily satisfied by architectural plans and drawings so long as the architect does not copy another’s plans. The originality requirement simply means that the work must owe its origin to the author and is “little more than a prohibition of actual copying.” Originality, thus, is a modest requirement; it requires only independent creation, not novelty.
or aesthetic merit. The fixation requirement is satisfied when a work is embodied in a tangible medium of expression that is sufficiently permanent to enable the work to be perceived, reproduced, or communicated for more than a transitory duration. Thus, an architect's creation is fixed when he draws blueprints, sketches a rendition, or constructs a model.

Of course, an architect's creative horizons may be limited to some extent by zoning and building restrictions, code requirements, functional considerations, and the client's needs and demands. These limitations, however, do not affect the copyrightability of plans. While these requirements might limit creative options, the final product still owes its origin to the architect. By analogy, a musical composer's creative options are limited by the thirteen tones, their octaves, and their variations. Other constraints are imposed by limitations on a performer's range and on our ability to hear. Although the average composer of popular music works under these physical limitations, the copyrightability of musical works is not questioned.

tance of borrowing and imitation in architecture). Architects, like artists, authors, and playwrights, draw upon the works of earlier creators for ideas and concepts as well as inspiration. This borrowing of general ideas does not, however, prevent their works from being copyrightable. See also Study No. 27, supra note 2, at 69 (many architectural plans have been registered at the Copyright Office).

28. A. Shafter, MUSICAL COPYRIGHT 196 (2d ed. 1939).
III. AN ARCHITECT'S RIGHTS IN PLANS

A. The Right to Reproduce

It is well established that the unauthorized copying of copyrighted plans infringes the reproduction right. If the copier then modifies those plans or sells them, he has also infringed the author's rights to distribute and display, as well as to prepare adaptations (derivative works). Thus, copyright enables the architect to control and profit from the full panoply of artistic rights except for the performance right, which, by definition, does not apply. Plans can, therefore, be copied, adapted, sold, or distributed in the form of another set of plans only with the architect's consent.

For instance, in Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co., an architectural firm prepared drawings for the defendants' use in the construction of a twenty-two unit apartment complex. The plaintiff delivered eighteen sets of blueprints to one of the defendants and retained the originals. Two sets were filed with the city's building code administrator, and a building permit was issued. The defendants paid the plaintiff for its architectural services and used the plans to com-

30. 17 U.S.C. § 106(1), (2), (3), (5)(1982); Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981); May v. Bray, 30 C.O. Bull. 435 (S.D. Cal. 1955); Study No. 27, supra note 2, at 69; 1 M. Nimmer, supra note 6, § 2.08[D], at 2-105; N. Boorstyn, supra note 13, § 2:25; Hellmuth, supra note 1, at 173; Cornell Note, supra note 3, at 54, 96-97. This principle was recognized at common law. See, e.g., Smith v. Paul, 174 Cal. App. 2d 744, 345 P.2d 546 (1959); Edgar H. Wood Assocs., Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964); Krahimer v. Luing, 127 N.J. Super. 270, 317 A.2d 96 (Ch. Div. 1974). Many of the common-law copyright cases were primarily concerned with what actions constituted a general publication. There was uncertainty whether construction published the plans and whether their filing of the plans with a municipal official, as required by law, constituted a divestive publication. See Katz, supra note 2, at 229-37. Even though the 1976 Act abolished common-law copyright, 17 U.S.C. § 301(a) (1982), these cases are still relevant because of section 113(b) of the Act. See infra notes 202-13 and accompanying text.

31. See 17 U.S.C. § 106(4) (1982). This is a commonsense limitation. Plans, as "pictorial, graphic, or sculptural works," cannot be recited, played, or acted. Id. § 101 (definition of "perform").

32. The owner of a copyright has the exclusive right to exercise and to authorize the exercise of any of the enumerated rights. Id. § 106. Cf. Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 205 Cal. Rptr. 620 (1984) (architect claimed that his common-law copyright was infringed by defendant's unauthorized distribution and modification of his plans, but court found his cause of action was preempted by § 301 of the Copyright Act).

Shortly thereafter the defendants decided to build a second apartment complex on an adjoining parcel of land and, without the permission or knowledge of the plaintiff, copied the plans for the first complex. Defendants then used the copied plans to construct a second, almost identical apartment complex. When the plaintiff discovered that the plans had been copied, it placed copyright notice on the original blueprints, registered its copyright, and sued for infringement.

Plaintiff contended that defendants had infringed its copyright by reproducing the plans, preparing or assisting in preparing a derivative work, reproducing copies of this derivative work, distributing copies of this derivative work to subcontractors and suppliers, and displaying the plans publicly by filing a copy with the city's building code department. The court concluded that the plans were copyrightable, that they were not a commissioned work, that plaintiff had not transferred copyright ownership by giving copies to defendants, and that the plans had been reproduced by defendants. Accordingly, the court held the defendants jointly and severally liable for infringement.

B. The Right to Control Use

Plans are valuable not for their own sake, but for the benefit to be derived from their use. They are meant to be used to construct the building portrayed in conformity with the architect's design ideas and concepts. An architect, therefore, is necessarily concerned not only about the actual copying of his

34. Id. at 254-55.
35. Id. at 255. Plaintiff also named a lumber company and an engineer as defendants.
36. Id. at 256.
37. Id. One of the defendants claimed that it, not plaintiff, was the copyright owner of the plans under the work-made-for-hire doctrine and that even if plaintiff owned the copyright, it was an innocent infringer and its use was a fair use. The court concluded that plaintiff was an independent contractor and not defendant's employee and that plaintiff, thus, owned the copyright. Id. at 258. It also concluded that defendant could not claim copyright ownership under the Act's joint-authorship provisions. Id. at 259. The court found that defendant's use of the plans was not a fair use and that defendant was not an innocent infringer because it was aware that plaintiff claimed copyright ownership. Id. at 260-61.
38. The lumber company and the individual hired to review the plans were not liable as contributory or vicarious infringers. Id. at 261-62.
plans, but also about their unauthorized use.39

The use of architectural plans to construct a dwelling is analogous to the use of a sculptor's drawings or model to execute a completed statue. The 1909 Act granted the right "to complete, execute, and finish [the copyrighted work] if it be a model or design for a work of art,"40 and this right is now included in the exclusive rights to control reproduction and the preparation of derivative works.41 Accordingly, a sculptor's copyright is infringed if another artist copies either his two-dimensional drawings or his finished three-dimensional statue and creates a substantially similar piece of sculpture.42

Since the copyright in blueprints protects against their unauthorized reproduction in the form of additional plans,43 it also would appear to protect against the unauthorized use of those plans in the construction of the building depicted.44 Protection seems to be warranted by a simple analogy to the protection af-

39. 1 M. NiMMER, supra note 6, § 2.08[D][2], at 2-106.
40. 17 U.S.C. § 1(b) (1973); Katz, supra note 2, at 237-38.
44. "The fact that a work in one medium has been copied from a work in another medium does not render it any less a 'copy.'" 2 M. NiMMER, supra note 6, § 8.01[B], at 8-13. Professor NiMmer added, however, that this proposition is qualified in the case of "useful articles." Id. at 8-13 to 8-14. But see Study No. 27, supra note 2, at 69 (highly doubtful that copyright in plans protects against unauthorized use).
forded a sculptor. While several decisions appear to support this proposition, most cases have involved attempts by plaintiffs to establish that defendants reproduced their copyrighted plans by creating an infringing set of blueprints before using the plans to construct the second, almost identical structure.

Nevertheless, it is possible for a person to obtain a set of plans and, without reproducing them in copies, use them to erect the building they portray. This unauthorized use of plans may be more damaging to an architect’s economic interests than the unauthorized reproduction of the plans themselves. If unauthorized building or other use of copyrighted plans occurs, a significant part of the market for the plans is destroyed and the architect’s copyright is of little value. Despite the obvious importance of the right to control the use of protected plans, however, some courts and commentators have suggested that a structure is not a “copy” of its plans and that the copyright on architectural plans does not encompass a right to control use.

45. Cf. Hellmuth, supra note 1, at 173-74, 177-78.


47. 1 M. Nimmer, supra note 6, § 2.08[D][2], at 2-106; Cornell Note, supra note 3, at 95.

48. Study No. 27, supra note 2, at 69-71; N. Boorstyn, supra note 13, § 2:25, at 77 (“It was generally accepted under prior case law that the unauthorized construction of a building based upon copyrighted plans did not constitute copyright infringement of the plans.”); 1 M. Nimmer, supra note 6, § 2.08[D], at 2-106 (discussing the architect’s rights when a contractor obtains a set of copyrighted plans and uses them without authorization and without making a two-dimensional reproduction); Hellmuth, supra note 1, at 173-74, 176-77 (one does not infringe by constructing the building described in the protected plans); Katz, supra note 2, at 237-39; Cornell Note, supra note 3, at 84-85, 95 (discussing the right to build). See, e.g., Imperial Homes v. Lamont, 458 F.2d 835 (5th Cir. 1972); Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 941 (W.D. Tex. 1982); Desilva Constr. v. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962); Muller v. Triborough Bridge Auth., 43 F. Supp. 298 (S.D.N.Y. 1942). Cf. Kramer v. Luing, 127 N.J. Super. 270, 276, 317 A.2d 96, 99 (Ch. Div. 1974) (“Of course, the interior and exterior is copyable by anyone with sufficient draftsmanship abilities.”). The issue of whether a structure is a copy of the plans was raised indirectly in several common-law copyright cases that addressed whether an architect’s plans were published, and his common-law copyright, therefore, divested, by the building of a structure from the plans. Katz, supra note 2, at 232-33; Cal. Comment, supra note 1, at 468-70. There were, however, some exceptions to these limitations. Under the 1909 Act it was possible to classify some architectural designs, such as cemetery monuments, as works of art under § 5(g). This classifi-
Thus, there is considerable uncertainty whether the unauthorized use of plans to construct a building constitutes infringement.\(^4\)

This uncertainty can be illustrated by examining two opinions that addressed architects' rights in copyrighted plans. In *Scholz Homes, Inc. v. Maddox*,\(^5\) the plaintiff had copyrighted plans for a split-level house marketed as its "Southern Shore" model. The house was displayed at builders' conventions and published in a copyrighted booklet. Maddox, who may have seen the model at a convention, took a rough sketch of a similar house to a draftsman who prepared plans that were used to build a house. Scholz sued for infringement and lost on the defendants' motions for summary judgment.\(^6\) The district court relied on cases indicating that no claim for infringement is stated if the alleged infringer uses plans to construct a building rather than to communicate to others how that building might be constructed.\(^7\) The court also concluded that there was no evidence that plaintiff's plans had been used in the construction of the Maddox home.\(^8\)

The Sixth Circuit Court of Appeals affirmed on the ground that the evidence was insufficient to create an inference that defendants had copied plaintiff's plans, although Maddox may have seen the model home and may have been familiar with the

\(^4\) See Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729 (M.D. Pa. 1936); H.R. Rep. No. 1476, supra note 14, at 55; Study No. 27, supra note 2, at 70. Cf. Drake Note, supra note 17, at 82-83. In the broad area of architectural structures, however, few can be classified as works of art. See infra notes 165-72 and accompanying text.


\(^6\) 379 F.2d 84 (6th Cir. 1967).

\(^7\) Id. at 85-86. Scholz sued Maddox and the lumber company that prepared the plans, claiming unfair competition and copyright infringement.

\(^8\) Id. The district court cited Baker v. Selden, 101 U.S. 99 (1879), DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962), and Muller v. Triborough Bridge Auth., 43 F. Supp. 298 (S.D.N.Y. 1942), for the proposition that plans are not infringed by the construction of a building according to them.

\(^9\) 379 F.2d at 85. There was no direct evidence of access. Id. at 86.
copyrighted booklet. The promotional booklet was not infringed because it had been copyrighted in order to preserve its value as an advertising medium; Scholz’s copyright did not give it the exclusive right to copy the plans in that brochure. In dictum the court recognized that although architects might desire protection against unauthorized use of their plans, it was not certain that copyright afforded such protection.

Similar facts were presented in Imperial Homes v. Lamont. The plaintiff prepared plans for a residential home named “Chateau” and built model homes that were open to the public. It also prepared an uncopyrighted promotional brochure containing the model’s floor plan. Defendants visited a model, made detailed observations and measurements, and then constructed a duplicate home. Imperial sued for infringement. Conflicting evidence was presented concerning whether the defendant had obtained the brochure and copied the plans, but the trial court ruled that the plaintiff had waived its copyright protection by reproducing the floor plan in its unprotected brochure.

The Fifth Circuit Court of Appeals reversed and remanded, concluding that plaintiff had not abandoned copyright protection. The court stated, however, that copyright granted an ar-

54. Id. at 86-87.
55. Id. at 85-86. The court acknowledged that this uncertainty resulted from the decision in Baker v. Selden, 101 U.S. 99 (1879), but did not decide how that decision affected the scope of protection available to copyrighted blueprints. See infra notes 72-81 and accompanying text.
56. 458 F.2d 895 (5th Cir. 1972).
57. Id. at 896. The architectural drawings were copyrighted, but the promotional brochure, containing only the floor plan from the complete set of architectural drawings, was not protected, despite its statement that plaintiff claimed copyright to the plans.
58. Id. at 896-98. The defendants’ home was intended to resemble plaintiff’s “Chateau” model. The trial court determined that the Lamonts obtained a copy of the brochure, but declined to rule on whether they had copied the floor plan from the brochure. Defendants were never shown the complete drawings for the “Chateau,” and there was no evidence of access to those complete copyrighted plans. Id. at 897.
59. Id. at 898-99. The publication of the brochure did not establish abandonment because it expressly stated that the floor plan was the subject of copyright. Id. at 898. The court disagreed with the Sixth Circuit’s determination in Scholz Homes that copying the plans from the brochure would not infringe because the brochure was copyrighted to preserve its value as an advertising medium. See supra note 54 and accompanying text. The Lamont court refused to limit the scope of copyright so narrowly as to undermine the economic philosophy of copyright and noted, by analogy, that an author’s publication of extracts from a book in order to advertise and promote it does not excuse
chitect no rights in the concept of constructing a home with 2x4s, a pitched roof, and a slab foundation. Copyright, the court explained, does not clothe an architect with exclusive rights to reproduce the building pictured in his plans, but does establish the exclusive right to reproduce plans to instruct a builder on how to proceed. The court, therefore, concluded:

[W]e do not hold that the Lamonts were in anywise restricted by the existence of Imperial's copyright from reproducing a substantially identical residential dwelling. All we hold is that if copyrighted architectural drawings of the originator of such plans are imitated or transcribed in whole or in part, infringement occurs.

The court remanded for a determination of whether defendants had copied plans from Imperial's booklet. Thus, the court ruled that plans are not infringed by the construction of a building substantially similar to the one depicted so long as the imitator does not copy the plans themselves. It did not, however, explicitly sanction the unauthorized use of plans.

1. The Impact of Baker v. Selden on the Right to Control Use

The Scholz Homes and Lamont opinions both relied on the Supreme Court's venerable decision in Baker v. Selden, which has had a strong impact on the scope of copyright protection

60. Id. at 899. These statements, made in the court's discussion of Baker v. Selden, arguably imply that copyright does not encompass the right to build. Cornell Note, supra note 3, at 85.
61. 458 F.2d at 899.
62. Contra Cornell Note, supra note 3, at 84-85. Professor Nimmer has also asserted that the Lamont decision held that copyright does not prohibit the construction of a building based on copyrighted plans. 1 M. Nimmer, supra note 6, § 2.08[D], at 2-108.1 n.176. If he meant that the decision sanctioned unauthorized use of plans, then he was reading too much into the opinion. On the other hand, Nimmer was correct if he meant that the decision recognized that the construction of a building substantially similar to one depicted in protected plans does not infringe so long as those plans are not used or reproduced. That activity is merely the independent creation of similar plans in order to construct a similar building. The primary concern in Lamont was whether defendants had copied plaintiff's protected plans in order to construct a similar dwelling. If they had, then a finding of infringement would have been appropriate on remand.
63. 101 U.S. 99 (1879). See also N. Boorstyn, supra note 13, § 2:25; Cal. Comment, supra note 1, at 475-76; Cornell Note, supra note 3, at 85.
afforded to blueprints. In *Baker* the alleged infringement was of a book that explained a bookkeeping system and contained blank accounting forms. The defendant's book described a similar system, and it contained similar blank forms. The parties' systems thus achieved the same results, but with different explanations. The Supreme Court ruled for the defendant and stated that copyright does not give an author exclusive rights to the art, idea, or system explained in his work; rather, copyright protects only the expression of an idea. Accordingly, even though the systems and the results were similar, Selden's rights were not infringed because the parties' explanations and the layouts of their respective forms were different.

*Baker* is often cited for the principle that copyright does not extend to ideas, systems, facts, or concepts; the Court's rambling opinion, however, has also been expansively interpreted to establish other propositions. It contained language, for example, that appeared to sanction the copying of the plaintiff's forms insofar as they were necessary for the use of the unprotectible system. The Court stated that the object of publishing the book was to communicate the useful knowledge it contained and that object would be frustrated if this knowledge could not be used without fear of infringement. The Court observed:

> [W]here the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.

The Court thus drew a distinction between copying for explanation and copying for use.

64. 101 U.S. at 100.
65. *Id.* at 101.
68. 101 U.S. at 102-03. See also *Hellmuth*, *supra* note 1, at 173; *Cornell Note*, *supra* note 3, at 85.
69. 101 U.S. at 103.
This language undermines the proposition that an architect’s copyright protects against the unauthorized use of his plans to erect a structure. A primary object of preparing blueprints is to indicate how the structure should be built; blueprints are meant to be applied and that object would be frustrated if the art they teach could not be used without infringement. Accordingly, commentators have argued that while unauthorized two-dimensional reproduction of plans for the purpose of explanation and distribution constitutes an infringement, the unauthorized use of plans to erect a building should not infringe because this would give the architect exclusive rights over the art disclosed by his plans in violation of the principles announced in Baker. Under this view, an architect should not be able to control the use of his plans in the building of a structure.

Baker’s broad language has led to uncertainty among lower courts. One court suggested excluding architectural plans from the scope of Baker’s holding because specific plans do not teach the art of architecture in the same way that the plaintiff’s book in Baker taught the art of bookkeeping and, thus, plans are not necessary incidents to the art and are not given to the public for the purpose of practical application. Other courts have read Baker more broadly and have refused to recognize any remedy for the unauthorized use of plans unless the plaintiff establishes...
In *Muller v. Triborough Bridge Authority,*\(^7\) for instance, the plaintiff alleged that his copyrighted bridge approach plans had been unlawfully appropriated and used in designing, planning, and constructing the approach to the Cross Bay Parkway Bridge. The court held that Muller's system of loops, ramps, viaducts, and traffic lanes, which relieved congestion, was not copyrightable even though it was explained in his copyrighted drawings. The court found that defendant's engineers had independently conceived and executed their design,\(^7\) but added that, because of *Baker's* principles, plaintiff would have been without a remedy even if defendant had actually used the copyrighted plans in designing and constructing its approach.\(^7\)

Similarly, in *DeSilva Construction Corporation v. Herald,*\(^7\) a district court stated that “[t]he protection extended by Congress to the proprietor of a copyright in architectural plans does not encompass the protection of the buildings or structures themselves, but it is limited only to the plans.”\(^8\) The court added that an architect does not have an exclusive right to build the structure embodied in his technical drawings; rather, protection is limited to the unauthorized copying of the original plans themselves\(^9\) and does not extend to the unauthorized use of plans in building a structure.\(^1\)

---

\(^7\) Id. at 299-300. Plaintiff referred to the system embodied in his copyrighted drawings as his “invention,” but his copyright could not prevent the use of that system in the defendant's approach. *Id.* at 300. The court found considerable similarity between the designs, but concluded that there was no actual appropriation and that defendant's engineers independently conceived and executed their bridge approach from other sources and prior experience. *Id.* at 299.

\(^7\) Id. at 299-300 (citing *Baker*, 101 U.S. at 99). The court suggested that Muller could not prevent the use of his drawings in the construction of the approach. *Id.* at 299. See also Study No. 27, *supra* note 2, at 69-70. The court could have stated only that Muller's copyright on his drawings did not protect against reproduction and use of the unprotectible system that they disclosed; it need not have added that Muller was without a remedy even assuming defendant's use of his drawings. *See infra* notes 82-120 and accompanying text.

\(^7\) 213 F. Supp. 184 (M.D. Fla. 1962)(plaintiff's plans for a ranch style house were allegedly infringed).

\(^7\) *Id.* at 195.

\(^9\) Id. at 195-96 (citing H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 396 (1944)).

2. Limiting the Impact of Baker v. Selden

Because the value of architectural plans depends in part on control over the right to build, the application of Baker that treats architectural plans like the forms appended to Selden's book renders copyright protection almost meaningless unless the architect can mass market his blueprints.\textsuperscript{2} As noted above,\textsuperscript{3} the unauthorized use of plans is as damaging to an architect's creative and economic interests as is their unauthorized duplication in copies. Moreover, it is possible to protect the public's right to use the ideas and design concepts disclosed in copyrighted blueprints without permitting the unfettered use of plans to build the structures they portray. Thus, while concern over extending copyright protection to an art or concept is legitimate,\textsuperscript{4} an exclusive right to build from or use copyrighted plans may be recognized as part of the reproduction right without any risk of monopolizing ideas, systems, and design concepts.

An architect's need for exclusive control over the use of his plans was recognized, to some extent, in two district court cases initiated by the same plaintiff. In \textit{Herman Frankel Organization v. Tegman},\textsuperscript{5} the defendants, desiring a house like plaintiff's "Shorewood" model, hired a draftsman who reproduced plaintiff's copyrighted, abridged floor plan as published in a brochure obtained from a building company. The court treated the abridged floor plan as a protected derivative work adapted from plaintiff's full set of copyrighted plans and found that the plans for defendant's home had clearly been taken from plaintiff's protected plan.\textsuperscript{6} Interpreting \textit{Baker}, the court distinguished be-

\textsuperscript{2} Study No. 27, supra note 2, at 91. The DeSilva discussion of the right to control use was made in the context of determining whether the construction and display of a model house constituted a publication of the plans that terminated common-law copyright protection. The court concluded that since building a structure from plans did not infringe the plans, because the structure is not a copy of the plans, then building a structure was not a publication. 213 F. Supp. at 195-96. The court found, however, that other actions of plaintiff's president amounted to a voluntary abandonment of its common-law copyright to the plans. Id. at 196-97. See also Katz, supra note 2, at 236; Cal. Comment, supra note 1, at 468-70.

\textsuperscript{3} 101 U.S. at 103. See supra notes 67-71 and accompanying text. Cf. Cal. Comment, supra note 1, at 476-78; Cornell Note, supra note 3, at 84-85, 95, 97.

\textsuperscript{4} See supra note 47 and accompanying text.

\textsuperscript{5} Cf. 1 M. Nimmer, supra note 6, § 2.18[B], at 2-198 to -199.


\textsuperscript{66} Id. at 1052-53. The defendants admitted that their plans were substantially a
tween reproducing copyrighted material and merely using the knowledge taught by copyrighted material.\textsuperscript{87} The court found this distinction important because

[a] person cannot, by copyrighting plans, prevent the building of a house similar to that taught by the copyrighted plans. One does not gain a monopoly on the ideas expressed in the copyrighted material by the act of registering them for copyright. A person should, however, be able to prevent another from copying copyrighted house-plans and using them to build the house.\textsuperscript{88}

After summarizing the Lamont case,\textsuperscript{89} the Tegman court determined that plaintiff had not abandoned its copyright\textsuperscript{90} and concluded that defendants had infringed. A key factor in this decision was defendants admission that they had copied the floor plan from plaintiff's protected brochure in order to prepare plans and to construct a similar dwelling.\textsuperscript{91} Tegman thus protected the copyright owner against the unauthorized reproduction and use of its plans without giving it a monopoly over the ideas and design concepts expressed in that protected work.\textsuperscript{92}

In Herman Frankel Organization v. Wolfe,\textsuperscript{93} the same judge reached a similar result. Defendants obtained a brochure containing a copy of the floor plan to plaintiff's "Fairmont" model copy of plaintiff's floor plan. Id. at 1052.

87. Id. at 1053. The Tegman court construed Baker to hold that the use of the system of bookkeeping taught by the plaintiff's copyrighted work was not an infringement because the Copyright Act is not a patent act. It also found that the Supreme Court did not hold that copies could be made of Selden's book without infringing. Id. at 1053.

88. Id. (emphasis added). The court seemed to be announcing the basic principle that copyright in plans does not protect the idea they disclose, but, rather, it protects against constructing a building based upon the protected plans. Cf. 1 M. Nimmer, supra note 6, § 2.08[D][a], at 2-108.1 n.179; Cornell Note, supra note 3, at 84 & n.29.

89. 367 F. Supp. at 1053 (discussing Imperial Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972)). Lamont was important because it also concerned the alleged copying of a floor plan publicized in a brochure. See supra notes 56-62 and accompanying text.

90. 367 F. Supp. at 1053-54 (citing Imperial Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972) and distinguishing Scholz Homes, Inc. v. Maddox, 379 F.2d 84 (6th Cir. 1967); both cases concerned brochures containing floor plans; see supra notes 50-62 and accompanying text).

91. 367 F. Supp. at 1053-54. The complaint against the persons for whom the house was built was dismissed because they played no role in copying the plans. A builder and a draftsman were liable. Id. at 1054.

92. Id. at 1054. See 1 M. Nimmer, supra note 6, § 2.08[D], at 2-108 n.179.

and gave it to a builder who then, without permission, obtained plaintiff's copyrighted working floor plans and elevations. These plans and the brochure were given to a designer for the purpose of making working drawings for the foundation and the floor plan. Plaintiff sued for infringement and obtained a preliminary injunction halting construction of the defendants' partially completed house. This injunction was eventually dissolved after defendants made substantial changes in their plans, but the court awarded damages and ordered defendants to surrender all drawings made from plaintiff's plans. The court concluded that the first set of plans prepared by defendants was copied from plaintiff's plans and that defendants intended plaintiff's copyrighted plans to be used as the basis for the home they were constructing. Thus, this decision, like Tegman, prohibited the unauthorized copying and use of the plaintiff's plans without contravening the principle that copyright does not extend to the ideas, systems, or discoveries expressed in a protected work.

Thus, a proper interpretation of Baker would merely recognize the proposition that copyright does not protect ideas, concepts, and systems. The broad reading of Baker, as applied in Muller and DeSilva, should be discarded. The Supreme Court in Baker was responding to Selden's contention that his copyright gave him an exclusive right to the use of his forms and,  

94. Id. at 820.
95. Id. at 821 (citing Herman Frankel Org. v. Tegman, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973)). See also Nucor Corp. v. Tennessee Forging Steel Servs., Inc., 476 F.2d 389, 390-93 (8th Cir. 1973)(concept of T-shaped building not protectible, but detailed plans of a specific building are copyrightable; the observation of the completed structure does not excuse the copying or use of its plans without permission; since the defendants' unauthorized structure was substantially completed, injunctive relief was not appropriate, but plaintiff was allowed to amend its complaint to seek damages). See also MacMillan Co. v. I.V.O.W. Corp., 495 F.Supp 1134, 1145-56 (D. Vt. 1980)(defendant given plans on the tacit understanding that they were to be used only if plaintiff was awarded the contract; instead the plans were given to another company for use in designing the project).
97. See Mazer v. Stein, 347 U.S. 201, 217 (1954); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1251-52 (3d Cir. 1983); Scholz Homes, Inc. v. Maddox, 379 F.2d 84, 85 n.1 (6th Cir. 1967); 1 M. Nimmer, supra note 6, § 2.18[D]. It is also possible to distinguish Baker by arguing that plans do not teach the art of architecture in the same way that Selden's book taught a bookkeeping system. Scholz Homes, 379 F.2d at 86; Cal. Comment, supra note 1, at 477.
98. See supra notes 75-81 and accompanying text.
thus, to the use of the system described in his book. The Court was concerned that the copyright monopoly might be construed to grant an exclusive right to use of a system—a right that can be conferred only by a patent. The Court held that the plaintiff’s copyright could not protect the art described in his work and ruled for the defendant because the parties’ respective forms and their explanations of the system were different.

Accordingly, the rule established by Baker should simply mean that an architect has no exclusive rights to the design ideas, concepts, and methods of construction disclosed in his copyrighted plans. Thus, any architect is free to design an 1800 square foot frame home with a slab foundation, two bathrooms, a garage, and a pitched roof. This basic limitation on copyright, however, does not restrict the architect’s exclusive right to reproduce copies of his plans for that home. Unauthorized copying that occurs in explaining an idea or system constitutes infringement. Thus, if a person likes a recently constructed home and somehow obtains a set of plans and copies

99. 101 U.S. at 100. The defendant’s book and forms were, in fact, different from plaintiff’s.

100. Id. at 103. Selden sought protection for his methods and diagrams. Such protection would have granted a monopoly in the underlying art “when no examination of its novelty has ever been officially made.” The Court stated that this would work a surprise and fraud on the public. Id.


104. Nucor Corp. v. Tennessee Forging Steel Servs., Inc., 476 F.2d 386, 393 (8th Cir. 1973); Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972). In Baker v. Selden, the Court stated:

[The rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright. The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art, would, undoubtedly, be an infringement of the copyright.

101 U.S. at 103.

105. 1 M. NIMMER, supra note 6, § 2.18[B], at 2-199.
them in order to explain to a builder how to construct a similar dwelling, an infringement has occurred.\textsuperscript{106}

Furthermore, reproduction of the plans in two-dimensional copies should not be required for a finding of infringement; the unauthorized use of plans to build a structure should result in copyright liability. The fundamental principle that copyright does not protect ideas would not be offended by holding a builder liable for using plans without permission to erect a structure. The builder's right to copy and use the ideas and design concepts revealed in a set of protected plans does not justify the actual use of those plans. In order to use such concepts and ideas, a builder should have to prepare his own set of blueprints independently or seek permission from the copyright owner to use the original plans.\textsuperscript{107}

The distinction made in \textit{Baker} between copying for explanation and copying for use is an awkward one\textsuperscript{108} and has not been reviewed by the Supreme Court for over a century.\textsuperscript{109} It is ludicrous to conclude that an architect's copyright is not violated when his plans are used without his consent, while holding that the unauthorized reproduction of plans to make another set of plans constitutes infringement. Both forms of misconduct appropriate not only the architect's ideas, but his protected expression as well, and both cause substantially the same harm to the architect's creative and economic interests. In both situa-

\textsuperscript{106} See, e.g., Imperial Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972); Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252 (D. Neb. 1982); Cornell Note, supra note 3, at 94, 96-97 (also explaining the economic rationale for protection).

\textsuperscript{107} Cf. Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1251-53 (3d Cir. 1983). \textit{Contra} Muller v. Triborough Bridge Auth., 43 F. Supp. 298, 299-300 (S.D.N.Y. 1942). In \textit{Muller} plaintiff had no right to stop defendant from using his system, but defendant's designers should not have been allowed to employ his plans in order to use his system. See supra notes 75-77.


tions, the plans aid builders who are unwilling to pay for an architect's services. To deny the architect the right to control the use of his plans deprives him of the right to profit from his own labor and makes his "writing" free for the taking. Thus, the architect's right to recover should not turn upon whether the defendant reproduces an architect's plans on a photocopying machine or has them adapted by a draftsman before using them to erect the building they depict. The use versus explanation distinction is without substance.

Moreover, the argument that the unauthorized use of plans to erect a building does not infringe because the structure is not a "copy" or a reproduction of the plans does not withstand analysis. The common understanding of "copy" is a reproduction or duplication that "comes so near to the original as to give every person seeing it the idea created by the original." An architect's plans represent how the completed structure will appear. Conversely, the structure gives the person seeing it the idea created by the plans—a client will recognize the structure

110. See Cornell Note, supra note 3, at 95, 97. Cf. Katz, supra note 2, at 233-34; Cal. Comment, supra note 1, at 462-70 (both discussing why the filing of plans and the erection of the structure they depict should not be regarded as publications divestive of common-law copyright); Krahmer v. Luing, 127 N.J. Super. 270, 317 A.2d 96 (Ch. Div. 1974). The awkwardness of the use versus explanation distinction is shown by MacMillan Co. v. I.V.O.W. Corp., 495 F. Supp. 1134 (D. Vt. 1980). See also Joseph J. Legat Architects, P.C. v. United States Dev. Corp., 29 PAT., TRADEMARK & COPYRIGHT J. (BNA) 609 (N.D. Ill. 1985)(federal subject matter jurisdiction exists for infringement claim against developer who allegedly repudiated a contract with an architectural firm, placed another firm's name on the plaintiff's plans for an apartment complex, and then used those plans to obtain financing and to build the project). Contra Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 933, 941 (W.D. Tex. 1982)(when plaintiff established that someone had copied its plans, but there was no evidence that one particular defendant had reproduced them, defendant could not be charged with infringement, even if it had used the copied plans, because use cannot form the basis for infringement).


112. See DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184, 193-96 (M.D. Fla. 1962). A structure is the result of plans, not a copy, and blueprints are copied only by their reproduction into similar technical drawings. Katz, supra note 2, at 236. This proposition is reasonable for dealing with the issue of whether construction of building is a publication that divests the architect of his common-law copyright in the plans. See Krahmer v. Luing, 127 N.J. Super. 270, 317 A.2d 96 (Ch. Div. 1974); Edgar H. Woods Assocs., Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964). It does not, however, warrant the conclusion that the unauthorized use of plans is permissible.

as the three-dimensional reproduction of the plans. 114 Furthermore, the Copyright Act grants the copyright owner the exclusive right to reproduce his work in copies, 115 which, as defined in the Act, include not only two-dimensional plans and drawings, but also completed structures derived from those plans and drawings. 116 Copyright prohibits copying in any medium, and subject to the Act's useful article limitations, no fundamental principles are offended by ruling that plans are infringed when they are used—that is, copied into a structure—without authorization. 117

Both Baker and section 102(b) of the Act make it clear that the copyright monopoly cannot extend to ideas, discoveries, methods, and systems regardless of how they are expressed. There is nothing in copyright law, however, that justifies the proposition that copying for use, versus copying for explanation, is not an infringement. The Act proscribes reproduction without qualification; it does not immunize use. 118 No risk of monopolizing unprotectible ideas or methods of construction would result from recognizing that the unauthorized use of copyrighted plans to construct a building constitutes infringement. In view of the wide variety of ways that ideas contained in blueprints can be

114. Cal. Comment, supra note 1, at 478-79. See also King Features Syndication v. Fleischer, 299 F. 533, 535 (2d Cir. 1924) ("A copy is that which ordinary observation would cause to be recognized as having been taken from or the reproduction of another.").


116. Id. § 101 ("'copies' are material objects . . . in which a work is fixed by any method . . . and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."). In addition, a structure can be viewed as derivative of or adapted from copyrighted plans and, therefore, within the copyright owner's exclusive right to prepare derivative works. Id. § 106(2). See id. § 101 (definition of "derivative work"); Cornell Note, supra note 3, at 97 & n.121. An architect also could attempt to show that the defendant's completed structure was copied from the architect's graphic rendition or scale model. Anyone viewing the finished building would then see a "copy" of the architect's design or model. See, e.g., Jones Bros. v. Underkoffler, 16 F. Supp. 729 (M.D. Pa. 1936). Models are copyrightable under 17 U.S.C. §§ 102(a)(5), 101 (definition of "pictorial, graphic, and sculptural works") (1982), but the Act's "useful article" limitations restrict the scope of protection afforded to the completed structure. See infra notes 151-84 and accompanying text.

117. Cf. 1 M. Nimmer, supra note 6, § 2.08[D], at 2-108 & n. 176; 2 M. Nimmer, § 8.01[B]; Cal. Comment, supra note 1, at 479; Cornell Note, supra note 3, at 97.

expressed by an architect, it is erroneous to conclude that a comparable dwelling can be constructed only by the use of one particular set of copyrighted blueprints.\textsuperscript{119} There is no justification for allowing a person who wants to construct a building similar to one portrayed in and erected in conformity with copyrighted plans to use those plans freely or to reproduce them in two-dimensional copies. Thus, in accordance with \textit{Baker} and the Act itself, a person is free to use the architect's unprotectible ideas and concepts, but should not be allowed to use the architect's protectible expression.\textsuperscript{120}

\textbf{IV. THE COPYRIGHTABILITY OF STRUCTURES}

The protection that copyright gives completed structures is even less certain than that afforded to the unauthorized reproduction and use of plans.\textsuperscript{121} At issue is whether an architect can prevent a person with sufficient drafting skills from copying the exterior and interior designs of a building and then erecting a substantially similar structure. Under existing law, copyright may not grant architects an exclusive right to reproduce the structures erected from their protected blueprints\textsuperscript{122} even

\begin{flushright}
\begin{footnotesize}
\textsuperscript{119. Cf. Ga-On Homes, Inc. v. Spitzer Homes, Inc., 178 U.S.P.Q. (BNA) 183, 185 (M.D. Fla. 1973). Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1251-53 (3d Cir. 1983)\textsuperscript{120. Cf. MacMillan Co. v. I.V.O.W. Corp., 495 F. Supp. 1134 (D. Vt. 1980); see supra note 110. In Mazer v. Stein, 347 U.S. 201 (1954), the Supreme Court interpreted \textit{Baker} to hold that copying an idea without copying the expression does not infringe and found that a statuette was copyrightable even though it was intended to be mass-produced and used as a lamp base. \textit{Id.} at 217. This interpretation implies that the distinction between copying for use versus explanation is dictum that will not be followed. 1 M. \textsc{Nimmer}, supra note 6, § 2.18[D], at 2-206. See Cal. Comment, supra note 1, at 477-78; Cornell Note, supra note 3, at 95, 97.\textsuperscript{121. Katz, supra note 2, at 237 (also noting that most countries, including England, provide copyright protection for structures). See also Hellmuth, supra note 1, at 180-87 (discussing the protection afforded to structures in several European nations); Cornell Note, supra note 3, at 85-86; Cal. Comment, supra note 1, at 480-84 (discussing the possibility of classifying architectural creations as works of art). Cf. Study No. 27, supra note 2, at 70, 75-76.\textsuperscript{122. An architect's copyright on plans does not prevent a person from constructing a substantially identical dwelling. Cf. Imperial Homes Corp. v. Lamont, 459 F.2d 895, 899 (5th Cir. 1972). See also Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 941 (W.D. Tex. 1982); Comment, Copyright Protection for Architectural Structures, 2 U.S.F.L. Rev. 320, 321 (1968)[hereinafter cited as U.S.F. Comment]; Herman Frankel Org., Inc. v. Tegman, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973); Edgar H. Wood Assocs., Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964); Krahmer v. Luing, 127 N.J. Super.}
\end{footnotesize}
\end{flushright}
though such protection would provide an additional incentive for architects to create.\textsuperscript{123}

The United States, unlike several European nations, does not explicitly afford protection to the designs of completed structures.\textsuperscript{124} In a 1961 report, the Register of Copyrights recommended against extending protection to the design of functional architectural structures because of the difficulty in distinguishing between the functional and artistic features of a design.\textsuperscript{125} It is not clear, however, whether the 1976 Copyright Act incorporated the Register's suggestions. The Act states that "pictorial, graphic, and sculptural works" are copyrightable\textsuperscript{126} and defines this category as two- or three-dimensional works "of fine, graphic, and applied art . . . technical drawings, diagrams, and models."\textsuperscript{127} Further, copyright includes the exclusive right to reproduce the protected work in "copies,"\textsuperscript{128} which are defined as material objects "in which a work is fixed by any method . . . and from which the work can be perceived, reproduced or otherwise communicated . . . ."\textsuperscript{129} Since a structure is a copy of its blueprints just as a statue is a copy of a sculptor's drawings or model for that work of art,\textsuperscript{130} the terms of the 1976 Act do not


\textsuperscript{124} A set of plans might be marketable, but if the resulting structure can be copied freely after it is erected, then the architect is deprived of the business of those who want a similar structure. Cornell Note, supra note 3, at 95-96.

\textsuperscript{125} See Study No. 27, supra note 2, at 73-74; Hellmuth, supra note 1, at 273-74; supra note 121. \textit{See also infra} notes 251-64 and accompanying text.


\textsuperscript{128} \textit{Id.} § 101 (definition of "pictorial, graphic, and sculptural works"). \textit{See also} Cal. Comment, supra note 1, at 480-82 (arguing that some architectural creations could be classified as works of art under the 1909 Act, 17 U.S.C. § 5(g) (1973)).

\textsuperscript{129} 17 U.S.C. § 106(a) (1982).

\textsuperscript{130} \textit{Id.} § 101 (1982)(definition of "copies").

\textsuperscript{131} \textit{See supra} notes 40-46 and accompanying text. \textit{See also} Mazer v. Stein, 347 U.S. 201 (1954)(artistic reproduction of a dancing human figure used as a lamp base copyrightable and infringed by defendant's reproduction of that figure). \textit{Cf.} Letter Edged in Black Press, Inc. v. Public Building Comm'n of Chicago, 320 F. Supp. 1303 (N.D. Ill. 1970)(monumental statue copyrightable); Jones Bros. Co. v. Underkoffer, 16 F. Supp. 729 (M.D. Pa. 1936)(plaintiff's memorial was copyrightable as a design for a work of art and was infringed by defendant's memorial). \textit{See also} Hellmuth, supra note 1, at 173-74, 177-78; Cal. Comment, supra note 1, at 479, 481-82; supra notes 112-17 and accompany-
foreclose copyright protection for structures.\footnote{131}

An architect's rights in the design of a functional structure, however, are not coextensive with a sculptor's rights to control reproductions and adaptations of his statuary. The Copyright Act reflects a strong policy against the monopolization of ideas in two places: the idea/expression dichotomy\footnote{132} and the limitations on the protection afforded to useful articles.\footnote{133} These limitations represent an attempt to prevent any monopolization of the functional and utilitarian features incorporated into a work of authorship.\footnote{134} Accordingly, if a building is functional, there may be only a few aspects of it that are protectible. It would be difficult to show that the construction of a substantially similar dwelling constituted infringement unless the defendant had reproduced or used the architect's plans.\footnote{135} If few aspects of the design of a building are copyrightable, there is nothing to stop a skilled draftsman from carefully scrutinizing and sketching a structure to prepare his own plans for the construction of a substantially similar building.\footnote{138}

\section*{A. An Architect's Unprotectible Ideas}

It is well established that ideas are not protectible; only the

\footnotesize{\textbf{\textit{Endnotes}}}

\footnote{131}{See also H.R. Rep. No. 1476, supra note 14, at 55; infra text accompanying notes 223-32.}

\footnote{132}{17 U.S.C. § 102(b) (1982). See also Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972); Herman Frankel Org., Inc. v. Tegman, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973) (\textit{Baker} permitted the system to be copied, but it did not permit copies to be made of the book).}

\footnote{133}{17 U.S.C. § 101 (1982)(definition of "pictorial, graphic, and sculptural works"). See infra notes 151-84 and accompanying text.}

\footnote{134}{1 M. NIMMER, supra note 6, § 2.08[D], at 2-108.2; Krahmer v. Luing, 127 N.J. Super. 270, 276, 317 A.2d 96, 98-99 (Ch. Div. 1974); Cal. Comment, supra note 1, at 479; Cornell Note, supra note 3, at 85-86; U.S.F. Comment, supra note 122, at 321.}

\footnote{135}{1 M. NIMMER, supra note 6, § 2.08[D], at 2-108.2; Krahmer v. Luing, 127 N.J. Super. 270, 276, 317 A.2d 96, 98-99 (Ch. Div. 1974); Cal. Comment, supra note 1, at 479; Cornell Note, supra note 3, at 85-86; U.S.F. Comment, supra note 122, at 321.}
author's original expression of ideas is copyrightable.\(^1\)\(^3\)\(^7\) This fundamental principle defines and limits the protectible elements of a structure in the same way that it limits the scope of protection afforded to any work of authorship.\(^1\)\(^3\)\(^8\) If an architect had exclusive rights to methods of construction or to design concepts, then he could prevent others from creating variations on those concepts and methods.\(^1\)\(^3\)\(^9\) This type of control by the architect would contravene copyright's objective of encouraging the production of works of authorship for public benefit.\(^1\)\(^4\)\(^0\) Thus, general design ideas and concepts expressed in a building are not protectible and can be copied freely from casual observation. On the other hand, the detailed plans and drawings of a specific building are copyrightable.\(^1\)\(^4\)\(^1\)

This dichotomy may defeat an architect's claim of infringement even if he establishes that the defendant had access to and used his copyrighted plans or deliberately imitated general aspects of his completed structure. A general impression of similarity between structures resulting from the similarity of ideas does not state a case of infringement.\(^1\)\(^4\)\(^2\) In \textit{Wickham v. Knox-}

\begin{enumerate}
\item[139.] For example, the idea of a tower with an enclosed structure on top is not copyrightable. Similarly, an architect cannot monopolize the idea of constructing a T-shaped building or a house erected with 2x4s, a pitched roof, and a slab foundation. See Wickham v. Knoxville Int'l. Energy Exposition, Inc., 739 F.2d 1094 (6th Cir. 1984); Nucor Corp. v. Tennessee Forging Steel Servs., Inc., 476 F.2d 386, 380 (8th Cir. 1973); Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972). Cf. Copyrightability—Works Not Copyrightable—Ideas, N.Y. Op. Att'y Gen. No. 84-F9 (Nov. 8, 1984), reprinted in 1985 Copyright L. Dec. (CCH) ¶ 25,753.
\item[140.] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954). Cf. Abrams, supra note 9, at 510. It is very common for architects to draw on the ideas of other designers. Cornell Note, supra note 3, at 91-94. Helmut Jahn's Illinois Center, for example, draws upon the geometry of I. M. Pei and Edward Larrabee Barnes, the office atrium used by Kevin Roche, the glass-enclosed elevators of John Portman, and the use of color by the firm Arquitectonia. The Battle of "Starship Chicago," \textit{Time Magazine}, February 4, 1985, at 84. These are unprotectible ideas and concepts.
\item[141.] For example, a modern home in America could not be built without bedrooms, bath, kitchen, and family room—necessities that are not copyrightable. An architect's particular arrangement of these rooms, however, results in an appealing, salable product that should be copyrightable. Cf. Ga-On Homes, Inc. v. Spitzer Homes, Inc., 178 U.S.P.Q. (BNA) 183, 185 (M.D. Fla. 1973). See also Nucor Corp. v. Tenn. Forging Steel Servs., Inc., 476 F.2d 386, 390; Cal. Comment, supra note 1, at 468-69.
\item[142.] In order to recover in an infringement action, the plaintiff must prove that he
\end{enumerate}
ville International Energy Exposition, Inc., for example, the plaintiff alleged that defendants had used and infringed the architect’s copyrighted drawings for the “Tower of Power” in order to design and build the “Sunsphere,” the central theme structure of the 1982 World’s Fair in Knoxville. According to the plaintiff, the architect had prepared two different renderings of his tower and turned over his copyrighted drawings to one of the defendants in 1977. These works were then allegedly furnished to and used by another architectural and engineering firm.

The defendants contended that there was no substantial similarity between the respective works and moved for summary judgment. The district court agreed because it was “impressed by the virtual absence of any similarity between . . . [the] structural designs.” Each rendition depicted enclosed buildings on top of elevated towers. One of the plaintiff’s two designs was a spherical building similar to defendants’ “Sunsphere,” but there were differences in the bases, the enclosed buildings, and the dimensions and proportions of the parties’ towers. The court stated:

Plaintiff seems to be asserting that he has the exclusive right to design and erect a tower with a spherical building on top of it. The use of towers in architectural designs is certainly not unique . . . Likewise the incorporation of a spherical struc-

owns the copyright and that the defendant copied his original work. Mazer v. Stein, 347 U.S. 201, 218 (1954); Reyher v. Children’s Television Workshop, 533 F.2d 87, 90 (2d Cir.), cert. denied, 429 U.S. 980 (1976). Absent direct evidence of copying, the plaintiff must prove defendant’s access to his work as well as similarities that demonstrate copying. Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1162 (9th Cir. 1977). He also must prove that the defendant copied more than the law permits—that there is substantial similarity of copyrightable expression. Ideal Toy Corp. v. Fab-Lu, Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966); 3 M. Nimmer, supra note 6, §§ 13.01, 13.02. See also Schuchart & Assoc. v. Solo Serve Corp., 220 U.S.P.Q. (BNA) 170, 176 (W.D. Tex. 1983)(defendants photocopied 20 pages of plaintiff’s specifications). Cf. Durham Indus. v. Tomy Corp., 630 F.2d 905, 912 (2d Cir. 1980). No amount of proof of access will suffice to establish copying if there are no similarities. Sid & Marty Krofft, 562 F.2d at 1172. See also infra notes 273-89 and accompanying text.

144. 555 F. Supp. at 155 (plaintiff was the trustee in bankruptcy for the estate of Marc Cardoso, author of the copyrighted architectural drawings allegedly infringed).
145. Id. at 157.
146. Id. at 155.
147. Id.
ture into the design is no more than an "idea."\textsuperscript{148}

The court concluded that there was no evidence from which a jury could find substantial similarity.\textsuperscript{149} On appeal the Sixth Circuit, while acknowledging that summary judgment is sparingly granted in infringement actions, affirmed because of the substantial design differences between the works and because the 'idea' of a tower structure is not copyrightable.\textsuperscript{150}

\textbf{B. The Useful Article and Utilitarian Function Limitations}

Copyright protects three-dimensional works of applied art, including works of artistic craftsmanship, under the rubric of "pictorial, graphic, and sculptural works."\textsuperscript{151} That protection, however, extends only "insofar as their form but not their mechanical or utilitarian aspects are concerned."\textsuperscript{152} A related limitation provides that the design of a useful article "shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, the design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article."\textsuperscript{153} A useful article is defined as one "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'"\textsuperscript{154}

Courts have experienced difficulty in determining whether

\textsuperscript{148} Id. at 156.
\textsuperscript{149} Id. at 156-57.
\textsuperscript{150} 739 F.2d at 1097. See 3 M. Nimmer, supra note 6, § 12.10. One of the defendants admitted having seen a newspaper article with a sketch of plaintiff's tower, but all denied that the sketch influenced their design and asserted that the "Sunsphere" was their original creation, that a sunlike object was an appropriate symbol for the fair (an energy exposition), and that economic and engineering considerations influenced their tower design. 555 F. Supp. at 156. Despite a dispute over access and copying, summary judgment was appropriate since there was no similarity of protectible expression.
\textsuperscript{151} 17 U.S.C. §§ 102(a)(5), 101 (definition of "pictorial, graphic, and sculptural works") (1982). The enumeration of works within the category is illustrative and not exclusive. \textit{Id.} § 101 (definition of terms "including" and "such as").
\textsuperscript{152} 17 U.S.C. § 101 (1982)(definition of "pictorial, graphic, and sculptural works").
\textsuperscript{153} Id.
\textsuperscript{154} Id. (definition of "useful article"). Thus, a blueprint is not a useful article since it functions merely to portray the article and to convey information. \textit{See supra} note 18.
particular works of authorship are useful articles and in applying the Act’s separability and independence test to ascertain whether a useful article contains any features that are copyrightable.\(^{155}\) Many articles have aesthetic as well as useful functions, and practical use is not necessarily dominant. As a result, consumer decisions to purchase items are frequently based on criteria beyond mere utility; it is often important for articles to be decorative or stylishly designed as well.\(^{156}\) It has been suggested, therefore, that in determining an article’s copyrightability, courts should consider whether its marketability is affected by such aesthetic qualities.\(^{157}\) For example, although most items of apparel are utilitarian, particular articles are often purchased because of the style, cut, shape, and dimensions that result from the dress designer’s artistic skills. Some people will pay a premium price for such qualities. Thus, the function of many stylishly designed garments is not limited to practical use; rather, they are purchased for decoration or to create an image. Accordingly, protection would seem to be warranted.\(^{158}\)

Despite these arguments, dress and apparel designs generally are not copyrightable.\(^{159}\) The Copyright Act’s definition of “useful article” employs the phrase “an intrinsic utilitarian function”\(^{160}\) in contrast to the troublesome “sole intrinsic func-

---


157. Cf. Poe v. Missing Persons, 745 F.2d 1238, 1243 (9th Cir. 1984); Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989, 992 (2d Cir. 1980); 1 M. NIMMER, supra note 6, § 2.08[B], at 2-96.2 to -96.3; Denicola, supra note 134, at 731-35.


159. 1 M. NIMMER, supra note 6, § 2.08[H][3], at 2-125; contra Poe v. Missing Persons, 745 F.2d 1238, 1243 (9th Cir. 1984).

tion" language contained in regulations adopted under the 1909 Act. It is, therefore, difficult to argue that items of apparel are not useful articles. Further, most dress designs do not contain any features that are physically or conceptually separable from the article's utilitarian aspects. The design on the fabric from which a dress is made might be copyrightable, but the design of the dress itself is not.

Similarly, because many people want to live and work in buildings that are both aesthetically pleasing and functional, they are willing to pay for an architect's professional services to create a distinctive design. The designs of many structures should be copyrightable because appearance and design may be as important as function. Nevertheless, the Act's barriers to the protection of dress and apparel designs also limit copyright protection for functional structures.

An architect might escape the Act's useful article limitations by arguing that he has created a work of art, like a piece of sculpture. This argument would be successful, however, only if

161. 37 C.F.R. § 202.10(c) (1960). See Cal. Comment, supra note 1, at 483 (arguing that architectural creations are not solely useful; some may have dual intrinsic characteristics of art and utility).

162. 1 M. Nimmer, supra note 6, § 2.08[B], at 2-90 to 93 (discussing Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1982), and the interpretive problems stemming from the "sole intrinsic function" phrase in 37 C.F.R. § 202.10(c) (1960) versus the "an intrinsic function" language in 17 U.S.C. § 101 (1982) (definition of "useful article"). Although utility is not necessarily the "sole" function of many stylish garments, they do have the intrinsic utilitarian function of protection from unwanted exposure.

163. 1 M. Nimmer, supra note 6, § 2.08[H][3], at 2-125. Cf. Norris Indus. v. International Tel. & Tel. Corp., 696 F.2d 918 (11th Cir.), cert. denied, 464 U.S. 818 (1983). But see Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984) (summary judgment inappropriate on issue of whether plaintiff's creation was a swimsuit (a useful article) or a copyrightable work of conceptual art; see infra note 167).

164. 1 M. Nimmer, supra note 6, § 2.08[H], at 2-124 to 126. Contra Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984).

165. Cf. Cal. Comment, supra note 1, at 483-84 (arguing that architectural creations should be copyrightable as works of art because they have dual intrinsic characteristics of art and utility).

166. Gerber, Book Review, 26 UCLA L. Rev. 925, 939, 942 (1979) (reviewing M. Nimmer, Nimmer on Copyright (2d ed. 1978) and discussing Professor Nimmer's approach to the separability test that treats structures and dress designs in the same way). See 1 M. Nimmer, supra note 6, at §§ 2.08[D]-b, 2.08[H]-3.

167. 17 U.S.C. § 101 (1982) (definition of "useful article"). See, e.g., Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984). Poe created an article that he described as an art work in the medium of soft sculpture. It had the appearance of a swimsuit, an article of clothing, and a photo of a person wearing his creation was used, without his consent, on
there were no evidence to support a finding that the work had a utilitarian function. For instance, the designs of cemetery memorials and other monumental and nonfunctional structures like the Eiffel Tower are entitled to full copyright protection notwithstanding the Act's useful article limitations.

Monuments and memorials, however, are designed primarily to be symbols and are more akin to sculpture and other three-dimensional works of art than to the standard products of architects' creative labors, such as homes, office buildings, shopping centers, and apartments. These functional structures will always be subject to the Act's useful article limitations. Most buildings are useful articles because each has an intrinsic utilitarian function, such as shelter. By contrast, an architect’s plans and scale models are not useful articles because they merely depict the real structures. Since a completed building's useful function usually will be obvious, a judge can determine as a matter of law whether the purpose of an architect's creation is utilitarian.

defendant's record album cover. He sued for infringement, and the district court granted summary judgment for defendants because Poe's creation was an uncopyrightable article of clothing. The court of appeals, however, reversed, concluding that there was a disputed issue of material fact as to whether the creation was a work of art or a swimsuit.  

168. Cf. Poe v. Missing Persons, 745 F.2d 1238, 1242 (9th Cir. 1984). Plaintiff's uncontradicted evidence established that his "swimsuit" existed solely as a work of art. There was no evidence that the article could be used as a swimsuit or that a person wearing it could move, walk, swim, sit, or lie down without unwelcome exposure. It might have been marketable as art even if it had no utilitarian function. Id. at 1241-42. See supra note 167.

169. See, e.g., Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n of Chicago, 320 F. Supp. 1303 (N.D. Ill. 1970)(Picasso's monumental statue for the City of Chicago was copyrightable, but there was a general publication divestive of common-law copyright protection); Jones Bros. v. Underkoffler, 16 F. Supp. 729 (M.D. Pa. 1938); 1 M. NIMMER, supra note 6, § 2.08[D][2][b], at 2-108.2.


171. So long as an article does not function solely to portray the appearance of an article or to convey information, like plans or scale models, it may be considered a useful article. N. Boorsyn, supra note 13, § 2:25, at 77; 17 U.S.C. § 101 (1982)(definition of "useful article"). Cf. Gay Toys, Inc. v. Buddy L. Corp., 703 F.2d 970, 973 (6th Cir. 1983)(toy airplanes are protectible because they have no intrinsic utilitarian function other than to portray real airplanes).

172. Cf. Norris Indus. v. International Tel. & Tel., 696 F.2d 918, 922 (11th Cir.), cert. denied, 464 U.S. 818 (1983); Poe v. Missing Persons, 745 F.2d 1238, 1242 (9th Cir. 1984)(the artist's uncontradicted evidence established that the only reason for the exis-
Analysis must, therefore, focus on the Act’s test of separability and independence; copyrightability depends on whether any of a building’s features can be identified separately from its utilitarian aspects.\textsuperscript{173} The Register of Copyrights and the courts have upheld the copyrightability of some artistic elements embodied in utilitarian objects. As noted above, fabric designs are protectible.\textsuperscript{174} Similarly, copyright protection is also available for certain personal accessories that perform utilitarian functions,\textsuperscript{175} such as ornamental belt buckles.\textsuperscript{176} The Act’s legislative history also supports the copyrightability of design elements that can be separated, either physically or conceptually, from a useful article’s utilitarian aspects.\textsuperscript{177} There has, however, been considerable disagreement and uncertainty about the meaning and impact of “conceptual” separability.\textsuperscript{178} Further, courts have recognized that the aesthetic elements of some articles are so inextricably interwoven with the item’s utilitarian aspects that there are no features that can be separated conceptually, let alone physically, to stand alone as copyrightable works.\textsuperscript{179} As a consequence, some attractively designed useful articles are not copyrightable because their designs do not incorporate features that are separa-

\textsuperscript{173} Cf. Fabrica, Inc. v. El Dorado Corp., 697 F.2d 890, 892-93 (9th Cir. 1983); H.R. REP. No. 1476, supra note 14, at 55.


\textsuperscript{176} Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989 (2d Cir. 1980).

\textsuperscript{177} H.R. REP. No. 1476, supra note 14, at 55. See also Esquire, Inc. v. Ringer, 591 F.2d 786, 807 (D.C. Cir. 1978)(Leventhal, J., concurring).

\textsuperscript{178} Compare Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411, 419-26 (2d Cir. 1985)(Newman, J., dissenting) with 1 M. Nimmer, supra note 6, at § 2.08[B] [and] Gerber, supra note 166, at 938-43. Since the statute’s definitions do not even mention “conceptual” separability, this permissive approach to ascertaining the copyrightable features in a useful article arguably conflicts with the Act’s explicit terms. Id. at 939.

ble and independent of their utilitarian aspects.\textsuperscript{180} Thus, if the design of a structure contains no elements or features that are physically or conceptually separable from that structure's utilitarian aspects, then nothing in that structure's design is entitled to copyright protection.\textsuperscript{181}

The Act's legislative history acknowledges that the physically or conceptually separable artistic touches that an architect incorporates into a structure are copyrightable whether the embellishments are on the building's interior or exterior.\textsuperscript{182} If, however, the Act's useful article limitations are interpreted restrictively, nothing aside from "add on" works of art will be protectible in a functional architectural design. For example, few if any features would be protectible in a stylish but unadorned "Miesian" style home or office building designed by an architect who follows the credo "less is more" or "form follows function." "Less" means "less," and perhaps no copyright protection should be afforded to any of the design aspects of a glass box structure. In contrast, an architect seeking to emulate his Victorian predecessors would be able to fare much better under the Act's separability test. By embellishing the structure with ornate carvings and decorations, he could create sculptural ornamentation that might stand alone conceptually, or perhaps even physically, from the building's utilitarian aspects and that would, therefore, be protectible.\textsuperscript{183} Similarly, the gargoyles embellishing a school building designed in an imitation gothic style would be protectible because with some imagination they could be conceptually chiseled away from the structure to stand alone.\textsuperscript{184}


\textsuperscript{181} H.R. Rep. No. 1476, supra note 14, at 55; Cornell Note, supra note 3, at 85-86.

\textsuperscript{182} For instance, protection should be available for ornamentation like the scrollwork incorporated in the window panels on some of Louis Sullivan's office buildings, or a stained glass window, or perhaps even original trim and molding designed by an architect and milled by a skilled artisan. Cf. H.R. Rep. No. 1476, supra note 14, at 55.

\textsuperscript{183} H.R. Rep. No. 1476, supra note 14, at 55.

\textsuperscript{184} Cf. Denicola, supra note 134, at 716. Prior to Mazer v. Stein, 347 U.S. 201 (1954), the Register of Copyrights granted registration to stained glass windows and bas-relief bronze doors. Amicus Curiae Brief for the Register of Copyrights at 27-28, Mazer v. Stein, 347 U.S. 201 (1954). Such works should be treated as features added to a structure, which are capable of existing separately from the building's utilitarian purpose.
school building designed in the Bauhaus style, on the other hand, would probably have no separable features and, thus, would not be copyrightable at all. The Act's test of separability and independence thus affords limited copyright protection to some architectural styles, while other styles or schools of design are deprived of protection entirely.

V. THE CASE FOR AN EXPANSIVE DEFINITION OF THE COPYRIGHTABLE FEATURES IN A STRUCTURE

While it is reasonable to protect the separable artistic features added to some functional structures, architects are more concerned in having protection for the overall appearance of their buildings and for their arrangements of space, such as the dimensions, configuration, and locations of rooms, halls, doors, windows, closets, and the like. They organize and arrange spaces and shapes to create structures that function effectively and efficiently and are aesthetically pleasing as well. Architects produce works of authorship that are as much the product of the creative process as any other manner of artistic output. Nevertheless, when the Act's separability test is interpreted and applied restrictively, many of the important creative features

185. Cf. Cornell Note, supra note 3, at 95-96, 98-99 (protection for the overall design is needed, but protection of individual ornamental design elements is inappropriate).

186. Far less creative effort and skill go into the preparation of many catalogues and directories that collect, arrange, and organize unprotectible facts and data; yet such compilations are copyrightable. 17 U.S.C. §§ 103(a), 101 (definition of "compilation") (1982). See, e.g., Schroeder v. William Morrow & Co., 566 F.2d 3 (7th Cir. 1977); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982). Some decisions have prevented the copying of the materials in a compilation by extending protection to the compiler's labor in preparing the work. 1 M. Nimmer, supra note 6, § 3.04, at 3-15. A compilation's collection of previously unavailable data is valuable, and protection affords an incentive for the creation of such works. National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89, 92 (N.D. Ill. 1982). In view of the importance of architecture and the great amount of thought, technical skill, judgment, artistic effort, and plain hard work that go into the design and execution of plans and the resulting structure, architectural works warrant at least as much copyright protection as compilations.


188. The Act's limitations on the copyrightability of useful articles are a significant barrier to adequate protection even though the separability and independence test has been applied inconsistently to works of applied art, such as belt buckles, wheel covers, and mannequins, and despite the potential for manipulating the conceptual separability.
embodied in a functional structure will be unprotectible regardless of the originality and attractiveness of the structure’s interior and exterior appearance.

Additionally, under modern interpretations, once a structure is erected, an architect cannot stop the imitation of that structure’s design if the copier does not reproduce or use his plans or copy the structure’s separable features and embellishments. An individual can walk through a completed or partially constructed dwelling, observe its design, make detailed notes about the configuration, dimensions, and locations of rooms, windows, and doors, and prepare his own set of plans. The copier can then use those plans to erect a substantially similar dwelling without infringing the architect’s copyright.\textsuperscript{189} The copier has not reproduced or used the architect’s protected blueprints, but has copied the architect’s design for a functional, useful article. The former is considered an infringement, but the latter is not.

This dichotomy constitutes a distinction without a difference. In each situation the product of an architect’s creative genius has been appropriated. It is inequitable and inappropriate to permit a person to scrutinize an existing structure in order to reproduce it; this type of copying is no different from reproducing protected plans.\textsuperscript{190} Several cases addressing architects’ common-law rights held that the erection of a building did not publish the plans and that the public did not acquire a proprietary interest in the work from its construction and exhibition.\textsuperscript{191} Construction does not indicate an architect’s intent to abandon his rights either to the plans or to “copies” of them, including the building they portray.\textsuperscript{192} Moreover, the Act’s definition of “copies” does not have to be distorted in order to treat a building as

\textsuperscript{189} See supra notes 173-84 and accompanying text. There are few reported decisions discussing the application of the separability and independence test to architectural structures; thus it is necessary to analyze this problem by looking to analogous cases addressing the copyrightability of works of applied art and industrial design.


\textsuperscript{191} Cf. Cal. Comment, supra note 1, at 469.

\textsuperscript{192} Edgar H. Wood Assocs., Inc. v. Skene, 347 Mass. 351, 365, 197 N.E.2d 886, 894 (1964); Cal. Comment, supra note 1, at 469. The erection of a structure should not be regarded as a divestive publication; that doctrine is outmoded.

\textsuperscript{192} Cal. Comment, supra note 1, at 470.
A copy of the architect’s plans. A person should, thus, be regarded as an infringer when he reaps where he has not sown, whether he reproduces plans in two-dimensional copies, uses plans without authorization to build the structure they depict, or studies an existing structure in order to prepare a set of plans for the erection of a substantially similar structure.

The copyright law can and should be interpreted to protect many of the design aspects of functional architectural structures without contravening either the idea-expression dichotomy or copyright law’s related prohibition against protecting the utilitarian aspects of useful articles. This contention can be illustrated through a hypothetical architectural design competition. The contest rules state that prizes will be awarded for the five best designs of a modestly priced, medium sized, single family home, as judged by a panel of experts. The home must be one story and no larger than 1800 square feet; it must have three bedrooms and two baths, be of frame construction, and be heated and cooled with a heat pump. Additionally, the total cost of the home, aside from the land, must not exceed $80,000.

There are many unprotected architectural design ideas and concepts that all of the contestants might employ in drawing their own plans for this modest dwelling. Although they work independently, there are bound to be similarities in their designs stemming from commonly held ideas regarding the logical locations for closets, bathrooms, and kitchen. In order to keep costs low, many of the architects may incorporate into their plans and specifications standardized, mass-produced doors, windows, moldings, and other details. This choice too will lead to some similarities in their designs. Thus, many architects independently designing an attractive and efficient home within the contest’s guidelines may use the same ideas and concepts to complete their projects, and as a result, their plans would display several similarities. Nevertheless, these plans would be copyrightable because they were prepared independently without copying.

Assume that the five best designs are selected and model

193. See supra notes 112-17 and accompanying text.
homes are then built in accordance with these winning plans. The differences and similarities between the respective copyrightable plans would be even more apparent once the dwellings are erected. Despite the obvious similarities compelled by the contest rules, differences in the exteriors and interiors should be apparent as a result of each architect's independent efforts. In a general sense, each dwelling functions in the same way; nevertheless, each architect resolved the design problem, employed unprotectible ideas and concepts, and created a functional architectural design without copying his competitors' works of authorship.

In view of the many ways in which this simple dwelling can be designed, there are no risks in affording copyright protection to many aspects of these functional architectural designs. Protection will not enable the copyright owner to stop other architects from independently designing structures that function in the same way. An architect should, however, be able to prohibit others from copying his particular manner of expression by reproducing the design aspects of his structure, and these protectible design features should include, among other things, the specific configuration of rooms and their dimensions, the arrangement of spaces and shapes, the location of doors and windows, and some of the choices of materials. These design features should be recognized as the architect's copyrightable expression of architectural ideas, concepts, and principles.

In essence, an architect's expression of his work of authorship in blueprints, plans, models, and an actual structure should be copyrightable even though the structure itself is a functional, utilitarian article. Thus, the architect's rights would be infringed by the unauthorized copying or use of his plans and by the reproduction of the copyrightable aspects of a completed structure. Other architects should be free to borrow design concepts and architectural principles to create independently other buildings that function like the copyright owner's structure, but the policy favoring the free use of ideas does not warrant the appropriation of the architect's manner of expressing those concepts and principles in a completed structure. The unauthorized reproduction of the design aspects of a completed, functioning structure should be treated no differently from the unauthorized copying or use of plans—as an infringement of the architect's copyright.
A. Accommodating Expanded Protection within the Copyright Act

1. The Limitations in Section 113

The hypothetical architectural design contest posed above illustrates that copyright can protect many of the design aspects of functional structures, as well as separable embellishments, without contravening the fundamental principle that ideas, systems, methods, and processes are not copyrightable. Further, this approach to copyrightability can be accomplished within the restrictions of the Copyright Act of 1976; there is no need for an amendment to explicitly afford protection to the design of functional structures.

Section 113(a) of the Act provides that the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work includes the right to reproduce the work in any kind of article, whether useful or otherwise. This section thus recognizes the architect's exclusive right to control the reproduction of his plans in the form of another set of plans and in the form of the useful structure executed from those plans. Therefore, an architect should be able to claim exclusive rights in the structure subject to the Act's useful article limitations and the restrictions in sections 113(b) and 113(c).

Section 113(c) provides:

(c) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of

---

196. See Ga-On Homes, Inc. v. Spitzer Homes, Inc., 178 U.S.P.Q. (BNA) 183 (M.D. Fla. 1973), aff'd mem., 492 F.2d 1241 (5th Cir. 1974) (the peculiar arrangement of a kitchen, bedroom, and family room results in a design concept that is a marketable and copyrightable product).

197. Contra Cornell Note, supra note 3, at 81, 96-100.


199. Plans are copyrightable, H.R. Rep. No. 1476, supra note 14, at 55; they are not useful articles as defined in the Act because their intrinsic function is to convey information on the construction of a building. 1 M. Nimmer, supra note 6, § 2.08[D], at 2-105. Rather, plans portray a useful article; thus when they are reproduced in three dimensions, the resulting "copy" is a building that ordinarily has a utilitarian function. See supra note 18.
such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.\textsuperscript{200}

This provision does not significantly restrict an architect’s rights against those who reproduce copyrightable elements from his executed designs. Rather, it is a minor limitation that prevents the copyright owner from complaining about photographs of the completed work that are made and used in connection with news reports, commentaries, and advertisements. Thus, an architect’s reproduction, distribution, and display rights in the copyrightable aspects of a structure are not violated when photographs of that structure are published.\textsuperscript{201} The copyright laws of several nations that explicitly afford copyright protection to structures contain similar provisions.\textsuperscript{202}

A more troublesome limitation is presented in section 113(b), which provides:

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.\textsuperscript{203}

\textsuperscript{200} 17 U.S.C. § 113(c)(1982).

\textsuperscript{201} There is no doubt that a photograph of a copyrighted three-dimensional object can infringe. See, e.g., Ronald Litoff, Ltd. v. American Express Co., 621 F. Supp. 981 (S.D.N.Y. 1985). Thus, without the § 113(c) exemption, a building could not be photographed, since the photo “reproduces” the work, until the architect’s copyright expired. This restriction would be intolerable. Cf. Hellmuth, supra note 1, at 184.

\textsuperscript{202} For instance, the German copyright statute immunizes pictures and other two-dimensional representations of works permanently displayed on public streets, including architectural exteriors. An Act Dealing with Copyright and Related Rights, Pt. I, § VI, art. 59 (1965); see Hellmuth, supra note 1, at 184. This sort of provision is common in statutes protecting architectural works. See generally Study No. 27, supra note 2, at 72-74.

\textsuperscript{203} 17 U.S.C. § 113(b) (1982). The Copyright Act of 1976 became effective on January 1, 1978. 17 U.S.C. § 102 (1982)(transitional and supplementary provisions). Accordingly, it is necessary to determine the scope of copyright protection afforded to architectural works under the 1909 Act and common-law copyright. See N. Boorstin, supra note 13, § 5:10, at 143 (“This section provides that the rights of a copyright owner in a work that portrays a useful article [architectural plans] shall be the same as under prior law with respect to the reproduction (and distribution or display) of the useful article [the architectural structure depicted in the plans] so portrayed.”); 1 M. Nimmer, supra
Thus, the rights granted to architects under the 1976 Act are no different from the rights granted under common law and the 1909 Act. It was well established long before the passage of the 1976 Act that architectural plans were copyrightable and that, at a minimum, the architect had protection against their reproduction in the form of another set of plans. Also, decisions in several jurisdictions held that neither the required filing of plans with a municipal official nor the erection of the structure depicted constituted a general publication divestive of the architect's common-law copyright. Further, despite case law authority to the contrary and the unnecessary distinction between copying for use and copying for explanation, this article has argued, and several pre-1978 cases have suggested, that plans are infringed by their unauthorized use to build a structure.

Most of the pre-1978 authorities, however, concluded that functional structures, although attractively designed, are not copyrightable as works in themselves. These authorities acknowledged that if a structure could be classified as a work of art, then full protection might be appropriate for the structure as a whole; yet most structures are not works of art. As a con-
sequence, the scope of copyright protection was restricted by the court-developed useful article limitations. These limitations are now codified in the definitions of "pictorial, graphic, and sculptural works" and "useful article," and the separability and independence test arguably limits copyright protection to the separable ornamental and decorative features that embellish a structure. Accordingly, under both the prior law and the 1976 Act, an architect's rights are limited to the separable artistic elements embodied in his structure's design; his rights do not extend to that useful article's utilitarian features. Thus, the major problem is identifying a structure's separable features.

This article argues, however, that the Act's definitions and its test of copyrightability should not be interpreted so restrictively as to limit the copyrightable aspects of a structure to features like statuary, cornices, and other embellishments. Rather, the Act should be so interpreted that an architect's original expression of the structure's interior and exterior is copyrightable. The particular configuration of rooms, the arrangement of space and shapes, the dimensions selected, the choices for materials and the locations of rooms can all be conceptually separated from the structure's functional aspects and should, therefore, be protectible. The terms of section 113(b), granting the architect rights no greater or lesser than those afforded under prior law, do not prohibit this interpretation. This expansive definition of the separable aspects of a structure's design merely enlarges the

Knoxville Int'l Energy Exposition, Inc., 555 F. Supp. 154, 156 (E.D. Tenn. 1983)(some monumental structures are functional when economic and engineering considerations dictate aspects of the design).

209. 1 M. Nimmer, supra note 6, § 2.08[D], at 2-108.
211. N. Boorstyn, supra note 13, § 2:25, at 77-78; 1 M. Nimmer, supra note 6, § 2.08[D], at 2-108.
212. One commentator has written:
Under either the former or the current Act, a copyright owner's exclusive right to reproduce a pictorial, graphic or sculptural work that portrays, depicts or represents a useful article so that the utilitarian nature of the article can be seen, is limited to the artistic element and does not extend to the useful article itself.

N. Boorstyn, supra note 13, § 5:10, at 143-44. This article argues that the separable and copyrightable elements in a functional structure derived from protected plans encompass much more of the architect's creative design product than just "add on" decorations and ornamentation.

213. See supra notes 190-95 and accompanying text.
range of copyrightable architectural subject matter.

2. The History of Copyright Revision

The history of the copyright revision process cuts against an expansive definition of the copyrightable design aspects of functional architectural structures. Several of the bills proposed between 1924 and 1940 to revise the 1909 Act contained provisions for the protection of architectural works.214 These proposals generally went beyond protection for plans and models and mentioned "'works of architecture' (i.e., structures) and 'models or designs for architectural works,' with the qualification that copyright extended only to the artistic character and design of such works and not to the processes or methods of construction."215 These bills apparently would have afforded protection not only against the duplication of models and designs, but also against their reproduction in actual structures.216 If these bills had been enacted, architectural structures "would no doubt have been protected against the reproduction of their artistic features in similar structures."217 Ultimately, however, none of these bills were enacted, and the Register of Copyright's 1961 report on the general revision of the law recommended that protection not be extended to the designs of functional structures because

[i]n the case of architecture particularly, it would often be difficult to differentiate between the functional and the "artistic" features of the design. While we are inclined to the view that a limited measure of protection should be afforded to the designs of functional structures, we do not believe that the copyright statute provides the appropriate framework for their protec-

214. STUDY No. 27, supra note 2, at 71.
215. Id. (citing particular bills introduced in 1924, 1925, 1930, 1935, and 1940).
216. Id. Some of the bills cited accomplished this result by giving copyright owners of all classes of works the exclusive right to reproduce or transform the work in any medium, form, or manner. Others explicitly extended the exclusive rights to complete, execute, and finish found in § 1(b) of the 1909 Act to models or designs for works of architecture. Id.
217. Id. at 72. Some of the bills also provided that copyright would not be infringed by the making and publishing of photographs of the structure, as in § 113(c) of the 1976 Act, and contained special provisions on deposit, registration, and limitations on remedies. In addition, some of the proposals specified that construction would not constitute publication. Id.
tion. We would leave this protection to be dealt with in the separate legislation proposed for the protection of ornamental designs of useful articles.\textsuperscript{218}

It is important to note that since 1914 many industrial design protection bills have been introduced,\textsuperscript{219} several of which might have afforded protection to the designs of structures.\textsuperscript{220} None were enacted,\textsuperscript{221} however, primarily because of the fear that protection "would create a new monopoly which has not been justified by a showing that its benefits will outweigh the disadvantage of removing such designs from free public use."\textsuperscript{222}

Thus, the primary objection to expanding the protection afforded to useful articles, including structures, has focused on the difficulty in distinguishing between an article’s functional and artistic features.\textsuperscript{223} This concern reflects the delicate balance in copyright law between the need to provide protection and incentives for the creators of works of authorship and the fear that ideas and concepts will be monopolized and competition restrained if copyright encompasses the utilitarian aspects of useful articles.\textsuperscript{224}

This tension is reflected in the terms of the 1976 Act and in its legislative history.\textsuperscript{225} Although copyright is available for

\textsuperscript{218} Report of the Register of Copyrights, supra note 125, at 16; U.S.F. Comment, supra note 122, at 324. The Register did recommend, however, that copyright should continue to protect plans, nonfunctional structures, and drawings of nonfunctional structures. Nonfunctional structures constitute works of art and could be protected on the same basis as sculptural works and drawings of sculptural works. Report of the Register of Copyrights, supra note 125, at 15-16; Hellmuth, supra note 1, at 176.


\textsuperscript{220} U.S.F. Comment, supra note 122, at 324-25; Cornell Note, supra note 3, at 86. See also Drake Note, supra note 17, at 84-87 (discussing design patent protection for architectural works).

\textsuperscript{221} Denicola, supra note 134, at 718-19; Cornell Note, supra note 3, at 86.

\textsuperscript{222} Denicola, supra note 134, at 719 (quoting H.R. Rep. No. 1476, supra note 14, at 50).

\textsuperscript{223} U.S.F. Comment, supra note 122, at 326; Hellmuth, supra note 1, at 176-77. The drafters of the Revision also objected to the duration of protection, the appropriate remedies, and the notice, deposit, and registration requirements. Several of the bills introduced between 1924 and 1940 had, in fact, addressed these issues. U.S.F. Comment, supra note 122, at 326-27; Sryn No. 27, supra note 2, at 71-72; see supra note 217.

\textsuperscript{224} U.S.F. Comment, supra note 122, at 326. See supra notes 9 and accompanying text, 141-45 and accompanying text.

\textsuperscript{225} Conflicts between the interests of creators and users (the public) are inherent in copyright. See generally Baird, supra note 9, at 415. The Constitution authorizes ex-
plans, as well as for pictorial, graphic, and sculptural works embodied in useful articles, this protection is limited by the principle that ideas, systems, and methods are not copyrightable. In addition, the separability and independence test limits the scope of protection afforded to useful articles. The House report, recognizing that architectural works present a special situation, stated that purely nonfunctional or monumental structures are subject to full copyright protection and "the same would be true of artistic sculpture or . . . embellishment added to a structure." The report added, however, that "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."

This commentary on the new Act does not prohibit copyright protection for useful structures. Rather, it shows that the scope of copyright protection afforded to a useful structure depends upon the interpretation of the separability test. Thus, the terms of the 1976 Act and its legislative history can accommodate an expansive definition of the separable copyrightable features embodied in useful structures.

The Act can be interpreted to protect the conceptually separable aspects of a building, such as the architect's particular configuration of rooms, shapes, space, and dimensions. Useful articles must be scrutinized in order to determine which features

clusive rights only for limited periods. U.S. Const. art. I, § 8, cl. 8. The Act itself grants exclusive rights, 17 U.S.C. § 106 (1982), and then subjects them to several specific limitations, Id. §§ 110-18. This tension is also reflected in the fair use doctrine, as codified at 17 U.S.C. § 107 (1982). Thus, two competing policies are balanced through copyright protection. One court explained: "If the protectible scope of an author's writings is too narrowly defined he will be discouraged from further writing. If, however, the protectible scope of the original author's work is too broadly defined, creative work by others will be discouraged." Morrison v. Solomons, 494 F. Supp. 218, 225 (S.D.N.Y. 1980). See also Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984).

222. H.R. Rep. No. 1476, supra note 14, at 55; 17 U.S.C. §§ 101 (definition of "pictorial, graphic, and sculptural works") (1982), 102(b). The House Report acknowledged that plans are copyrightable, that purely nonfunctional or monumental structures should be subject to full copyright protection, and that ornamentation or embellishments added to a structure should also be protectible. See generally Cornell Note, supra note 3 (arguing for changes in the Copyright Act to afford greater protection to architectural works). See also supra notes 178-84.

228. Id.
229. Id.
are copyrightable and which aspects are utilitarian. Admittedly, it is difficult to differentiate between the functional aspects and the physically or conceptually separable design features of any useful article.²³⁰ Courts, however, have been making these difficult distinctions for works of applied art for many years; the task of making the same distinctions for architectural works should be no more difficult.²³¹

The designs of functional structures are worthy of copyright protection and the creative efforts of architects are trivialized when protection is limited to plans and the physically separable decorations and embellishments of the building. While ideas, methods of construction, and design concepts cannot be monopolized, an architect's particular arrangement of shapes, spaces, dimensions, materials, and components are conceptually separable from a structure's utilitarian aspects. These design features are not inextricably interwoven with a structure's utilitarian function since there are many ways for an architect to express his ideas on the arrangement and configuration of a particular kind of structure. Those aspects of a design, as well as embellishment and ornamentation, should be regarded as the architect's copyrightable works of authorship. These creative aspects are separate and apart from the general and unprotectible conception of a functioning home or office building and should be deemed to stand alone conceptually as copyrightable works.

²³⁰ Cf. U.S.F. Comment, supra note 122, at 326; see also supra notes 155-95 and accompanying text, 223-24 and accompanying text.

²³¹ Courts attempt to distinguish between the functional and nonfunctional features of products in trademark and trade dress litigation as well as in copyright litigation. See generally Olds & Hoy, Developments in the Doctrine of Functionality, in CURRENT DEVELOPMENTS IN TRADEMARK LAW AND UNFAIR COMPETITION 129-134 (1984). A design feature may not serve as a trademark if it is "functional." Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982). A design feature is "functional" if it is "essential to the purpose of the article or . . . affects the cost or quality of the article." Id. at 850 n. 10. In some cases plaintiffs have alleged that the configuration or trade dress of the structures they use in their businesses functions as a symbol of their services and is entitled to protection against copying by competitors. See, e.g., Fotomat Corp. v. Photo Drive-Thru, Inc., 425 F. Supp. 693 (D.N.J. 1977) (Fotomat's small, free standing kiosk topped by overhanging three-tiered roof was functional and not protectible). Contra Fotomat Corp. v. Ace Corp., 208 U.S.P.Q. (BNA) 92 (S.D. Cal. 1980) (shape of booth was only incidentally functional; its primary purpose was to identify the corporation); Fotomat Corp. v. Cochran, 437 F. Supp. 1231 (D. Kan. 1977) (shape of booth was not dictated by its function, but was significant for identifying the owner). These cases show that in the trade dress area, as in copyright, it is difficult to determine whether a particular feature of a useful article is functional.
Those decisions that have denied protection to the designs of relatively simple articles like wheel covers, mannequins, and light fixtures are inapposite. 232

3. The Originality Standard

At the turn of the century Justice Holmes wrote:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation . . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. 233

This warning against judicial assessment of artistic merit was repeated by the Supreme Court fifty years later in Mazer v. Stein: 234 "Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art." 235 The 1976 Act now reflects this same concern. Congress, intending to incorporate without change the lenient standard of originality established by the courts under the 1909 Act, deliberately left undefined the phrase "original works of authorship" contained in section 102. That standard does not include requirements of novelty, ingenuity, or aesthetic merit. 236 Similarly, the Act's definition of "pictorial, graphic, and sculptural works" does not imply any criteria of "artistic taste, aesthetic value, or intrinsic quality." 237 The category includes not only works of art in the traditional sense, but also graphic art, illustrations, works intended for use in advertising and commerce, and works of applied art. Thus, this category encompasses all original pictorial, graphic, and sculptural works embodied in useful articles, re-

237. Id. at 54 (discussing the definition of "pictorial, graphic, and sculptural works" in 17 U.S.C. § 101 (1982)).
The 1976 Act's separability and independence test, however, effectively precludes copyright protection for the designs of some useful articles. For instance, in *Esquire, Inc. v. Ringer*, the court of appeals reversed the district court and held that a lighting fixture "in nontraditional form, devoid of ornamentation or decoration but of pleasing shape and used apparently for outside lighting of parking lots" was not protectible because no feature was separable or distinguishable from the article's form. Similarly, in *Norris Industries v. International Telephone & Telegraph Corp.*, the court denied protection for wire-spoked wheel covers, despite their creator's arguments that they were ornamental and intended to adorn the wheel and hide its ugliness. The court held that they were "not superfluous ornamental designs, but functional components of utilitarian articles." The separability and independence test precluded protection because no feature was physically or conceptually separable from the covers' utilitarian aspects. Although these results arguably effectuate congressional intent to exclude industrial design from the subject matter of copyright, they are not consistent with Justice Holmes' warning against weighing artistic merit to avoid discrimination against particular styles. In es-

---

240. 414 F. Supp. at 940.
241. 591 F.2d at 805-06. The court of appeals' decision was based primarily on the scope of review for administrative determinations. The Register of Copyrights had held that the fixture was not copyrightable. See also Hauhart, supra note 12, at 113-15.
243. 696 F.2d at 924.
244. Baylor Note, supra note 242, at 832.
245. The House report stated:
On the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.

sence, the Act's approach to determining the copyrightability of works of applied art favors traditional art forms and denies protection to some less conventional styles, such as modern abstract utilitarian design.  

If useful structures are treated like works of industrial design, a similar inconsistency will result. Structures falling within some architectural styles, such as a Miesian style office building, would not be entitled to any copyright protection, while separable embellishments adorning a Victorian style home would be copyrightable. To interpret the separability and independence test in a manner that favors certain styles, but denies any protection whatsoever to others, offends the admonitions of Justice Holmes and Mazer v. Stein, as well as the principle that the originality standard does not incorporate any standard of artistic merit. Because of the wide variety of ways architects can express themselves in designing functional structures, it is inappropriate to apply the separability test woodenly to architectural works. The copyright law should not be interpreted in a manner that discriminates against particular styles. Rather, an expansive approach to defining the copyrightable aspects of useful structures can be applied uniformly to all styles and schools of design to avoid violating the principle that copyright protection is not dependent upon any standard of aesthetic merit or taste. In essence, therefore, one architect's unconventional expression of the

246. Note, Works of Applied Art: An Expansion of Copyright Protection, 56 S. Cal. L. Rev. 241, 253 (1982); Note, Copyright Law—Copyright Protection for Industrial Designs Under the 1976 Copyright Act, 25 Wayne L. Rev. 923, 929 (1979). For instance, a two-slice toaster, made of aluminum and designed as a simple rectangular box, without ornamentation, would not be protectible. In contrast, a toaster with the outward appearance of a loaf of bread, made of a heat resistant plastic, might be protectible because its sculptured body—the plastic loaf of bread—could stand alone, physically or conceptually, as a "work of art" apart from the toaster's utilitarian aspects. See e.g., Ted Arnold Ltd. v. Silvercraft Co., 259 F. Supp. 733 (S.D.N.Y. 1966)(casing of pencil sharpener designed to look like an antique telephone protectible). Note, Copyright Law—Copyright Protection for Industrial Designs Under the 1976 Copyright Act, 25 Wayne L. Rev. 929, 933 (1979). Some people might not regard this "pop art" toaster designed to look like a loaf of bread as conventional, let alone as art. Nevertheless, the Act warns against passing judgment on artistic merit, and since this toaster casing can be separated from the article's utilitarian function, it should be copyrightable.

247. See supra notes 182-84 and accompanying text.
249. See supra notes 233-38 and accompanying text.
modest home presented in the hypothetical design contest should be afforded no less protection than another architect’s more conventional design for that home.

B. Protection of Architectural Works in Other Countries

An expansive approach to defining the copyrightable design aspects of structures will grant protection roughly equivalent to that afforded architectural works in several other nations. The United Kingdom Copyright Act of 1956, for example, provides copyright in “works of architecture, being either buildings or models for buildings” as a species of “artistic works.” Such works, subject to several limitations, are protected against reproduction “in any material form.” The French copyright statute protects “works of . . . architecture” and “plans, sketches, and plastic works relative to . . . architecture.” All authors in France are accorded the exclusive right of reproduction, which is defined as “the material fixation of the work by all methods that permit of indirect communication to the public.” In the case of architectural works, “reproduction shall also consist in the repeated execution of a plan or standard draft.” The German copyright statute specifically protects architectural works as a subcategory of “artistic works.” Authors in Germany have the exclusive right to reproduce, as well as to distribute and exhibit. Several foreign statutes also afford architects moral

250. See supra note 195 and accompanying text.
251. See generally Study No. 27, supra note 2, at 73-74; Hellmuth, supra note 1, at 180-87; U.S.F. Comment, supra note 122, at 326-27.
252. 4 & 5 Eliz. 2, ch. 74, pt. I, § 3(1)(b) (1956)[hereinafter cited as English Act]; Study No. 27, supra note 2, at 73.
253. English Act, supra note 252, pt. I, § 3(5)(a); Study No. 27, supra note 2, at 95.
254. Law No. 57-296 on Literary and Artistic Property, art. 3 (1957)[hereinafter cited as French Act], quoted in Study No. 27, supra note 2, at 73. See also Hellmuth, supra note 1, at 185.
255. French Act, supra note 254, arts. 21, 40, 47. See Study No. 27, supra note 2, at 73.
256. French Act, supra note 254, art. 28, quoted in Study No. 27, supra note 2, at 73.
257. French Act, supra note 254, art. 28, quoted in Study No. 27, supra note 2, at 73. See also Hellmuth, supra note 1, at 185-87.
259. Hellmuth, supra note 1, at 183.
rights and droit de suite in addition to the fundamental economic rights of controlling reproduction and adaptations.\textsuperscript{260}

In exchange for such expansive copyright protection, however, structures are subjected to some special limitations. For instance, some nations provide, either through their statutes or through judicial rulings, that an architect's rights do not extend to processes or methods of construction,\textsuperscript{261} that copyright is not infringed by making and publishing a photograph of a structure,\textsuperscript{262} and that the remedies for infringement do not include restraining the completion of a structure or ordering the destruction of an infringing building.\textsuperscript{263} At a minimum, therefore, the fact that other countries extend copyright protection to structures emphasizes the need for a more tolerant approach to copyrightability in the United States; these foreign laws bolster the argument that very few risks would result from defining expansively the separable, copyrightable aspects of completed structures.\textsuperscript{264}

\textbf{C. The Ramifications of Expanded Protection}

Judicial recognition of the architect's right to control the use of his plans,\textsuperscript{265} combined with an expansive definition of the copyrightable aspects of functional structures, will provide greater economic incentives and will grant architects protection

\begin{itemize}
\item 260. Hellmuth, supra note 1, at 182-87 (discussing the German and French statutes).
\item 261. Study No. 27, supra note 2, at 73 & n.51 (discussing this limitation with respect to architectural works in France and Germany).
\item 262. English Act supra note 252, pt. I, § 9(4), (6); German Act, supra note 258, pt. I, § VI, art. 59; Study No. 27, supra note 2, at 73-74; Hellmuth, supra note 1, at 184. This sort of limitation is necessary because a photograph of a copyrighted three-dimensional object can infringe. See, e.g., Ronald Litoff, Ltd. v. American Express Co., 621 F. Supp. 981 (S.D.N.Y. 1985).
\item 263. English Act, supra note 252, pt. I, § 17(4); German Act, supra note 258, pt. IV, § II, art. 97-105; Study No. 27, supra note 2, at 73-74; Hellmuth, supra note 1, at 184.
\item 264. Several of these foreign statutes, as well as several of the bills introduced in Congress between 1924 and 1940, deal with copyright formalities such as deposit, registration, and notice requirements, as well as with appropriate limitations on remedies and the scope of protection. These foreign laws and proposed bills address adequately many of the objections raised in the Report of the Register of Copyrights, supra note 125. See U.S.F. Comment, supra note 122, at 327. The primary objection is the problem of distinguishing between a structure's functional and nonfunctional features. See supra notes 214-32 and accompanying text.
\item 265. Cornell Note, supra note 3, at 95, 97 (the right to build).
\end{itemize}
comparable to that afforded the creators of other artistic and sculptural works. Original and creative designs will be encouraged without restraining competition and without precluding the legitimate borrowing of architectural ideas and concepts.\textsuperscript{266} An expansive definition of the architect's rights against the unauthorized reproduction and use of his artistic creations—his plans and the resulting structure—does not contravene the fundamental principle, set forth in the Act, that ideas, concepts, systems, and processes are not protectible.\textsuperscript{267} The architect's copyright would not extend to a general concept, such as the modest three bedroom home in the hypothetical design contest.\textsuperscript{268} Any architect can attempt to design a similar structure independently, regardless of the other architect's copyrighted plans and finished building.\textsuperscript{269} More particularly, an architect's copyright does not encompass processes and methods of construction or any exclusive rights to the use of elements like skylights, atriums, courtyards, domes, columns, and basic shapes. Rather, it is the designer's particular arrangement, treatment, and configuration of such unprotectible elements that should be regarded as the copyrightable expression embodied in both his plans and the structure.\textsuperscript{270}

In addition, copyright protection for plans and structures does not preclude architects from drawing upon common sources, borrowing ideas and concepts, or imitating the general styles of their contemporaries and predecessors.\textsuperscript{271} Similarities between plans and structures are inevitable when architects independently test their skills on similar projects, and copyright cannot and must not prevent that from taking place.\textsuperscript{272}

\begin{footnotesize}
\textsuperscript{266} Cf. id. at 91-94.
\textsuperscript{267} 17 U.S.C. § 102(b) (1982).
\textsuperscript{268} See supra note 195 and accompanying text.
\textsuperscript{269} Similarly, any author can write a comedy based upon conflicts between Irish and Jews into which the marriage of their children becomes the central focus. That "plot" is no more susceptible of copyright than the general outline of Romeo and Juliet. See Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).
\textsuperscript{270} Cf. Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 96 (2d Cir. 1977).
\textsuperscript{271} Cf. Cornell Note, supra note 3, at 91-94.
\textsuperscript{272} An analogy to music is appropriate; since composers of popular music have a limited number of tones at their disposal, similarity of tone construction is inevitable. Further, it is generally agreed that the original fund of melodic ideas has been exhausted so that composers must turn to the use of rhythm and harmony to attain originality. A. SHAFTER, MUSICAL COPYRIGHT 197 (2d ed. 1939). Similarly, architects work in a confined
\end{footnotesize}
other hand, similarities resulting from the "copying" of plans or
an existing structure may give rise to an infringement claim. The
well-settled requirements for establishing copyright infringe-
ment guarantee that an architect's copyright cannot be used to
retard progress in this important art.

For example, in the hypothetical architectural design con-
test described above, an architect's copyright would not be in-
fringed by another designer's independent creation of a similar
home because "[a]bsent copying there can be no infringement
of copyright." The copyright owner must, therefore, demon-
strate the fact of copying and prove substantial similarity of
copyrightable expression. If the architect can show that his
plans were actually reproduced or used by the alleged infringer,
his case should be relatively strong. Copying of plans to make
another set of plans violates the reproduction right. Similarly, if
the architect's plans are used, the resulting structure will proba-
bly be substantially similar to the architect's creation and a
finding of infringement would be appropriate.

An infringement claim will be more difficult to prove when
the plaintiff cannot show copying or use of his plans. In that
situation the architect must prove copying of the protectible as-
pects of the structure. The architect may be able to establish a
strong inference of copying by showing that the defendant had
access to the structure—that he had seen it and perhaps walked
through it—and that there are many similarities between the ar-
chitect's copyrighted structure and the alleged infringing
work. On the other hand, similarities resulting from the fact
that both structures are based on the same general concept—a
modest three bedroom home—will not provide the basis for a
successful claim. Further, although striking similarities be-

---

area and must turn to the arrangement of spaces and shapes and to types of rooms for
their original treatments of an idea like a modest, single family home. See Harper &
importance of the idea/expression dichotomy).

273. See supra note 195 and accompanying text.
277. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), cert. de-
nied, 282 U.S. 902 (1931).
tween the structures may create a presumption of copying, the copyright owner still must show a substantial and material taking of protectible expression. The architect will not have to establish that the defendant’s copying was intentional, but his burden will be heavy because of the basic requirements of proof and because of the nature of the copyrighted work.

In some respects functional architectural works are analogous to factual literary works, such as biographies, histories, catalogues, and directories. Major portions of these writings consist of elements that cannot be protected by copyright: facts, sequences of events, and raw data. These elements are comparable to design concepts, ideas, structural processes, borrowings from common sources, and generalized styles in architectural works. Broad latitude is given to subsequent authors of factual literary works, and substantial latitude should be given to later architects as well so that they can modify and perhaps improve upon unprotectible architectural styles, ideas, and concepts.

Further, in order to establish infringement of a factual work, the required similarity of expression may have to amount to verbatim reproduction or very close paraphrasing. By analogy, an architect charging infringement of the copyrightable aspects of his functional structure should have to show more than just the defendant’s roughly similar treatment of the basic project. A plaintiff should have to prove substantial similarity in the proportion and arrangement of rooms, the locations of doors and windows, and the use of space. If the interior or exterior configurations of the defendant’s structure are very similar to

137-38 (C.D. Cal. 1983)(similarities that exist because two works treating the same historical material cannot provide the basis for an infringement claim).


281. Id. at 161.


286. See Cornell Note, supra note 3, at 91-94 (discussing the importance of imitation and borrowing in architecture).

the plaintiff's design, then the plaintiff would seem to have established that the defendant copied more than the law allows.\textsuperscript{288} An architect should not be able to recover without such a showing.\textsuperscript{289} Thus, the existing requirements for proving copyright infringement will prevent architects from monopolizing unprotectible concepts and ideas as well as the functional aspects of their structures.

VI. Conclusion

Architectural works of authorship include structures as well as plans, and the Copyright Act of 1976 affords protection to both these forms of architectural expression. Some courts have, however, expansively interpreted the 1879 Supreme Court decision in \textit{Baker v. Selden} to prevent architects from controlling the use of their plans. In addition, the Act's limitations on the copyrightability of useful articles arguably restrict the protectible aspects of functional structures to separable ornamentation and embellishment. Taken together, these limitations severely diminish the value of copyright protection for architectural works. As a consequence, copyright protection offers few incentives to architects.

In order to promote progress in this important art form and to grant architects copyright protection commensurate to that already enjoyed by other artists, the courts should reconsider their approaches to these limitations.\textsuperscript{289} The \textit{Baker} decision notwithstanding, courts should recognize the right to control the use of plans as part of the reproduction right. Furthermore, they

\textsuperscript{288} This conclusion may not be appropriate for the designs of some very simple structures like garages and storage buildings with a single room and dimensions dictated by the sizes of vehicles. Arguably, there are very few ways to express that "idea," and an architect may not be entitled to relief absent a showing of slavish copying.

\textsuperscript{289} Appropriate relief would ordinarily be a monetary award based on the plaintiff's damages, the defendant's profits, or a combination of the two. Injunctive relief, either restraining the completion of the defendant's structure or mandating its destruction, should not be granted. \textit{See supra} note 95.

\textsuperscript{290} This article has not discussed the nature and scope of protection architects might enjoy under the design patent provisions of the Patent Act, unfair competition, or the moral rights doctrine. \textit{See generally} Loyola Note, \textit{supra} note 3, at 99-101, 117-126; Cornell Note, \textit{supra} note 3, at 87-91; Drake Note, \textit{supra} note 17; Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 205 Cal. Rptr. 620 (1984)(plaintiff architect unsuccessfully claimed that his architectural work was protectible under California's codification of the moral rights doctrine).
should expansively define the separable copyrightable aspects embodied in useful structures. This expansion of architects' rights against the copying and unauthorized use of their intellectual creations can be accomplished under the Copyright Act of 1976 without amendment, without contravening the principle that copyright protection does not extend to ideas and concepts, and without affording protection to the utilitarian aspects of useful structures.