



ARCHITECTURAL WORKS AS SUBJECT MATTER OF COPYRIGHT PROTECTION: A CONUNDRUM

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Abstract

The article studies the Copyrightability of 'architectural works' under the Indian Intellectual Property Law, particularly the Indian Copyright Act, 1957. In addition to the analysis of the evolution of the law of other countries, the author has examined the issue in the light of the common law principles pertaining to usefulness, separability, substantial reproduction and functionality. The article discusses the copyrightability of architectural plans and drawings and thereafter the statutory incorporation of the Copyright protection granted to architectural works, both in the international and national realm. The article also highlights the dilemma faced by the legislature and the Courts alike while granting Copyright to architects for the constructed buildings and the application of Copyright principles in event of an infringement of the same. In conclusion, the author has attempted to substantiate the copyrightability of such works. However, whilst granting such protection certain complications that may arise have also been anticipated by the author; and the recommendations have been made in that regard.

Introduction

An 'architect' expresses their thoughts and reveals their artistic personality through their 'writings'.¹ In this regard, they are similar to all other creators of intellectual properties. However, in addition to words, they use, among other things, technical signs and symbols, and graphic representations to communicate their ideas. Taking the liberty to draw an analogy- the architect's signs, symbols, and graphic representations are to the builder what a composer's notes and performance instructions are to the musician.² Hence, an architectural work is the design of a building as embodied in any tangible medium of expression, including a building architectural plans, or drawings inclusive of unconstructed architectural works embodied in unpublished plans or drawings.

Now, imagine an architect is hired to construct an artistic building, and he constructs the same under a project contract. Years later, to his dismay, he is made aware of a deceptively similar building being constructed. What shall be his rights, and the liability of the architect of the deceptively similar building? The challenge of drawing a line between inspiration and plagiarism has been the bone of contention among architects for a long time. This can be exhibited by a perfect example when in 2010, the construction of the Chinese Pavilion sparked a heated battle given its stark similarity to the Japanese Pavilion and the Canadian Pavilion constructed in 1992 and 1967, respectively. Consequently, Ni Yang, the assistant designer of the Chinese Pavilion, claimed that there were "*differences between his work and mine. His work had a decorative*

¹ Ladas, Stephen. P, 'The International Protection Of Literary And Artistic Property' (1938) 1 Am. J. Int'l L. (New York), 223.

² Giles Lithographic Co. v. Sarowy, (1884) III U.S. 53.

³ 'Copyright Registration of Architectural Works', Circular 41, <copyright.gov/circs/circ41.pdf>.



*purpose; mine is a building. Pavilion style is widely used in architectural design, so it cannot be said that it is the creation of Tadao Ando (the architect of the Japanese Pavilion)."*⁴

Such controversies are highly common in the world of architecture. Hence, the author intends to comment on such scenarios while providing recommendations for the same. The article begins with analysing the copyrightability of architectural plans, moving on to understand the development of Copyright protection granted to architectural works, both in the international and national realms. Since the scope of architectural works has always intrigued the audience, an attempt has been made to decipher that aspect of Copyright principles as well. Moreover, the article also attempts to examine issues such as ownership of property, infringement of Copyright in architectural works, and the question of publication, which usually arises when discussing Copyright infringement.

I.

Copyrightability of Architectural Plans
The foremost step in ascertaining the copyrightability of architectural works is analysing whether architectural plans or blueprints are afforded protection under Copyright law. The 1886 version of the Berne Convention provided protection to architectural plans but not architectural works.⁵ Implementing the provisions of the Convention, the United States law required that 'original works of authorship' be fixed in any tangible medium of expression, now

known or later developed to be copyrightable.⁶ Thus, the U.S. Courts have held that architectural plans are protectable under Section 5(i) as drawings or plastic works of a scientific or technical nature.⁷ Additionally, several commentators have mentioned that protection might also be accorded to architectural plans under the "works of art" classification in Section 5(g)⁸ or under the literary work classification corresponding to any written matter on the plan.⁹

It is pertinent to mention here that, though the Indian law implements the provisions of the Convention, the position of copyrightability of 'architectural plans' in the Indian scenario seems to be hazy and still in the process of development. However, an artistic work includes "a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph"¹⁰ which is accorded Copyright protection under the Indian Copyright Act, 1957.¹¹ The analysis of the same law leads on to the fact that architectural plans and/or blueprints shall be treated as artistic work and accorded Copyright protection under Indian law.

However, simply affording Copyright protection to architectural plans means that if one copied the sketches an architect had created to guide the construction of a particular building, one would be liable. However, if one managed to construct the same building without those sketches, then one would escape liability. To counter this

⁴WIPO, 'Architecture and Copyright Controversies', (September, 2011), <https://www.wipo.int/wipo_magazine/en/2011/05/article_0004.html>.

⁵ Article 4, Berne Convention, 1886.

⁶ 17 U.S.C. § 102 (1909).

⁷ Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (1972).

⁸Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.08[D] at 2-104 (1985); N. Boorstyn, *Copyright Law* § 2:25, at 76 (1981).

⁹ Interlego AG v. Tyco Industries Inc ([1989] AC 217).

¹⁰ Section 2(c), Copyright Act, 1957

¹¹ Section 13, Copyright Act, 1957.



loophole, the Court, in the case of *Peace v. Ove Arup Partnership Ltd.*¹² held that “buildings will also receive indirect Copyright protection by virtue of any Copyright in the plans for them”.

Therefore, to counter the loopholes present in the legislature across international contours and considering the ambiguity which shrouded the copyrightability of architectural works, it becomes imperative to discuss the same.

II.

Copyrightability of Architectural Works

U.S. Law

Statutory Incorporation of the Protection

Due to the inadequacy of the legislature with respect to architectural works, the Berne Convention proceeded to grant Copyright protection to the same.¹³ Thereafter, after 80 years, when the U.S. ratified the Convention, it also accorded protection to architectural works¹⁴ per se by adopting the Architectural Works Copyright Protection Act (AWCPA), which became effective in 1990.

Evolution and Dilemma of the Application of the Protection

The most important implication of this new statute is that architectural works in the U.S. no longer have to run the gauntlet of the conceptual separability test in order to be protected¹⁵, which had been the bone of

contention for years.¹⁶ Thereafter the courts stated that a piece of architecture must be original to be protectable.¹⁷ Thus, analyzing the “original elements” test of the *Feist* case, the Courts came up with a dual question that must be in the affirmative to be able to ascertain Copyright infringement: (1) whether there was evidence of direct or indirect copying,¹⁸ and (2) whether the copying was so substantially similar to qualify as infringement.¹⁹ However, the application of this test proved to be counterproductive because not only did it prevent architects from tailoring their actions to avoid infringement, but was also detrimental to efficiency and productivity.²⁰

To overcome the posed hurdle to the originality test, the Courts came up with the ‘substantial similarity’ test. Substantial similarity problems arise particularly when artistic expression is present.²¹ Minor similarities are not enough to constitute infringement of an architectural work. On the other hand, infringement does not require identical duplication.²² Herein lies the difficulty that circuits face when attempting to determine whether a work is substantially similar for purposes of infringement.²³

This difficulty has been best expressed by the dispute between two architects mentioned ahead. In 1989, the Polish architect Daniel Libeskind designed a Jewish Museum in

¹² [2001] EWHC Ch 481.

¹³ Article 2(1), Berne Convention, 1908.

¹⁴ 17 US Code, S. 102(a).

¹⁵ Daniel Su, ‘Substantial Similarity and Architectural Works: Filtering Out “Total Concept and Fee”’, (2007).101 Nw. U. L. Rev. 1851, 1865.

¹⁶ See *Carol Barnhart Inc. v. Economy Cover Corporation*, 773 F.2d at 419-420.

¹⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.* (1991) 499 U.S. 340.

¹⁸ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.* (1991) 499 U.S. 361.

¹⁹ *Johnson v. Gordon*, 409 F.3d at 17-18.

²⁰ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d at 489

²¹ Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 13.03 (2014).

²² *Id.*

²³ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489.



Berlin. The shape of the building was unusual – a complex zigzag. His architectural partner and wife, Nina Libeskind, emphasized the theme of the building likening its shape to a broken star of David.²⁴ In the latter half of the 1990s, the Australian architect Howard Raggatt was hired on commission to design the National Museum of Australia. When the final model of the Museum was constructed, the parallelism and resemblance between the two buildings were unmistakable.²⁵ This case did not result in litigation then. However, if the current US standard is construed, Libeskind's design would qualify for Copyright protection and the Australian building resembling it would be sufficient to satisfy the legal standard of substantial similarity.

The U.S Courts when applying the principle of substantial similarity have determined two tests. First is the 'Pattern' test. This test looks at the two works side by side, taking into consideration a number of elements and whether they occur in similar succession.²⁶ The court then compares those elements, to determine whether there is substantial similarity between the works albeit no literal similarity.²⁷ Second is the 'Total Concept and Feel' Test. Under this test, the court will analyze two works, using both an "extrinsic test" to identify similar ideas, and an "intrinsic test" to identify similar expression.²⁸ It is noteworthy that this test calls for the "ordinary observer" to determine

whether there is substantial similarity of expression between the two works.²⁹ The ordinary observer analysis in this test renders it detrimental to artistic expression.³⁰

Therefore, owing to the ambiguity and vagueness of the final interpretation of this principle and its vast application, one can only hope that a determinative test is laid down by the United States Supreme Court to avoid all sorts of confusion.

Common Law

Statutory Incorporation of the Protection

Meanwhile, the situation in the United Kingdom with respect to the inclusion of Copyright protection in the statute was precarious. The legislature implemented the Act of 1911, which not only preserved the right of the architect to Copyright in his plans, which had existed under the old law, but created a new right by including "architectural work of art" amongst artistic works capable of enjoying Copyright protection.³¹ It was unsuccessfully contended in the case of *Meikle v. Maufe*³² that there could not be a separate Copyright in building, as distinct from a Copyright in the plans on which the building is based, and in fact there seems no reason to doubt that the Act of 1911 created a new and distinct right.³³

Keeping the challenges posed by the precursory Act, the U.K. Copyright Act 1956 was implemented. Fortunately, the

²⁴ Elizabeth Grant et. al., *The Handbook of Contemporary Indigenous Architecture*, (2018), 78.

²⁵ Edward Elgar, *New Directions in Copyright Law*, (2008) 3, 141. ;

²⁶ Z. Chafee, 'Reflections on the law of Copyright', (1945) 45 Col. L. Rev. 503, 513.

²⁷ *Id.*

²⁸ Sid & Marty Krofft Television Productions v. McDonald's Corp. 562 F.2d 1157, 1161(1977).

²⁹ Sid & Marty Krofft Television Productions v. McDonald's Corp. 562 F.2d 1157, 1161(1977).

³⁰ Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 13.03 [A][1][c] (2014).

³¹ S. 1, Copyright Act, 1911.

³² *Meikle v. Maufe*, (1941) 3 ALL.E.R. 144.

³³ Copinger and Skone, *Law of Copyright* (1948) 8, 38-39.



legislation shed some light on the position of architects by including the words “*work of architecture, being either buildings or models for buildings*”³⁴ within the definition of ‘*artistic work*’.

Thus, an architectural creation is capable of protection at three stages: (a) as a two dimensional technical writing, i.e., as a plan, drawing or design; (b) as a two dimensional artistic representation of the projected structure, or a three dimensional model of the said structure; (c) as a completed structure.³⁵

Indian Legal Regime

Statutory Incorporation of the Protection

The Indian scenario with respect to Copyright protection of architectural works is somewhat simpler to understand and analyse, since the legislature has made amendments to make the Indian Copyright law uniform with the International policy. The “*works of architecture*” eligible for Copyright protection in India have been defined as “*any building or structure having an artistic character or design, or any model for such building or structure*”³⁶. However, in India, despite ‘*architectural works*’ being considered artistic works,³⁷ some structures have been kept outside the scope of Copyright protection, wherein bridges, dams, tents, boats are not considered ‘*buildings*’.³⁸

It is interesting to note that here the requirement of “*artistic quality*” has been abandoned³⁹ and thus the restrictive definition of “*architectural work of art*” which emphasized “*artistic character*” is somewhat broadened. The Act clearly lays down that the Copyright under the Act subsists throughout India in original artistic works.⁴⁰ Additionally, the Copyright protection of an architectural work of art shall subsist only in artistic character and design, and is not available to processes or methods of construction.⁴¹ The Indian Copyright law has also widened its scope to allow protection to the architectural design of commercial buildings.⁴²

Therefore, architects in India are free to apply for Copyright protection for their architectural work under the national registration system. However, it is essential to note that since India is a signatory to the Berne Convention as well as the Universal Copyright Convention, works protected in other Berne signatory countries will automatically be protected in India without the need for registration.⁴³

Architectural works to be protected under a Copyright or as a Design : A Conundrum

³⁴ S. 3(1) (b), U.K. Copyright Act 1956.

³⁵ Yankwich, *Originality in the of Intellectual Property*, (1951) 11, F.R.D.457.

³⁶ S. 2(b), Copyright Act, 1957.

³⁷ S. 2(c), Copyright Act, 1957.

³⁸ Section 1.1.16, Model Building Bye-Laws, 2016, Town and Country Planning Organization, Ministry of Urban Development, <<http://mohua.gov.in/upload/uploadfiles/files/MBBL.pdf>>.

³⁹ British Northrop v. Texteam Blackburn Ltd. (1974) RPC 57.

⁴⁰ S. 13(1)(a), Indian Copyright Act 1957.

⁴¹ S. 13(5), Indian Copyright Act 1957..

⁴² *Id.*

⁴³ LexQuest, ‘Architectural Work under the Indian Copyright Regime’, (9 February, 2015) <[PIF 6.242](https://lexquest.in/architectural-work-indian-copyright-regime/#:~:text=But%2C%20the%20Indian%20law%20also,are%20eligible%20for%20copyright%20protection.&text=Architects%20in%20India%20can%20register,under%20the%20copyright%20registration%20system.>></p>
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The term ‘design’ has been defined as “*the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.*”⁴⁴ Moreover, the Design Act specifically provides for registration of Architectural works under Class 25-03 and 25-99. Therefore, due to multiple provisions conferring protection to architectural works, a conflict may arise about whether Architectural works should be protected under the Copyright Act or the Design Act, or whether Section 15(2) of the Copyright Act, which deals with seizure of the Copyright in the article as soon as it is applied for registration under the Design Act, and that it has been reproduced more than 50 times by an industrial process,⁴⁵ would come in play for determination of what architectural works would be protected as a Designs or under a Copyright.

To resolve this conundrum in the Indian scenario, the Courts have evolved a ‘*mischief rule*’. This rule pertains to the interpretation of the statutes and is applied by the Courts whenever there is a conflict between two laws or provisions of law.⁴⁶ Therefore, to understand the intent of the legislature,⁴⁷ and to resolve the ambiguity created by the said provisions, this particular rule is applied.⁴⁸ In

the case of *Microfibers Inc. v. Girdhar & Co. & Anr.*,⁴⁹ the question was whether the design of an “*artistic work*” in fabrics should be protected under the Copyright Act or the Design Act. The court by applying the ‘*mischief rule*’ stated that the “*the mischief sought to be prevented is not the mischief of copying but of the larger monopoly claimed by the design proponent inspite of commercial production.*”⁵⁰ The court had held that if the design is registered under the Designs Act, it would lose its Copyright protection, and if the design has not been registered it would still continue to enjoy Copyright protection as long as the threshold limit of its application through an industrial process does not go beyond 50 times, after which it shall lose its Copyright protection.⁵¹ The Hon’ble High Court of Delhi, upheld the aforementioned application of the ‘*mischief rule*’ in the case of *Holland L.P. & Anr. V. A.D. Electro Stell Co. Pvt. Ltd*⁵², dismissing the plea of the Plaintiff, who pleaded that under Section 2I read with Section 13 of the Copyright Act, he had the “*right to convert a two dimensional artistic work into a three dimensional construction*” and that the “*drawings*” were capable of being copyrighted under Section 15(2) of the Copyright Act. The court reasoned that the Plaintiff’s drawings were capable of being registered under the Design Act and they would lose their Copyright if they are reproduced by the industrial process more than 50 times, and would also fall under the public domain.⁵³

⁴⁴ S. 2(d), Design Act, 2000.

⁴⁵ Section 15(2), Copyright Act, 1957.

⁴⁶ Heydon’s Case [1584] EWHC Exch J36.

⁴⁷ See *RMDC v. UOI*, AIR 1957 SC 628.

⁴⁸ See *Bengal immunity co. v. State of Bihar*, AIR 1955 SC 661.

⁴⁹ 128 (2006) DLT 238.

⁵⁰ *Microfibers Inc. v. Girdhar & Co. & Anr.*, 128 (2006) DLT 238.

⁵¹ *Microfibers Inc. v. Girdhar & Co. & Anr.*, 128 (2006) DLT 238.

⁵² *Holland L.P. & Anr. v. A.D. Electro Stell Co. Pvt. Ltd.*, CS(COMM) 83/2017.

⁵³ *Holland L.P. & Anr. v. A.D. Electro Stell Co. Pvt. Ltd.*, CS(COMM) 83/2017.



III.

Infringement of Copyright in Architectural Works

Copyright is infringed by the production of something which, to the eye, is a copy of the original, and the use of processes or methods of construction would, it is thought, constitute an infringement.⁵⁴ No great significance seems to have been attached, in decisions under the U.K. Act of 1911, to the requirement of “*artistic character or design*”, and it is doubted whether this meant more than that there must be something beyond the use of common stock features which would not be sufficient to constitute a Copyright.⁵⁵ It was held that the requirement of originality did not imply more than that the work was the personal effort of the architect.⁵⁶ Moreover, it was also held that there was Copyright in the design of certain semi-detached villas on the ground that they exhibited something apart from the common stock of ideas and which struck the eye as uncommon.⁵⁷

Today, architects are concerned with infringements of their rights in three different forms. These are, copying of plans in the form of other plans,⁵⁸ copying of plans in the form of the buildings, and the copying of a building by another building.⁵⁹

The definition clause of the Indian Copyright Act does not define infringement as such, but the definition of an infringing copy⁶⁰ provides some standards and criteria for the determination that an infringement has occurred. As regards an artistic work, an infringing copy is that copy which is a “*reproduction thereof otherwise than in the form of cinematograph film*”.⁶¹ The familiar question with regard to unauthorized reproduction of copyrighted work raises the standard issues regarding meaning of originality, copying and extent of reproduction. On the issue of reproduction, in India, the expression ‘*infringing copy*’, without a doubt, means copies that reproduce the whole of the infringed work.⁶² The reasons for this view are that the term ‘*infringing copy*’ has been defined only under the 1957 Act. Eventually it was understood, both in the U.K. and in India, that a copy was an infringing copy if it reproduced a substantial part of the original work.⁶³ Whereas the U.K. Act of 1957 made this position clear,⁶⁴ the Indian Act of 1957 chose not to define the extent of reproduction as an aspect of the ‘*infringing copy*’. Thus, under the present Indian law, unless the whole of an architect’s work has been reproduced, no infringement of Copyright occurs. As seen above, the requirement of whole reproduction makes it almost impossible for an architect to claim Copyright protection because the infringers can simply escape by

⁵⁴ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc. (1991) 499 U.S. 361.

⁵⁵ *Supra* 38.

⁵⁶ Chabot v. Davies (1936) 3 All E.R. 227.

⁵⁷ Black v. Warren (1928 - 35) Macg. Cop. Cas. 268.

⁵⁸ Czewowski v. George W. Wass & King (1959) 173 Estates GAZETTER 735; Ancher Mortlock Murray and Wodey Pty. Ltd. v. Hooker Homes Pty. Ltd. (1971) 2 N.S. W.L.R. 278.

⁵⁹ Hay & Hay Construction Co Ltd. v. Sloan (1958) 12 D.L.R. (2d) 397; Hay v. Saunders & Saunders (1959) 17 D.L.R. (2d) 352.

⁶⁰ S 2(m), Indian Copyright Act 1957.

⁶¹ S 2(m)(i), Indian Copyright Act 1957.

⁶² Lyenger, T.R.S., ‘The Copyright Act 1957’, (1977) 3 R 101.

⁶³ Baxi, Upendra, ‘Copyright Law and Justice in India’, (1986) 28 J.I.L.I. R 526.

⁶⁴ S. 49(1), U.K. Copyright Act 1956.



making minor modifications or alterations in the architect's work.

It is suggested that the Indian law should be amended on the lines of the British Act so that the requirement of reproduction of the whole work is substituted by "*substantial reproduction*".

IV.

Conclusion & Recommendations

A bare reading of the aforesaid interpretation of the current legal regime on copyrightability of architectural works leads on to the fact that Copyright protection afforded to architectural designs has been a controversial issue worldwide. The protection offered to architects under the U.S. law prior to 1976 was highly insufficient as compared to the protection enjoyed by their counterparts in the U.K. and India. However, even though the 1994 Indian Amendment Act has in fact further broadened the protection, given to architects by replacing the term '*architectural work of art*' by '*work of architecture*' to make it a wider expression, it does not solve certain hurdles that architects are facing in these digitally advanced times.

Recommendations

After analysing the current legal regime on the copyrightability of architectural works, the author of the article recommends the following amendments to the Indian Copyright Act, 1957 to deal with the issues that might arise in the future when someone enforces their Copyright in architectural works:

1. **Awareness regarding Copyright for Architectural Works:** Worldwide, and specifically in India, architects lack awareness regarding the legal regime of Copyright protection to the architectural plan and the works. Therefore, unless an awareness of their Copyright is created amongst the architects, the protection afforded to them shall remain only in the statute book, and their plight courtesy large scale infringements shall continue.⁶⁵ Therefore, the author suggests conducting seminars, hiring legal lecturers, and introducing architects' rights in the curriculum in order to foster awareness regarding the same.

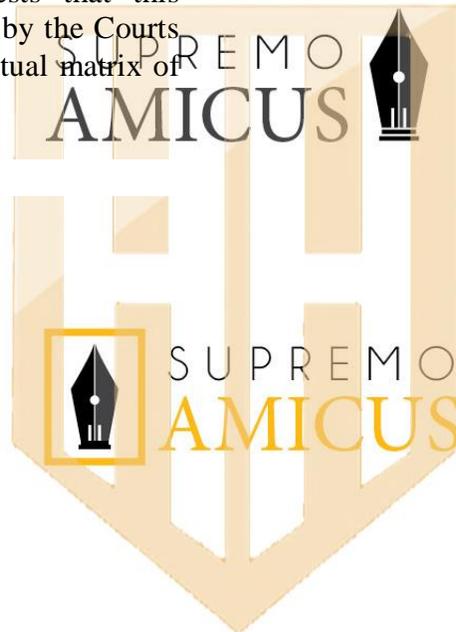
2. **Amendment to Section 2(m)(i) of the Copyright Act, 1957:** It is suggested that since the '*extent of reproduction*' to constitute infringement of an artistic work has not been discussed by the Act, an explanatory clause may be appended with the said Section, wherein either the '*extent of reproduction*' is given some colour by the legislature or alternatively, the requirement of reproduction of the whole work is substituted by "*substantial reproduction*". Since the latter amendment seems more plausible in its application, it is emphasized that the same should be implemented by the legislature. It is also noteworthy to mention that inspiration can be drawn from either the U.S. law or the Common law for the same.

3. **Adoption of a Hybrid Approach Test:** The best way to solve the struggle between a utilitarian ideal and actual protection of

⁶⁵ Katz, S. Arthur, 'The doctrine at Moral Right and American Copyright Law - A Proposal' (1951) 24 Calif L. Rev. 375.



artistic expression in architectural works, is to eliminate the *'total concept and feel'* test and the *'ordinary observer'* standard, in favour of a hybrid approach.⁶⁶ Under this standard, *'adequate'* or similarity is a more appropriate standard.⁶⁷ This standard allows architects to protect their artistic expression without having to worry about subsequent creators making minimal changes to escape infringement.⁶⁸ However, adoption of this test in India will only be possible once the *'extent of reproduction'* constituting Copyright infringement of artistic works is settled by the Courts, and the legislature is combined. Thereafter, the author suggests that this particular test can be adopted by the Courts while keeping in mind the factual matrix of each case.



⁶⁶ Vaughn Drozd, 'The Building Blocks of Copyright Protection for Architectural Works: Roadblock or Masterpiece?' (2015) 14 J. Marshall Rev. Intell. Prop. L. 623.

⁶⁷ *Supra* 26.

⁶⁸ *Id.*