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INNOVATION AND IMITATION: ARTISTIC ADVANCE 
AND THE LEGAL PROTECTION OF 
ARCHITECTURAL WORKS 

Architectural design represents a unique combination of innovation 
and imitation. One commentator has noted that "an uneasy balance 
between influence and originality" exists within the profession.\(^1\) Imita-
tion may play a greater role in advancement in architecture than in 
other forms of intellectual property that the law protects against copy-
ing. Nevertheless, architectural work must be protected to encourage 
original and creative design. Thus, proper protection of architectural 
works requires independent consideration and individualized legisla-
tion. This Note evaluates the appropriate level of protection for archi-
tectural works in light of the need to encourage progressive architectural 
creativity without precluding architectural imitation. Section I exami-
nes the current protection afforded architectural works under the Copy-
right Act of 1976, the Patent Act, and the common law of torts. Section 
II identifies the promotion of artistic progress as the purpose underlying 
protection of architectural works and then discusses two factors that 
contribute to achieving that purpose: protection of economic incentives 
for the individual designer and legal recognition of a right to borrow 
elements from the design of another. Finally, Section III evaluates the 
adequacy of current protection and suggests changes in the law that 
would more effectively promote architectural progress. 

I 
CURRENT PROTECTION AFFORDED ARCHITECTURAL 
WORKS 

Three legal doctrines afford limited protection to architectural de-
sign: copyright law,\(^2\) the design patent provisions of the Patent Act,\(^3\) 
and the common law tort of unfair competition.\(^4\) 

A. Copyright Law 

Federal copyright legislation, enacted by Congress pursuant to its 
power under the patent and copyright clause of the Constitution,\(^5\)

\(^1\) Giovannini, Architectural Imitation: Is It Plagiarism?, N.Y. Times, Mar. 17, 1983, at C1, 
col. 3. 
\(^2\) See infra notes 5-39 and accompanying text. 
\(^3\) See infra notes 47-69 and accompanying text. 
\(^4\) See infra notes 70-90 and accompanying text. 
\(^5\) U.S. CONST. art. I, § 8, cl. 8. "The Congress shall have Power . . . [t]o promote the 
Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors
secures to individual "authors" the economic benefits of their works.\textsuperscript{6} Both the language of the Constitution's copyright provision\textsuperscript{7} and legislative and judicial references to the copyright power,\textsuperscript{8} however, indicate that the ultimate goal of copyright law is the promotion of progress in the arts. The provision of economic incentives to individual authors is merely a means of attaining this goal.

1. \textit{General Provisions of the Copyright Act of 1976}

The Copyright Act of 1976\textsuperscript{9} protects "original works of authorship fixed in any tangible medium of expression."\textsuperscript{10} The statute divides "works of authorship" into seven categories,\textsuperscript{11} including the category of "pictorial, graphic, and sculptural works."\textsuperscript{12} This category includes "two-dimensional and three-dimensional works of fine, graphic, and applied art, . . . technical drawings, diagrams, and models."\textsuperscript{13} The statute protects such works, however, only "insofar as their form but not their mechanical or utilitarian aspects are concerned."\textsuperscript{14} Thus, the de-
sign of a "useful article" such as a building receives copyright protection "only if, and only to the extent that, such 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."  

A copyright owner possesses the exclusive rights "to reproduce the copyrighted work," "prepare derivative works," "distribute copies . . . to the public by sale[,] . . . rental, lease, or lending," and "to display the copyrighted work publicly." 

In general, protection of these rights continues during the author's life and for fifty years following his death. Differing terms apply, however, to joint works, anonymous or pseudonymous works, and works "made for hire."

2. Application of the Copyright Act of 1976 to Architectural Works

To analyze the protection afforded architectural works under the Copyright Act of 1976, one must distinguish three different forms of copying. First, an infringer may directly reproduce an architect's plans in the form of additional plans. Second, if the infringer has continuing access to the original plans, he or she may copy the design by building from those plans without actually reproducing them. Finally, an infringer...

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15 The Act defines "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101.

16 Id. This portion of § 101 comes from Copyright Office regulations promulgated in response to the Mazer decision. H.R. Rep., supra note 14, at 54-55. This statutory language represents a further congressional attempt to clarify the "applied art-industrial design" distinction. Id. at 55. See also N. Boorstin, supra note 14, § 2:10, at 39 n.24 (citing prior Copyright Office regulations incorporated in § 101).


18 Id. § 106(2).

19 Id. § 106(3).

20 Id. § 106(5).

21 Id. § 302(a). This term of protection extends to work created on or after January 1, 1978, the effective date of the Act. For the protection received by work created before the effective date, see id. §§ 303, 304.

22 Id. § 302(b), (c).

23 Unless plans are publicized in advertisements or exhibitions, continuing access to the plans by third parties is unlikely. Thus, an infringer would be forced to reproduce the plans in additional plans and be subject to the Copyright Act's prohibition of such copying. See infra notes 24-27 and accompanying text. An architect may protect against unauthorized possession or use of plans by a client by using the standard provision of the American Institute of Architects (AIA) Owner-Architect Agreement:

Drafts and Specifications . . . shall remain the property of the Architect whether the Project for which they are made is executed or not. The Owner shall be permitted to retain copies . . . for information and reference in connection with the Owner's use and occupancy of the Project. The Drawings and Specifications shall not be used by the Owner on other projects, for addi-
fringer may copy a design embodied in a completed structure without having access to the plans for that structure.

a. **Protection of Plans.** Architectural plans, as "technical drawings," fall within the statutorily prescribed subject matter of copyright.24 Because the Copyright Act of 1976 gives the copyright owner the exclusive rights "to reproduce the copyrighted work,"25 infringement occurs when anyone other than the designing architect reproduces plans in the form of additional plans without proper authorization. The House Report on the 1976 Act confirms the protected status of plans,26 and recent cases recognize that plans are protected against copying by the 1976 Act.27

b. **Protection of Right to Build from Plans.** The Copyright Act of 1976 provides that the common law and statutes in effect on December 31, 1977, govern "the making, distribution, or display of the useful article" depicted in a copyrighted work.28 Thus, pre-1978 copyright law determines whether architects have the exclusive right to build from their plans. The cases from that period unanimously hold that a copyright in architectural plans bestows no such exclusive right.29 For example, in *Imperial Homes Corp. v. Lamont*,30 the defendant homeowner developed drawings and constructed a home substantially similar to a model home designed by the plaintiff, a company which designed, constructed, and sold residential dwellings. The Court of Appeals for the Fifth Circuit authorized relief for the plaintiff only if, on remand, the district court found that the defendants had reproduced the plaintiff's plans in develop-

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24 See supra note 13 and accompanying text.


26 See H.R. Rep., supra note 14, at 55 ("An architect's plans and drawings would, of course, be protected by copyright . . . .").


28 See Imperil Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972); Scholz Homes, Inc. v. Maddox, 379 F.2d 84, 85 (6th Cir. 1967) ("[T]he holder of a copyright of architectural plans cannot prevent others from building according to those plans . . . ."); Herman Frankel Org. v. Tegman, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973) ("A person cannot, by copyrighting plans, prevent the building of a house similar to that taught by the copyrighted plans."); Muller v. Triborough Bridge Auth., 43 F. Supp. 298, 300 (S.D.N.Y. 1942) (A "copyright of a drawing, showing a novel bridge approach to unsmear traffic congestion, does not prevent any one from using and applying the system of traffic separation therein set forth.").

30 458 F.2d 895 (5th Cir. 1972).
opining their own plans. The appellate court, however, expressly placed the right to build from plans beyond the scope of copyright protection: "[N]o copyrighted architectural plans . . . may clothe their author with the exclusive right to reproduce the dwelling pictured."31

The courts confronted with the "right to build" issue have relied on *Baker v. Selden*,32 an 1879 Supreme Court case, to deny architects the exclusive right to erect buildings depicted in their plans. The plaintiff in *Baker* had written a book describing the use of a financial bookkeeping system.33 The defendant copied the accounting forms and blanks appearing in the copyrighted book.34 The Court held that copyright did not give the plaintiff exclusive rights to use the system. Therefore, the forms could be copied.35 The decision rested on the distinction between lawful use of the subject matter by another in the manner intended by the creator and unlawful use for explanatory purposes, as in incorporating the subject matter into another book about the system.36 In the architectural context, the courts have applied the *Baker* doctrine to define building from architectural plans as the kind of practical use that copyright law does not prohibit. Courts have thus denied architects the exclusive right to build from their plans.

c. Protection of Completed Structures. The requirement of section 101 of the Copyright Act of 1976 that artistic design elements be separately identifiable and "capable of existing independently of the . . . utilitarian aspects of the article"37 significantly limits the scope of copyright protection afforded completed architectural works. Functional considerations play an important role in many basic commercial and residential structures, making the art-utility distinction required by the copyright statute impossible to draw. Consequently, many architectural designs will not qualify for copyright protection.38 Indeed, one court

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31 *Id.* at 899.
32 101 U.S. 99 (1879).
33 *Id.* at 99-100.
34 *Id.*
35 *Id.* at 104.
36 The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book . . . 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.
37 *Id.* at 103.
38 The House Report on the 1976 Act acknowledges that many architectural works will fall beyond the scope of protection, and that resolution of the protection issue must proceed on a case by case basis:

[T]he extent to which [copyright] protection would extend to the structure
has suggested that even seemingly “monumental” works are “functional” to the extent that “economic and engineering considerations” dictate facets of their designs.\(^{39}\)

Congress has repeatedly rejected legislation providing more comprehensive protection for the design embodied in useful articles such as completed architectural works.\(^{40}\) For example, the Design Protection Act of 1980,\(^{41}\) which was not reported out of committee, would have protected the “original, ornamental design of a useful article”\(^{42}\) for a five year term, renewable upon application for one additional term.\(^{43}\) The Act covered three-dimensional features of a design\(^{44}\) and, unlike the Copyright Act of 1976, did not limit protection to designs in which ornamental and utilitarian features can be separately identified.\(^{45}\) Thus, nonmonumental architectural structures that do not qualify for copyright protection would have received protection under the Act. Moreover, the Design Protection Act imposed no restrictive subject-matter requirements such as the novelty and nonobvious criteria found in the Patent Act.\(^{46}\)

depicted would depend on the circumstances. Purely non-functional or monumental structures would be subject to full copyright protection . . . [as] would . . . artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.


During consideration of predecessors to the legislation enacted in 1976, the Copyright Office offered several rationales for excluding functional architectural design from copyright protection. The Office asserted that: the life plus 50 year term for copyright protection is too long for design protection; the balance between the need for protection and the possible restraining effects on competition favors nonprotection. House Comm. Print, supra note 6, at 13. Because distinguishing functional and artistic features is so difficult, the Copyright Office urged Congress to enact separate legislation extending protection to functional structures. Id. at 15-16.


\(^{40}\) Design protection provisions have passed the Senate on five occasions since 1962. See H.R. Rep., supra note 14, at 50. The Copyright Act of 1976 originally contained a design protection section, but the House Judiciary Committee deleted it. Id. The Committee deleted the design protection provision in large part because it believed that such protection did not properly fall within the scope of copyright. Id. For a discussion and bibliography of prior design protection proposals, see 1A R. Callmann, The Law of Unfair Competition, Trademarks and Monopolies § 4.61, at 106 n.28 (4th ed. 1981).


\(^{42}\) Id. § 901(a).

\(^{43}\) Id. § 905(a).

\(^{44}\) Id. § 901(b)(2).

\(^{45}\) Id. § 901(b)(1), (3); see supra note 16 and accompanying text.

\(^{46}\) H.R. 4530, 96th Cong., 1st Sess. (1979); see infra notes 54-60 and accompanying text.
B. Design Patent

As with copyright, the Constitution provides Congress with the authority to enact patent legislation. Furthermore, the primary purpose of both copyright and patent law is the promotion of progress in "Science and useful Arts."

Although both copyright and design patent have the same primary purpose, they offer different forms of protection. Copyright protects a particular expression of an idea by granting the author the exclusive right to copy or reproduce the work. Copyright will not prevent duplication of his work through the independent creative effort of another, however. Patent law, on the other hand, seeks not only to protect the individual author, but also to foster development in a field by "confer[ring] a monopoly on the first man concocting a new idea and reducing it to physical form." Thus, if the architect of a monumental work obtains copyright protection, another architect who develops a substantially similar design without knowledge of the prior work does not infringe on the copyright. In contrast, if the first architect acquires a design patent, the second designer will infringe on that patent even if the second designer in fact knows nothing of the prior work.

A designer may obtain a patent for a "new, original and ornamental design for an article of manufacture . . . subject to the conditions and requirements of [the Patent Act]." The Patent Act requirements

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47 For a comprehensive discussion of the history and requirements of design patents, see generally 1 D. CHISUM, PATENTS § 1.04 (1983).
48 See supra note 5.
49 See E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 6 (2d ed. 1982); supra notes 6-8 and accompanying text.
51 See infra notes 56-57 and accompanying text.
52 Pogue, supra note 50, at 36.
53 35 U.S.C. § 171 (1982). In Mazer v. Stein, 347 U.S. 201 (1954), the Supreme Court expressly recognized the overlap in statutory subject matter of the copyright and design patent laws, holding that the availability of a design patent for a china statuette used as a lamp base did not preclude copyright protection. This overlap is not complete, however. Although the subject of a design patent cannot be "dictated solely by considerations of function, it need not meet the copyright standard of separate identification and independent existence." 1 D. CHISUM, supra note 47, § 1.04[5], at 1-155 (emphasis in original) (footnote omitted). Theoretically, a creator need not choose between the two forms of protection if a design falls within the statutory subject matter of both copyright and design patent. See In re Yardley, 493 F.2d 1389 (C.C.P.A. 1974) (upholding design patent application by designer who had already obtained copyright protection, reasoning that an election requirement would be contrary to congressional intent). To acquire both forms of protection, however, a designer must obtain a copyright first, because the Copyright Office will not register a copyright claim in a patented design or in the drawings in a patent application after the patent has been issued. 37 C.F.R. § 202.10(a), (b) (1982). If a designer acquires both a copyright and a design patent, copyright protection continues for the duration of the statutorily prescribed term, even though the design patent expires after 14 years. See In re Yardley, 493 F.2d at 1395.
include "novelty"\textsuperscript{54} and "non-obviousness";\textsuperscript{55} thus a work must be novel, nonobvious, and ornamental to qualify for design patent protection. As judicially developed, "[t]he standard of novelty is whether the design appears to the ordinary observer to differ from the prior art and not to be a mere modification of it."\textsuperscript{56} This requirement distinguishes design patent protection from that of copyright because copyright requires only originality, but not novelty. Thus, if an author independently creates a work substantially similar to an existing, copyrighted and patented work, the author will be liable for patent, but not copyright, infringement.\textsuperscript{57} A "non-obvious" design is one that "would [not] have been obvious at the time the invention was made to a person having ordinary skill in the art."\textsuperscript{58} No analogous requirement appears in copyright law.\textsuperscript{59} A design qualifies as "ornamental" if not solely functional; it may have a useful, as well as decorative, purpose, however.\textsuperscript{60}

Unlike copyright, which confers the limited right to copy or reproduce a work,\textsuperscript{61} a design patent gives the owner the exclusive rights to make, use, or sell the design.\textsuperscript{62} A design patent endures for a term of only fourteen years, however.\textsuperscript{63}

Courts have held that architectural structures constitute "articles of manufacture" that may qualify for design patent protection.\textsuperscript{64} For example, in upholding a roof design patent, the Third Circuit noted that "the term 'manufacture' in the patent law embraces buildings" and that "[w]e must not be misled by the factors of size and immobility."\textsuperscript{65} Unlike copyright, therefore, a design patent not only protects an architect's plans, but also gives the architect the exclusive right to build from his plans. The complex and costly procedures involved in acquiring a design patent,\textsuperscript{66} however, as well as the difficulty of satisfying stringent

\textsuperscript{55} \textit{Id.} § 103.
\textsuperscript{56} 1 D. CHISUM, supra note 47, § 1.04[2](e), at 1-127 n.36 (quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 247 (3d Cir. 1968).
\textsuperscript{57} P. ROSENBERG, PATENT LAW FUNDAMENTALS § 5.01[1] (2d ed. 1980). For a detailed comparison of copyright and design patent protection, see generally Pogue, supra note 50.
\textsuperscript{58} 35 U.S.C. § 103.
\textsuperscript{59} P. ROSENBERG, supra note 57, § 5.01[3], at 5-6.1.
\textsuperscript{60} 1 D. CHISUM, supra note 47, § 1.04[2](d).
\textsuperscript{62} 35 U.S.C. § 271(2).
\textsuperscript{63} \textit{Id.} § 173. Copyright endures for the "life of the author and fifty years." 17 U.S.C. § 302(a).
\textsuperscript{65} Riter-Conley Mfg. Co. v. Aiken, 203 F. at 702.
\textsuperscript{66} See 35 U.S.C. §§ 111-15 (1982); Pogue, supra note 50, at 37-38; Comment, \textit{The Protection of Architectural Plans as Intellectual Property}, 6 LOY. L.A.L. REV. 97, 119 (1973). In order to acquire a design patent, the designer must file a written application with the Patent Office containing a description and drawings of the design. The Patent Office closely examines the
ARCHITECTURAL WORKS

standards of novelty and nonobviousness, 67 may largely preclude this form of protection for architectural works. 68 Moreover, even if an architect succeeds in obtaining a design patent, the protection afforded his design extends for only a fourteen year period. 69

C. Unfair Competition

In 1918, the Supreme Court recognized misappropriation as a form of unfair competition in International News Service v. Associated Press. 70 In granting plaintiff Associated Press (AP) relief for the defendant’s unauthorized use of news items obtained from AP bulletins, the Court identified the competitive relationship between the two news services 71 and the plaintiff’s expenditure of “labor, skill and money” 72 as essential elements of a misappropriation claim.

Misappropriation provides a very different form of design protection than copyright and patent law. First, the doctrine derives from state decisional law, rather than from comprehensive federal statutory schemes such as the Copyright or Patent Acts. Second, an author need not comply with preliminary administrative procedures such as application and registration before bringing a claim.

Although an author may forego these preliminary administrative procedures and still benefit from the misappropriation doctrine, this advantage is offset by the limitations on the doctrine’s availability. Perhaps because of a compelling dissent by Justice Brandeis in International News Service, 73 the misappropriation doctrine 74 has had limited applica-

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67 See Comment, Copyright Protection for Architectural Structures, 2 U.S.F.L. REV. 320, 322 (1968) (“Seldom is an architectural creation so radical or enlightened as to be beyond the scope of the field’s ‘prior art.’”).

68 Comment, supra note 66, at 120.


70 248 U.S. 215 (1918).

71 Id. at 238-39. “The fault in the reasoning [of defendant’s contention] lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves.” Id. at 239.

72 Id. at 239-40. [D]efendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant’s members is appropriating to itself the harvest of those who have sown.

73 Id. at 248 (Brandeis, J., dissenting).

74 See 2 R. CALLMANN, supra note 40, § 15.03, at 5; see also E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 35 (2d ed. 1978) (“Subsequent courts were not completely willing to extend the theory of misappropriation to factual settings that varied from that in INS.”); Comment, The Misappropriation Doctrine After the Copyright Revision Act of 1976, 81
tion. Some courts have rejected the doctrine altogether, and most others have applied it only to factual situations similar to that in *International News Service*.

Even if a court generally recognizes the *International News Service* doctrine, it may deny a misappropriation claim on the ground that federal patent or copyright law preempts the state remedy. For example, patent law preempts the state misappropriation remedy if a design patent has been denied for failure to meet a subject matter requirement such as novelty or nonobviousness.

Even though the Copyright Act of 1976 explicitly addresses the issue of preemption of state remedies by federal copyright law, the Act's application to state misappropriation law remains unclear. Under the Act, "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works . . . that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . are governed exclusively by [the Copyright Act]." This provision thus "establishes a two-pronged analysis for preemption": (1) Is the work within the subject matter of copyright? and (2) Are rights against misappropriation equivalent to exclusive rights provided by the Copyright Act?

Although architectural plans and works do not always qualify for copyright protection, they do come within the subject matter addressed by the Copyright Act and the prior case law incorporated by the Act. Unfortunately, whether rights against misappropriation are

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75 2 R. Callmann, supra note 40, § 15.03, at 5.
76 E. Kintner, supra note 74, at 35.
77 See, e.g., Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 (1964) (denying state unfair competition claim when design patent was invalid for lack of invention, reasoning that "[s]tate[s] cannot . . . give protection of a kind that clashes with the objectives of the federal patent laws"); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) (following Sears, Roebuck in denying relief under state common law); 17 U.S.C. § 301 (1982). But see Goldstein v. California, 412 U.S. 546, 571 (1973) (upholding a state law prohibiting record piracy because Congress, in the Copyright Act of 1909, had "indicated neither that it wishe[d] to protect, nor to free from protection" sound recordings).

80 2 R. Callmann, supra note 40, § 15.08, at 23-24.
81 17 U.S.C. § 301(a). See N. Boorstin, supra note 14, § 1:8; Comment, supra note 74, at 485-86.
83 Id.; Comment, supra note 74, at 490.
84 See supra notes 28-39 and accompanying text.
85 See supra notes 24-39 and accompanying text; see also Schuchart & Assocs., Professional Eng'rs, Inc. v. Solo Serve Corp., 540 F. Supp. at 943 ("Architectural . . . drawings fall within the subject matter of copyright.").
The legislative history of the 1976 Act provides no answers on this point, and the few cases addressing the issue are divided. Although commentators suggest that courts should continue to recognize misappropriation claims, the courts may not look with such favor on those claims. One district court, for example, held that when one architect, in preparing his own drawings, copied the plaintiff's copyrighted plans, federal copyright law precluded the plaintiff's misappropriation claim. Thus, state unfair competition law provides only uncertain protection for architectural plans and works.

II

APPROPRIATE PROTECTION FOR ARCHITECTURAL WORKS

A. Achieving the Goal of Protection: The Conflict Between Providing Economic Incentives and Allowing Design Borrowing

The objective of protecting architectural design is the same as that of all legal protection of intellectual property: artistic and scientific advance. Measuring progress in architectural design, unlike some art forms, requires not only aesthetic considerations of style, but also practi-

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86 2 R. CALLMANN, supra note 40, § 15.08, at 23 ("[I]t remains uncertain what is or is not 'equivalent' to copyright, and in particular whether misappropriation protection is equivalent thereto."); see also N. BOORSTYN, supra note 14, § 1.9, at 13 ("[T]he precise contours of preempted rights are not clear.").

87 M. NIMMER, CASES & MATERIALS ON COPYRIGHT 495-97 (2d ed. 1979); N. BOORSTYN, supra note 14, § 1.9, at 13-14; 2 R. CALLMANN, supra note 40, § 15.08, at 23-24; Comment, supra note 74, at 486-89.

88 See, e.g., Bromhall v. Rorvik, 478 F. Supp. 361, 367 (E.D. Pa. 1979) ("Since the claims...are not entitled to protection under the Act, they are not preempted by the Act."); Synecom Technology, Inc. v. University Computing Co., 474 F. Supp. 37, 43 (N.D. Tex. 1979) (computer formats at issue "do not qualify for [copyright] protection," but "enforcement of the misappropriation doctrine here would conflict unacceptably with the goals of the federal...copyright laws."); N. BOORSTYN, supra note 14, at 15-17; 2 R. CALLMANN, supra note 40, § 15.08, at 24-26. Rights protected by the Copyright Act of 1976 include "the exclusive rights of reproduction, adaptation, publication...and public display." N. BOORSTYN, supra note 14, § 1.9, at 13; see 17 U.S.C. § 106 (1982).

89 See 2 R. CALLMANN, supra note 40, § 15.08, at 26-27 (arguing that "criterion of equivalence" should be whether "the state law claim and the copyright claim seek to protect the same interest" and that while "[c]opyright protects the incentive to create literary and artistic works...the misappropriation doctrine protects the viability of a business system...from attack by anyone...who would undermine its structure or operation..."); Comment, supra note 74, at 491 ("[V]alid distinctions can be made between the exclusive rights of a copyright owner, valid against the whole world, and the limited right of a commercial enterprise to be free from unfair competitive practices that deprive it of a fair return on its work and investment.").


91 See supra notes 5-8 and accompanying text.
cal considerations of structural soundness and functionality. Thus, the 
law protecting architectural design should promote the creation of aesthetically pleasing, sophisticated design\(^9\) that is, at the same time, func-
tional and structurally feasible. Achieving this goal depends on at least 
two factors: economic incentives for individual architects and the con-
tinuing thoughtful use of quality design elements from prior works.

Attaining architectural progress through quality design requires 
that society encourage talented, creative individuals to become and re-
main architects. Through its copyright and patent legislation, Congress 
has assumed that financial reward is an essential inducement to individ-
ual scientific or artistic labor.\(^9\) Such legislation therefore guarantees 
personal monetary gain for the author or inventor by limiting the rights 
of third parties to freely use and reproduce his work.

A total ban on copying would provide architects with financial in-
centive to create, but it would stifle progress in architectural design by 
eliminating an essential source of architectural ideas: prior architectural 
works. Throughout its history, and perhaps to a greater extent than 
other art forms, architecture has involved “borrowing”—the use by one 
architect of the design elements of another prior or contemporary archi-
tect. From its beginnings, American architecture has reflected this ten-
dency to rely on borrowed design elements.\(^9\) Classical styles, borrowed 
from the Roman and Greek traditions, dominated American architec-
ture in the decades following independence.\(^9\) Thomas Jefferson, for ex-
ample, employed the cylindrical forms and domes of classical Roman 
architecture in designing both Monticello and the rotunda of the Uni-
versity of Virginia.\(^9\) Nineteenth century American architecture was

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\(^9\) Stating a standard of architectural progress in abstract terms does not eliminate the 
difficulty and necessary subjectivity involved in determining which works represent progress, 
or in drafting legislation which specifically protects those works. See Kunstadt, Can Copyright 
(1980) (noting difficulty in identifying which works represent progress and determining 
whether copyright laws promote progress).

\(^9\) See supra notes 5-8 and accompanying text. Architects themselves acknowledge the 
importance of economic incentives in their creative endeavors. See, e.g., Dunlap, A Graceful 
Move Upstairs, N.Y. Times, May 23, 1982, § 8, at 6, col. 3 (interviewing architect Philip John-
son who notes that “making more money . . . is, really, the first consideration of any archi-
tect”).

Clearly, however, financial reward is not the only motivating force behind the creative 
work of architects. See, e.g., Goldberger, Kevin Roche Wins Pritzker Prize in Architecture, N.Y. 
Times, Apr. 15, 1982, at C23, col. 1 (discussing Roche’s intention to use $100,000 prize to 
begin an endowment fund for chair of architecture at Yale University in honor of late archi-
tect, Eero Saarinen).

\(^9\) See generally J. Fitch, AMERICAN BUILDING: THE HISTORICAL FORCES THAT 
SHAPED IT (rev. 2d ed. 1973) (surveying American architecture from 1620 to 1965).

\(^9\) See generally J. Fitch, supra note 94, at 51-98.

\(^9\) W. Lesnikowski, RATIONALISM AND ROMANTICISM IN ARCHITECTURE 59 (1982). 
Jefferson felt that the creation of an American architecture based on classical motifs would 
influence the development of a national identity. See J. Fitch, supra note 94, at 51-60.
ARCHITECTURAL WORKS

also influenced heavily by borrowing. During the second half of that century, American architects imported classical design again, this time in the style of the well-known L’Ecole des Beaux Arts in Paris. American architecture students went to Europe to study, and American architecture schools were organized so that copying became a much more sophisticated activity connected with careful examination, study, and selection. The Pennsylvania Railroad Station in New York and the Boston library illustrate architectural borrowing of this period.

In addition to borrowing from a particular period, an individual architect may borrow design elements or concepts directly from another architect. Often, an architect will borrow from a mentor with whom he may have studied as a young professional. For example, Philip Johnson was strongly influenced in his early career by the German Mies van der Rohe, whom he met in 1930. The two collaborated on the Seagram building in New York, and later Johnson designed a house for himself that borrowed extensively from Mies’s Farnsworth House in Illinois.

Although Johnson later departed from Mies’s style, he continues to borrow design elements. The pediment Johnson used to cap his recently completed AT&T building in New York was modelled after a piece of antique Chippendale furniture. Prominent architects explicitly acknowledge both a general reliance on prior work and specific use of features from other architects’ designs. Moreover, these architects as-

97 W. LESNIKOWSKI, supra note 96, at 77-81.
98 Id. at 77.
99 Id. at 78. For more recent examples of the use of Greek and Roman design elements, see Russell, Is the Time Right for Classicism?, N.Y. Times, Nov. 5, 1981, at C1, col. 1.

Use of classical design features was facilitated by the availability of architectural drawings and plates which provided the technical detail necessary to incorporate a particular classical element into a current work. See, e.g., H. D’ESPOUY, FRAGMENTS FROM GREEK AND ROMAN ARCHITECTURE (Classical America Edition of Hector d’Espouy’s Plates) (1981) (republication of d’Espouy’s classical plates of Greek and Roman architecture which first appeared in 1905); W. WARE, THE AMERICAN VIGNOLA (5th ed. 1928) (plates with text and illustrations giving forms and proportions of Roman architecture). Reliance on published architectural drawings was particularly prevalent in the case of residential structures. See J. FITCH, supra note 94, at 118-21.

100 W. LESNIKOWSKI, supra note 96, at 296. For a second example of one great architect borrowing from another, see James Marston Fitch’s discussion of the influence Henry Hobson Richardson had on Louis Sullivan. J. FITCH, supra note 94, at 194.
101 W. LESNIKOWSKI, supra note 96, at 92, 296.
102 Id. at 296.
104 “I try to pick up what I like throughout history.” W. LESNIKOWSKI, supra note 96, at 294 (quoting Philip Johnson); “I try to be guided . . . by a conscious sense of the past—by precedent, thoughtfully considered.” Id. at 297 (quoting Robert Venturi).
105 “We copy, borrow and derive motifs from other architects. Artists have always quoted other artists.” Giovannini, supra note 1, at C6, col. 1 (quoting Robert A.M. Stern); “[O]riginality [of design] is rare . . . .” Id. at C6, col. 6 (quoting Robert Venturi).
sert that borrowing has a beneficial effect on both the copied architect and the art form.

Given the prominent role of borrowing in architecture, complete protection against copying is not a suitable means to promote advancement in architectural design. Nevertheless, because protecting designs from copying provides economic incentive and thereby promotes progress in the field, some protection against copying is appropriate. In order to promote the greatest progress in architecture, therefore, a legal scheme of protection must achieve a compromise between the conflicting considerations of individual financial reward and borrowing.

B. Resolving the Protection Issue Conflict

Resolution of the conflict between providing economic incentives and allowing for continued borrowing can be considered in light of three forms of potential copying: the reproduction of original drawings in the form of additional plans, the unauthorized construction of a building from original plans, and the copying of the design of a completed structure in the form of plans or another structure.

1. Protection of Plans

Architectural plans are the immediate and tangible product of the designer's labor. Plans are also the economic element in the design process and should be protected against copying.

The economic interest embodied in an architect's plans is especially significant in the case of the designer engaged solely in mass marketing drawings and blueprints for the construction of uniform structures. If these plans were not protected against copying, a purchaser could buy one plan and, without expending the time and skill required to originate a design, reproduce and market the plan in direct competition with the designer. Thus, without protection of these plans, no economic incentive to enter the architectural design field would exist for a mass marketing company. To the extent design activity of this type would continue at all, design quality would certainly suffer.

Unrestricted copying of a complete set of plans not only destroys a designer's economic rewards but also encourages construction of identical buildings, thus discouraging artistic advance. If, however, the copying involves only a portion of a plan or a discrete detail of the design,

106 "'As long as the source is good, I steal. Not in the sense of taking away from another architect—he is not poorer because of a theft but is in fact more influential.'" Id. at C6, col. 1 (quoting Robert A.M. Stern).

107 "'There is nothing wrong with being influenced, or even with copying. Imitating is how children learn. . . . Quality is more important than originality. Doing something good is better than doing something first. . . . [O]riginality is . . . not even the highest virtue of an artist.'" Id. at C6, cols. 1, 6 (quoting Robert Venturi).

108 See supra notes 5-8 & 93 and accompanying text.
the interest in artistic progress through borrowing becomes stronger because a unique combination of borrowed elements from a series of designs may represent an artistic advance. Nevertheless, such borrowing can occur without reliance on the design originator’s plans, through observation and study of the completed structure. The economic role of plans in assuring continued creation of quality design warrants complete protection of plans against copying.

2. Protection of Right to Build from Plans

Although an architect initially expresses himself through his plans, his ultimate objective is the realization of his design in a completed structure. One commentator analogizes architectural plans to the score for a musical composition or the script of a play and concludes that “[a]rchitectural plans, drawings, and designs are no more an end in themselves than is a piece of sheet music. They are primarily intended to be executed, to be turned into structures.”

Plans are not only an interim step in the total creative process, they also represent only a part of the architect’s economic interest in a design. Except in the limited instances in which architects mass market plans and achieve adequate financial return through volume sales, the right to build from plans forms a part of the economic value of the drawings. By purchasing a set of plans, a client acquires the accompanying right to build only one structure from those plans. Permitting anyone to build at will from an architect’s plans destroys a marketable element of these plans—the right to build—and undermines the economic incentive to develop thoughtful, sophisticated designs. In addition, as with the wholesale copying of plans, unrestricted building from another architect’s drawings encourages the construction of identical buildings rather than buildings that incorporate thoughtful, selective borrowing and contribute to artistic progress. Thus, in order to promote architectural progress and provide economic incentives to architects, the right of architects to build from their plans should be protected.

3. Protection of Completed Structures

Upon completion of a structure embodying an architect’s design, the architect has received both economic return for the use of his plans and the personal satisfaction of witnessing the culmination of the creative process. Further economic return from subsequent use of the plans should also receive protection, however. In particular, when the design represents a basic commercial or residential structure, rather than a monumental work, it may be marketable to additional clients. If the

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110 For example, in the first decade of this century, Frank Lloyd Wright designed his
original structure were not protected against copying, other architects would be able to copy the original with impunity, thus depriving the originator of potential business from clients seeking a similar structure. In these circumstances, failure to protect the completed structure from copying directly affects the architect’s continuing economic interest in the initial plans themselves and thus removes an economic incentive to creative activity.

Prohibiting the copying of an entire design from a completed structure protects an architect’s future economic interests in a design while eliminating only the mindless copying that thwarts rather than promotes artistic progress. A completed structure, however, also presents the fullest opportunity for other architects to examine and analyze a design and to engage in carefully considered borrowing of discrete design elements. Therefore, to best serve progress in architectural design, wholesale copying of completed structures should be prohibited, but protection should not preclude the selective borrowing of design elements within a completed structure.

III
Adequacy of Current Protection Afforded Architectural Works

The foregoing analysis suggests that the appropriate level of protection for architectural design depends on the particular form of copying involved. Therefore, assessing the extent to which current law promotes progress in architecture requires an evaluation of the protection now available against each form of copying.

A. Protection of Plans

The Copyright Act of 1976 adequately protects architectural plans against copying. This protection is essential to preserve the economic incentives that attract talented designers to the profession and to ensure continuing artistic development. The required copyright notice and the procedure for registering a copyright are simple and impose no barrier to obtaining the protection theoretically afforded by the 1976 Act. Therefore, no changes in this aspect of copyright protection are warranted.

famed “Prairie Houses,” a series of residential structures that shared many common design features, including low, over-hanging roofs and rows of leaded casement windows. See G. Minson, Frank Lloyd Wright to 1910: The First Golden Age 101-37 (1958); see also Comment, supra note 67, at 327 (“Often repetition of [an architect’s] basic designs is the means whereby he collects the bulk of his fees.”).

111 See supra notes 24-27 and accompanying text.
112 See supra section II.B(1).
Given the protection of architectural plans provided by the Copyright Act of 1976, the potential unavailability of design patent protection and misappropriation remedies does not seriously threaten the economic interests of individual architects. Therefore, artistic progress does not require changes in the Patent Act or the common law of unfair competition with regard to the copying of architectural plans.

B. Protection of Right to Build from Plans

Unlike the plans themselves, the right to build from plans has not received copyright protection. Instead, the courts have unreasonably applied Baker v. Selden, a case involving the allowable use of accounting forms from a copyrighted accounting book, to hold that architects do not have the exclusive right to build from their own plans. The unavailability of copyright protection for the right to build from plans significantly limits the economic return possible from plans, thus undermining a major incentive to design activity and ultimately inhibiting architectural progress.

Modification of existing law is therefore necessary to achieve the purpose underlying copyright legislation. Statutory revision is not required, however, because no provision of the Copyright Act of 1976 expressly denies protection to the right to build from plans. Instead, protection of this right requires that the courts repudiate their misplaced reliance on Baker v. Selden and replace it with an expanded interpretation of the rights secured by section 106 of the 1976 Act.

Copyright law offers potential protection of the right to build from plans without amendments to the 1976 Act. Moreover, copyright protection would fully ensure the economic incentives necessary to promote architectural progress. On the other hand, the costly administrative procedures and strict subject matter requirements of design patent law and the uncertain status of state misappropriation remedies make these doctrines less attractive sources of protection against this form of copying. Therefore, a revised judicial construction of the Copyright Act of 1976, rather than changes in the Patent Act or the law of unfair compe-
tition, is the most appropriate means of extending protection to the right to build from plans.

C. Protection of Completed Structures

Both copyright and patent law presently offer some protection to the design embodied in a completed structure. Nevertheless, neither doctrine is tailored to the unique characteristics of architectural design and thus neither provides a form of protection likely to promote progress in architecture.

The Copyright Act of 1976 protects a design only if its artistic features "can be identified separately from, and are capable of existing independently of, [its] . . . utilitarian aspects."124 This formulation reflects copyright law's focus on the protection of pure art forms. As Congress has expressly acknowledged, however, this requirement effectively limits protection in the field of architecture to monumental works.125 It is ironic that the absence of economic incentives which would otherwise result from protection126 undoubtedly concerns the many architects designing residential and commercial structures more than the few who are commissioned to design monuments or other essentially nonfunctional works. Moreover, the Act protects "works of artistic craftsmanship"127 without differentiating individual elements from the entire design. The House Report on the Act confirms the potential for protection of individual design elements.128 Based on its central role in past architectural development,129 the "borrowing" of individual design elements is essential to the continued progress of the art. Thus, the Copyright Act of 1976 affords inappropriate protection to completed architectural works by failing to protect most structures and by instead protecting individual ornamental design elements that might be constructively borrowed.

Although copyright law basically protects only pure art forms, design patent law theoretically extends protection to any design dictated, at least in part, by aesthetic considerations.130 Precisely because architectural advancement involves a studied reliance on the past, the novelty131 and nonobviousness132 requirements of the design patent statute

125 See supra note 38.
126 See supra section II.B(3).
128 H.R. Rep., supra note 14, at 55 ("[A]rtistic sculpture or decorative ornamentation or embellishment added to a structure [will be protected].").
129 See supra notes 94-107 and accompanying text.
130 See supra note 60 and accompanying text.
131 See supra notes 54, 56 and accompanying text.
132 See supra notes 55, 58 and accompanying text.
ARCHITECTURAL WORKS

may eliminate the availability of patent protection.\textsuperscript{133} Furthermore, for the few architectural designs that qualify, the procedures for obtaining a patent are complex and costly\textsuperscript{134} and may unduly burden a firm’s financial resources or preclude protection altogether.\textsuperscript{135}

Given the substantive and procedural shortcomings of copyright and design patent protection afforded architectural design embodied in a completed structure, and given its constitutional mandate to promote progress in useful arts, Congress should consider separate legislation reflecting the unique characteristics of architecture. Earlier design protection proposals largely eliminated the requirements of separability of ornamental and utilitarian features and the requirements of novelty and nonobviousness imposed by copyright and design patent law respectively.\textsuperscript{136} Therefore, in drafting legislation extending protection to completed architectural works, Congress should draw from these prior proposals. Appropriate protection of architectural design may even be included in a more comprehensive design protection statute. Any statutory formulation must include a specific proviso, applicable to completed architectural works, limiting protection to the design of an entire structure. Continued artistic development in architecture requires explicit preservation of the right to borrow individual elements from the designs of others.

Extending protection of the architectural design embodied in completed structures for the duration of the copyright term, life plus fifty years,\textsuperscript{137} may be unnecessary to adequately preserve the economic incentives to design activity. On the other hand, the five year, renewable term of the proposed Design Protection Act\textsuperscript{138} is probably insufficient to ensure that a designer obtains the maximum potential economic return. Therefore, architectural design protection legislation should specify an intermediate term of protection, derived, perhaps, from the average length of an architect’s professional life.

CONCLUSION

The constitutional authorization for copyright and patent legislation makes the purpose of such legislation explicit: “to promote the Progress of Science and Useful Arts.”\textsuperscript{139} Although progress in architecture, as in other art forms, requires economic incentives for the creator, pro-

\textsuperscript{133} See supra notes 66-68 and accompanying text. One commentator suggests that this difficulty in obtaining design patent protection for architectural works explains the “dearth of reported cases on the patenting of architectural designs.” Comment, supra note 66, at 120.

\textsuperscript{134} See supra note 66 and accompanying text.

\textsuperscript{135} See supra note 68 and accompanying text.

\textsuperscript{136} See supra notes 41-46 and accompanying text.

\textsuperscript{137} 17 U.S.C. § 302(a) (1982); see supra note 21.

\textsuperscript{138} H.R. 4530, 96th Cong., 1st Sess. § 905(a) (1979).

\textsuperscript{139} U.S. CONST. art. I, § 8, cl. 8.
gress has also depended on the continuing innovative use of elements borrowed from the designs of others. Thus, Congress and the courts must reconcile these conflicting interests which in turn call for increased or decreased protection against copying. Because the relative importance of these two conflicting interests varies at different stages of the creative process, this reconciliation is best accomplished by addressing each of three potential forms of copying in the architectural design context: copying of plans in additional plans, building from copyrighted plans, and copying a completed structure. Plans, the tangible manifestation of the creative process, are a marketable commodity requiring complete protection against copying. The Copyright Act of 1976 currently provides such protection. The right to build from plans invests those plans with additional economic value. To protect this additional economic incentive to design, the right to build from plans should be protected by a more expansive judicial interpretation of the rights secured by the Copyright Act of 1976. Finally, because most architectural design is suitable for repeated use, the designer's potential financial return from such use should be preserved by extending protection to completed structures. The prohibition on copying, however, should extend only to the copying of an entire design. Express statutory authorization of the use of a particular design feature from a completed structure is essential to ensure that thoughtful borrowing and the consequent artistic progress are not sacrificed to the simplicity of unqualified protection.

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