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## The Architectural Works Copyright Protection Gesture of 1990, Or, "Hey, That Looks Like My Building!"

Clark T. Thiel

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**THE ARCHITECTURAL WORKS COPYRIGHT  
PROTECTION GESTURE OF 1990, OR,  
"HEY, THAT LOOKS LIKE MY BUILDING!"\***

*Clark T. Thiel\*\**

INTRODUCTION .....	2
I. BACKGROUND OF THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT	3
<i>A. A Historical Overview of United States Copyright Law.</i> .....	3
<i>B. Copyright Protection Under the 1976 Copyright Act.</i> .....	5
<i>C. The United States and the Berne Convention for the Protection of     Literary and Artistic Works.</i> .....	13
II. THE CURRENT STATE OF UNITED STATES COPYRIGHT PROTECTION FOR ARCHITECTURAL WORKS .....	19
<i>A. The Architectural Works Copyright Protection Act of 1990.</i> .....	19
<i>B. Limitations on the Architects' Right to Create and Distribute Derivative     Works.</i> .....	20
III. ANALYSIS .....	23
<i>A. A Closer Look at the Pictorial Representation Exception.</i> .....	23
<i>B. The Fair Use Doctrine.</i> .....	26
<i>C. United States Compliance With International Law.</i> .....	28
<i>D. A Proposed Solution.</i> .....	32
CONCLUSION .....	35

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\*\* B.S. 1984, University of Wisconsin at Milwaukee; Master of Architecture 1988, University of Wisconsin at Milwaukee; third-year student, King Hall School of Law, University of California at Davis. Registered Architect in the States of Hawaii and Wisconsin; Certified by the National Council of Architect Registration Boards. I am very grateful to Pamela Thiel, David Smith, Jim Touchstone, Harry Ermoian, Jason Schaumberg, and Stacey Sheston for their insight, advice and guidance.

## INTRODUCTION

On December 1, 1990, the Architectural Works Copyright Protection Act<sup>1</sup> (AWCPA) became law. The United States, for the first time, provided copyright protection for architectural structures. This new law established certain property rights in architectural designs, enabling architects to better control exploitation of their works.<sup>2</sup> Generally, the AWCPA provides architects with the exclusive right to reproduce or alter their copyrighted works.<sup>3</sup> Furthermore, the AWCPA brings the United States closer to full compliance with its obligations stemming from the international copyright treaty known as the Berne Convention.<sup>4</sup>

The AWCPA, however, affords only limited protection for architectural structures.<sup>5</sup> The Act's provisions require the architect to surrender to the building's owner the right to alter or destroy the work.<sup>6</sup> Moreover, the public retains the right to make pictorial representations of the architect's work.<sup>7</sup> This article argues that the architect's copyright should include the exclusive right to make or authorize pictorial representations of architectural works. Congress should amend the AWCPA to better protect this valuable form of art<sup>8</sup> while simultaneously taking another step toward full

1. Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 701, 703, 104 Stat. 5128, 5133 (1990) (codified in scattered sections of 17 U.S.C., including §§ 101(5), 102(a)(8), 120 (Supp. II 1990)).

2. See *infra* notes 19-23, 31 and accompanying text (defining copyright as bundle of property rights).

3. See *infra* notes 117-152 and accompanying text (discussing architect's rights under AWCPA).

4. See *infra* notes 184-194 and accompanying text (discussing United States compliance with international law obligations arising from Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, 828 U.N.T.S. 221 (Paris Revision, July 24, 1971)). On October 31, 1988, President Ronald Reagan signed into law the Berne Convention Implementation Act of 1988. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

5. See 17 U.S.C. § 120 (Supp. II 1990) (defining scope of exclusive rights in architectural works); see also *id.* § 101 (defining "Architectural Work"). An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. *Id.* The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features. *Id.*

6. *Id.* § 120(b). The owner of a building embodying an architectural work may, without the consent of the copyright owner, make or authorize the making of alterations to the building. *Id.* The owner may also destroy or authorize the destruction of the building. *Id.*

7. *Id.* § 120(a). The copyright in a constructed architectural work does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work. *Id.* This exception applies only if the building embodying the work is located in or ordinarily visible from a public place. *Id.*

8. Pub. L. No. 101-650, reprinted in 1990 U.S.C.A.N. (101 Stat.) 6936. Congress determined that architecture is a form of artistic expression that performs a significant societal purpose, both domestically and internationally. *Id.* See also Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L. J. 1598, 1599-1600 (1992) (discussing architecture's importance as art form).

Berne Convention compliance.

Part I of this article discusses the background of the Architectural Works Copyright Protection Act, including the historical treatment of architectural works in the United States. It also highlights the United States' responsibilities under the Berne Convention. Part II comments on the current state of copyright law, focusing on the Architectural Works Copyright Protection Act and its treatment of derivative works. Part III analyzes the shortcomings of existing copyright protection and offers possible solutions.

## I. BACKGROUND OF THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT

### A. *A Historical Overview of United States Copyright Law*

At the time of the Constitutional Convention, twelve of the thirteen states in the Union provided statutory copyright protection for authors within their respective states.<sup>9</sup> In an attempt to promote literary and graphic arts,<sup>10</sup> the individual state laws secured authors<sup>11</sup> the exclusive right to make and distribute copies of their work product.<sup>12</sup> These laws, however, failed to provide authors adequate protection for their creations for two reasons.<sup>13</sup> First, the individual laws were unenforceable beyond a state's jurisdiction.<sup>14</sup> Second, there was no uniformity among state laws.<sup>15</sup> These

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9. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 5 (4th ed. 1993) [hereinafter GORMAN & GINSBURG]. Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina and Virginia all had copyright laws by 1787, with only Delaware failing to provide statutory protection for authors. *Id.* See generally Irah Donner, *The Copyright Clause of the U.S. Constitution: Why did the Framers Include It With Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361 (1992) (discussing purposes for copyright clause in United States Constitution).

10. See Donner, *supra* note 9, at 369 (discussing individual copyright laws of original states).

11. For copyright purposes, the term "author" generally refers to the creator of a copyrightable work, be it written, graphic or sculptural. See, e.g., *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989) (holding author is party who translates idea into fixed, tangible expression entitled to copyright protection); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1492 (11th Cir. 1990) (defining architect as author of architectural drawings).

12. See James Bingham Bucher, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 39 EMORY L.J. 1261, 1264 (1990) (stating traditional purpose of copyright law is to encourage creativity by granting exclusive economic rights).

13. See *infra* notes 75-82 and accompanying text (discussing difference between property rights and moral rights); see also Todd Hixon, *The Architectural Works Copyright Protection Act of 1990: At Odds With the Traditional Limitations of American Copyright Law*, 37 ARIZ. L. REV. 629, 639 (1995) (stating that inconsistencies in several states' copyright statutes required federal copyright legislation).

14. See Donner, *supra* note 9, at 362 (discussing limitations on individual states' copyright law).

15. *Id.*

limitations forced authors to obtain a copyright for their works in each of the individual states.<sup>16</sup> The authors' only alternatives were to either distribute the work in only one state or forego copyright protection entirely.<sup>17</sup>

Recognizing that national legislation would eliminate this deficiency, the Constitutional Convention empowered Congress to enact federal copyright legislation.<sup>18</sup> The Constitution's framers intended to benefit the public by granting authors a uniform but limited monopoly in their works.<sup>19</sup> The limited monopoly served as incentive to motivate the authors' creativity by providing them with a financial reward. The public would then benefit from free access to the authors' creative genius after the authors' limited period of exclusive control had expired. To this end, copyright is a means to protect authors, for a limited time, against unauthorized use of the product of their labors.<sup>20</sup> Because copyright is for the public's benefit,<sup>21</sup> Congress and the courts have allowed authors only property rights in their works.<sup>22</sup>

16. *Id.* at 365.

17. *Id.* at 363.

18. *Id.* at 361. The Constitutional Convention unanimously approved this measure. *Id.* See also U.S. CONST. art. I, § 8, cl. 8 (granting Congress power to promote progress of useful arts by securing authors exclusive rights in their writings).

19. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing monopoly privileges that Congress may authorize under Article I of U.S. Constitution).

20. See Winick, *supra* note 8, at 1603 (discussing reasons for providing copyright protection).

21. See *id.* at 1601 (providing constitutional purposes of U.S. copyright law); see, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (holding limited scope of copyright monopoly reflects balance of competing claims upon public interest; private artistic motivation must serve to promote public availability of useful arts); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (holding that copyright law makes reward to owner secondary consideration); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (holding that primary object of copyright monopoly lies in general benefits public derives from labors of authors). Copyright is given by the public for benefits bestowed upon it by the skill of individuals, and as incentive to further their efforts for those benefits. *Id.*

22. H.R. REP. NO. 2222, 60th Cong., 2d Sess. 57 (1907), reprinted in OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN THE AGE OF ELECTRONICS AND INFORMATION 38 (1986). The Legislative Committee's report on the 1907 Act stated that U.S. copyright legislation is not based on any natural right that the author has in her writings. *Id.*

The Supreme Court has held that copyright is purely a statutory right. See, e.g., *Dowling v. United States*, 473 U.S. 207, 217 (1985) (holding that infringement of statutorily defined property rights of copyright holder implicates complex set of property interests); *Commissioner of Internal Revenue v. Wodehouse*, 337 U.S. 369, 401 (1949) (Frankfurter, J., dissenting) (stating that in "exercise of its power 'To promote the Progress of Science and useful Arts,' Congress, by granting copyrights, has created valuable property rights"); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907) (holding that object of United States' statutes is to secure and protect nature of property rights in copyright).

Although the Berne Convention text recognizes the author's moral rights, see *infra* notes 75-92 and accompanying text, in ratifying the treaty, Congress in no way accepted the idea of moral rights. See S. REP. NO. 352, 100th Cong., 10 (1988), reprinted in 1988 U.S.C.C.A.N. 3706,

Additionally, Congress has limited the author's monopoly by statutorily regulating the duration of those property rights.<sup>23</sup>

### B. Copyright Protection Under the 1976 Copyright Act

Beginning with the 1790 Copyright Act,<sup>24</sup> Congress has consistently provided authors with property rights in their original works.<sup>25</sup> Initially protecting little more

3715 (stating that adherence to Berne Convention not intended to change status quo regarding moral rights). However, the enactment of the Visual Artists Rights Act of 1990 represented movement towards the recognition of moral rights under United States copyright law. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5128 (1990) (granting visual artists moral rights, including right of paternity and right of integrity); see also William Belanger, *Article: U.S. Compliance With the Berne Convention*, 3 GEO. MASON IND. L. REV. 373, 373-76 (1995) (discussing history of U.S. copyright law); Hixon, *supra* note 13, at 639-40 (discussing historical purposes for copyright law in United States); Winick, *supra* note 8, at 1599-1604 (discussing historical purposes and background of U.S. copyright law).

23. Hixon, *supra* note 13, at 640. For example, the first copyright statute limited the author's monopoly to a fourteen-year period, with the privilege of renewing for another fourteen years. Act of 1790, 1 Stat. 124. Congress then extended the term to twenty-eight years, with a twenty-eight-year extension. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075. Currently, the author's monopoly is generally limited to the life of the author plus fifty years. 17 U.S.C. § 302 (1988).

24. Act of 1790, 1 Stat. 124 (*quoted in* Hixon, *supra* note 13, at 643 n.91). The 1790 Act provided "for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned." *Id.*

25. Act of May 31, 1790, ch. 15, 1 Stat. 124. The Copyright Act enacted in 1790 protected only literary works, maps and charts. *Id.* In 1802 Congress amended the Act, adding prints to the list of protected subject matter. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

The 1802 expansion of American copyright law was but the first of many legislative actions granting, qualifying, expanding and restricting copyright protection. *Id.* In 1831 Congress broadened the scope of protection granted in the original Copyright Act of 1790 by including musical compositions. Act of Feb. 3, 1831, ch.16, 4 Stat. 436. The 1831 Act also expanded the term of protection to 28 years with the privilege of renewal. *Id.* In 1870, another amendment to the 1790 Act added copyright protection for models or designs intended to be perfected as works of the fine arts. Act of July 8, 1870, ch. 230, 16 Stat. 198, 212. This amendment also granted copyright owners the exclusive right to complete, copy, execute, finish, and vend the work. *Id.* In 1909, the legislature substantially changed the scope of copyright protection. Act of Mar. 4, 1909, ch. 301, 35 Stat. 1075. The 1909 Act substituted "works of art" for "Fine arts," again expanding copyright protection. *Id.* The 1909 Act protected works of art, models, or designs for work of art and protected drawings or plastic works of a scientific or technical character. *Id.* at § 5.

Congress first amended the Copyright Act of 1909 with the Act of August 24, 1912, ch. 356, 37 Stat. 488, rendering motion pictures expressly copyrightable, and again in 1939, to protect prints and labels used for merchandise. Act of July 31, 1939, 53 Stat. 1142. Finally, in 1971 Congress again amended the 1909 Act by the Sound Recording Amendment of 1971, which provided limited protection to sound recordings. *Id.* The Act of 1909, as amended, remained in effect through 1977, and governs pre-1978 causes of action. Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.).

than literary works,<sup>26</sup> United States copyright law has continuously evolved to reflect the world's economic changes and technological advancements.<sup>27</sup> Although the Copyright Act of 1909<sup>28</sup> still controls certain rights,<sup>29</sup> the Copyright Act of 1976<sup>30</sup> and its subsequent amendments currently define copyright protection.

The 1976 Act generally affords the copyright owner<sup>31</sup> five exclusive privileges.<sup>32</sup> The Act provides an artist with the exclusive right to distribute an original work, copy an original work<sup>33</sup> and make similar (derivative) works based upon that work.<sup>34</sup> It also grants an artist the exclusive right to authorize public display of the work and to

Congress enacted the current Copyright Act in 1976. Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.). Amendments to the current Act include the Computer Software Copyright Act of 1980, § 10, Pub. L. No. 96-517, 94 Stat. 3028 (extending protection to computer software); the Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (amended 1988) (regulating compulsory jukebox licenses); the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853; the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, Title II, section 201, Nov. 16, 1988, 102 Stat. 3949; the Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, tit. VIII, 104 Stat. 5089; the Visual Artist Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5089; the Architectural Works Copyright Protection Act, Dec. 1, 1990, Pub. L. No. 101-650, tit. VII, 104 Stat. 5089; the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4248; and the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304.

26. Act of May 31, 1790, ch. 15, 1 Stat. 124. The 1790 Act offered authors protection for only original maps, charts, and books. *Id.*

27. See GORMAN & GINSBURG, *supra* note 9, at 9 (discussing concept of copyright from historical perspective).

28. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, *reprinted in* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, app. 6 (1993) [hereinafter NIMMER ON COPYRIGHT].

29. 17 U.S.C. § 113(b). For instance, the 1976 Act codifies judicial interpretation of the 1909 Act and does not find infringement in the plans of a structure through the unauthorized construction of a substantially similar building. 4 NIMMER ON COPYRIGHT, *supra* note 28, 2.08(D), at 2-116 to -117.

30. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2451, *reprinted in* 4 NIMMER ON COPYRIGHT, *supra* note 28, app. 2.

31. H.R. REP. NO. 1476, 94th Cong., 1976, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5698. The term "copyright owner" is used here because the enumerated rights create the "bundle of rights" that is copyright. *Id.* Each right may be subdivided, owned and enforced separately. *Id.*

32. See *infra* notes 75-82 and accompanying text (discussing differences between copyright as "natural right" and as legislatively granted privilege). These privileges were essentially inherited from the English Statute of Anne. 8 Anne c. 19, 1710 (U.K.). This statute established authors' exclusive right to print, reprint and distribute a new work. *Id.*

33. 17 U.S.C. § 106(1). The owner of a copyright has the exclusive right to reproduce the copyrighted work in copies, *id.*, and to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. *Id.* § 106(3).

34. *Id.* § 106(2). The owner of the copyright has the exclusive right to prepare and authorize derivative works based upon the copyrighted work. *Id.* A "derivative work" is a work based on a preexisting work, such as a translation, dramatization, motion picture version, art reproduction, or any other form in which one may recast, transform, or adapt a work. *Id.* § 101.

authorize public performance of certain protected works.<sup>35</sup> Congress and the courts, however, have imposed various qualifications,<sup>36</sup> exemptions,<sup>37</sup> and limitations<sup>38</sup> on these privileges.

The judiciary has also influenced modern copyright law. The United States Supreme Court<sup>39</sup> has established a fundamental rule of modern copyright law, holding that copyright protection applies to only the expression of an idea and not to the underlying idea itself.<sup>41</sup> Furthermore, courts have interpreted this rule to support another fundamental rule of copyright law: that copyright does not protect those articles that have an intrinsic utilitarian function, otherwise known as "useful articles."<sup>42</sup>

35. *See id.* § 106(4)-(5) (granting exclusive right to public performance and public display of copyrighted work).

36. *Id.* § 113 (Scope of exclusive rights in pictorial, graphic, and sculptural works); *id.* § 114 (Scope of exclusive rights in sound recordings); *id.* § 115 (Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords).

37. *Id.* § 116 (Negotiated licenses for public performances by means of coin-operated phonorecord players); *id.* § 118 (Use of works in connection with noncommercial broadcasting); *id.* § 120 (Scope of exclusive rights in architectural works).

38. *Id.* § 107 (Limitations on exclusive rights: Fair use); *id.* § 108 (Limitations on exclusive rights: Reproduction by libraries and archives); *id.* § 109 (Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord); *id.* § 110 (Limitations on exclusive rights: Exemption of certain performances and displays); *id.* § 111 (Limitations on exclusive rights: Secondary transmissions); *id.* § 112 (Limitations on exclusive rights: Ephemeral recordings); *id.* § 117 (Limitations on exclusive rights: Computer programs); *id.* § 119 (Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing).

39. *Baker v. Selden*, 101 U.S. 99 (1879). The Court held that the author could copyright a book on accounting principles, but the author could not copyright the accounting procedures described therein. *Id.* at 104. Differentiating "practical applications" from "ornamental designs," the Court defined the latter as "the product of genius and the result of composition," and the former as having "their final end in application and use." *Id.* at 103. The application and use are what the public derive from the object. *Id.* at 103-04. The embodiment of the rules and methods alone is what the copyright secures. The use by another of the same statements, whether in words or illustrations, would be an infringement of the copyright. *Id.*

40. *See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 350 (1991) (citing *Baker v. Selden*, 101 U.S. 99 (1879) for proposition that copyright protection applies to expression of idea, not idea itself); *Kepner-Iregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 535 (5th Cir. 1994) (same); *Bell South Advertising & Pub. Corp. v. Donnelley Information Pub., Inc.*, 999 F.2d 1436, 1442 (11th Cir. 1993) (same); *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) (same); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 839 (Fed. Cir. 1992) (same); *Kregos v. Associated Press*, 937 F.2d 700, 706 (2d Cir. 1991) (same).

41. *Baker*, 101 U.S. at 102-04. There is a clear distinction between a book, as such, which would be the subject of copyright, and the procedure that it illustrates, which is not. *Id.*

42. *See, e.g., Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 202-03 (9th Cir. 1989) (holding utilitarian features of calendar pages and address/telephone pages, not subject to copyright protection); *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1146-47 (2d Cir. 1987) (holding that although the sculpture which inspired the bicycle rack may be



Currently, under the amended 1976 Act, a utilitarian or useful article<sup>43</sup> qualifies for copyright protection as to its form, but not its mechanical or utilitarian aspects.<sup>44</sup> Thus, a useful article may qualify for protection only if the article's design can exist independently of its utilitarian aspects.<sup>45</sup> Furthermore, Congress has established that

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copyrightable, the rack was not copyrightable because the form of the rack was influenced by utilitarian concerns and aesthetic elements that were not conceptually separable from the utilitarian elements); *Norris Indus. v. International Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 1983) (holding that the wire-spoked automobile wheel cover was a useful article within meaning of copyright law, not eligible for copyright protection), *cert. denied*, 464 U.S. 818 (1983); *Superior Form Builders v. Dan Chase Taxidermy Supply Co., Inc.*, 851 F. Supp. 222, 223 (E.D. Va. 1994) (holding forms used to mount animal skins not useful articles within meaning of copyright law but copyrightable as sculptural works); *Lisa Frank, Inc. v. Impact Int'l, Inc.*, 799 F. Supp. 980, 999-1000 (D. Ariz. 1992) (holding that novelty stationery items do not have utilitarian function, so not useful articles that are denied copyright protection); *Little Souls, Inc. v. Petits*, 789 F. Supp. 56, 58 (D. Mass. 1992) (holding doll's armhole designed to accommodate automatic stuffing machine and to prevent arm from swinging excessively, and face structure designed to make doll look more realistic are utilitarian functions and not protected expressions within the meaning of U.S. copyright law); *Act Young Imports, Inc. v. B and E Sales Co.*, 667 F. Supp. 85, 87 (S.D.N.Y. 1986) (holding artistic aspect of children's backpacks separate from useful function, backpacks were copyrightable); *Williams Electronics, Inc. v. Bally Mfg. Corp.*, 568 F. Supp. 1274, 1279 (N.D. Ill. 1983) (holding only aspects of game separable from its utilitarian aspects are copyrightable; Congress intended to exclude from copyright protection functional elements of work included in rolling ball arcade game); *Stein v. Benaderet*, 109 F. Supp. 364, 366 (E.D. Mich. 1952) (holding that thing intended solely for practical use not copyrightable).

Before 1954, the courts applied the utilitarian article rule to allow copyright protection for the forms embodied in works of artistic craftsmanship, but not the works' mechanical or utilitarian aspects. *Fabrica Inc. v. El Dorado Corp.*, 697 F.2d 890, 892 (9th Cir. 1983). In *Mazer v. Stein*, 347 U.S. 201 (1954), a lamp manufacturer copied a statuette that his competitor used as a lamp base. *Id.* at 950. The United States Supreme Court held that although a lamp is a useful article, because the statuette was removable from the lamp, it was subject to copyright protection. *Id.* at 952. Following this "new" interpretation of what constitutes a useful article, Congress defined the term "useful article" as an object which its utility comprises its sole intrinsic function. 37 C.F.R. § 202.10(c) (1990). Furthermore, Congress specifically excluded from the definition appended artistic features that one could separately identify and that can exist as an independent work of art. *Id.*

43. See *supra* note 42 and accompanying text (defining "useful" or "utilitarian" articles).

44. See 17 U.S.C. § 101 (defining "pictorial, graphic, and sculptural works" as excluding mechanical or utilitarian aspects of that work).

45. See, e.g., *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 670 (3d Cir. 1990) (holding that sculptural work was not "useful article" and copyrightable because sole utilitarian function is to portray appearance of article); *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985) (holding that work of applied art with artistic features that court could not identify separately from useful article was not copyrightable, regardless that it may be aesthetically satisfying); *Gay Toys, Inc. v. Buddy L. Corp.*, 703 F.2d 970, 974 (6th Cir. 1983) (holding that copyright law allows only certain aspects of an item to be copyrightable individually as separate and independent features). Individual aspects may be copyrighted only when items are first, as whole, disallowed copyright protection as "useful articles." *Id.* See also *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir. 1980) (stating that just as

an article that is normally a component of a useful article is itself a useful article and ineligible for copyright.<sup>46</sup> The United States copyright law thereby denies protection to useful articles that have *any* intrinsic utilitarian function,<sup>47</sup> not only those articles having utility as their *sole* intrinsic function.<sup>48</sup> It follows, then, that an author can copyright artistic, sculptural or decorative elements incorporated in a useful article only if they are physically or conceptually separable from the article.<sup>49</sup> This requirement has resulted in fundamental disagreements regarding the classification of certain works, making it difficult for the courts to separate an article's form from its function.<sup>50</sup> Consequently, the process of determining what constitutes a useful article has consumed considerable judicial resources, resulting in no fewer than four different separability tests.<sup>51</sup>

Before Congress enacted the AWCPA, courts consistently applied one or more of

copyright protection extends to expression but not ideas, copyright protection extends only to artistic aspects, but not mechanical or utilitarian features of protected work); *Acorn Structures, Inc. v. Swantz*, 657 F. Supp. 70, 75 (W.D. Va. 1987) (stating that Congress did not intend to extend copyright protection to use of ideas found in copyrighted works; unauthorized use of architectural plans was not infringement of architect's copyright), *rev'd on other grounds*, 846 F.2d 923 (4th Cir. 1988).

46. 17 U.S.C. § 101. "An article that is normally a part of a useful article is considered a 'useful article.'" *Id.*

47. *Id.* (defining "pictorial, graphic and sculptural works"). The design of a useful article may be protected only if, and only to the extent that, its artistic features can exist independently of the utilitarian features of the article. *Id.*

48. Copyright Office and Procedures, 37 C.F.R. § 202.10(c). "If the sole intrinsic function of an article is its utility, the fact that it is unique and attractively shaped will not qualify it as a work of art." *Id.*

49. *See, e.g., National Theme Productions, Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352 (S.D. Cal. 1988) (holding masquerade costumes copyrightable to extent they had features separately identifiable and capable of existing independently as work of art; features need only be conceptually separable from utilitarian functions of garment to have copyright protection).

50. *See, e.g., Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987) (holding aesthetic elements of bicycle rack not conceptually separable from utilitarian elements); *Innovative Concepts in Entertainment, Inc. v. Entertainment Enterprises Ltd.*, 576 F. Supp. 457, 462 (E.D.N.Y. 1983) (expressing doubt that toy hockey players were utilitarian articles, but even if they were, there are many ways of sculpting hockey player).

51. U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS, THE REPORT OF THE REGISTER OF COPYRIGHTS ON WORKS OF ARCHITECTURE xvii-xx (1989) [hereinafter COPYRIGHT OFFICE REPORT]. First, the Copyright Office interprets conceptual separability as meaning that utilitarian items' artistic features, while physically inseparable, are clearly recognizable as potentially a freestanding sculpture and independent of the shape of the useful article. Paragraph 505.03, COMPENDIUM II COPYRIGHT OFFICE PRACTICES, 1984, *reprinted in* COPYRIGHT OFFICE REPORT, *supra*, at xviii. Second, the "temporal displacement" test requires that the article "stimulate in the mind of the beholder" an artistic concept separate from the utilitarian article. *Id.* at xix. A third approach is whether an ordinary observer would understand the work as having both the function of a work of art and its utilitarian function. *Id.* at xx. Finally, some courts have applied a two-prong test. Those applying this test first ask whether an ordinary observer would conceive the presence of artistic features in a utilitarian object. If so, they then ask whether the object's functions dictate those features. *Id.*

the separability tests to preclude copyright protection for most architectural structures.<sup>52</sup> Functional, non-monumental works of architecture easily fit within the courts' classification of utilitarian articles.<sup>53</sup> Therefore, given the difficulty of separating a building's utilitarian aspects from its design, the copyright law generally denied architects any protection for constructed architectural works.<sup>54</sup>

Architects could, however, obtain copyright protection for nonfunctional or monumental structures<sup>55</sup> categorized as "sculptural works."<sup>56</sup> Furthermore, copyright protection for original plans and technical drawings has long been available in the

52. *See, e.g.*, *Schuchart & Assocs. v. Solo Serve Corp.*, 540 F. Supp. 928, 941 (W.D. Tex. 1982) (holding building itself has intrinsic utilitarian function that is not merely to portray appearance of article or to convey information, and as such is useful article); *Herman Frankel Org. v. Wolfe*, 184 U.S.P.Q. (BNA) 819, 821 (E.D. Mich. 1974) (holding that a person cannot, by copyrighting plans, prevent the building of house similar to that taught by copyrighted plans, but can prevent another from copying plans and using them to build house). *See also* *DeSilva Constr. Corp. v. Herald*, 213 F. Supp. 184, 195 (M.D. Fla. 1962) (recognizing the view that architects do not have an exclusive right to build structures embodied in technical writings, permitting copying of constructed building and subsequent use of plans which closely resemble originals). Copyright law limited protection to unauthorized copying or use by another of the original plans themselves. *Id.* Copyright does not protect architectural plans from their use in building a structure with the possible exception of a structure qualifying as a work of art. *Id.* *See also* *Muller v. Triborough Bridge Auth.*, 43 F. Supp. 298, 300 (S.D.N.Y. 1942) (holding that a copyright of a drawing for bridge approach did not give copyright owner exclusive property in art described; could not recover for infringement even if copyrighted drawing used to design and construct bridge approach).

53. *See* COPYRIGHT OFFICE REPORT, *supra* note 51, at xvii (quoting language of H.R. REP. NO. 1476, 94th Cong., 2d Sess. 55 (1976), as stating that purely nonfunctional or monumental structures would be subject to full copyright protection under 1976 law).

54. *Id.* Works which can satisfy the stringent conceptual separability standard are so rare that, for all practical purposes, American copyright law provides no protection for architectural structures. *See, e.g.*, *Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 295 n.12 (E.D. Tex. 1988) (holding building not within subject matter of copyright); *Smith v. Paul*, 174 Cal. App. 2d 744, 758 (1959) (holding that anyone with sufficient draftsmanship abilities may duplicate structure's exterior); *see also* COPYRIGHT LAW REVISION STUDY NO. 27: COPYRIGHT IN ARCHITECTURAL WORKS 71 (Comm. Print 1960) (stating no protection in broad area of functional structures which, though attractively designed, are not works of art).

55. Robert E. Saarino, *Complexity, Contradiction and Copyright: Evolving Intellectual Property Doctrine and the Practice of Architecture in the United States* 45 (1994) (unpublished M. Science thesis, University of Pennsylvania). For example, courts may consider the Washington Monument in Washington, D.C., or the Statue of Liberty in New York City to be nonfunctional structures. H.R. REP. NO. 1476, 94th Cong., 55 (1976); *see, e.g.*, *Hart v. Sampley*, No. 91-3068, 1992 U.S. Dist. LEXIS 1154, at \*5-\*7 (D.D.C. June 24, 1992) (dismissing argument that Vietnam Veterans Memorial cannot be separated from its functional purpose of honoring Vietnam Veterans).

56. H.R. REP. NO. 1476, 94th Cong., 55 (1976); *see* *Jones Bros. C. v. Underkoffler*, 16 F. Supp. 729, 731 (M.D. Pa. 1936) (holding design of memorial was "design for work of art" within provision of copyright act notwithstanding memorial was "article of manufacture" as well as "object of art").

United States.<sup>57</sup> Moreover, in 1988, Congress amended the current copyright law to explicitly include protection for "architectural plans."<sup>58</sup> Nevertheless, after the 1988 amendment, the extent of the architects' copyright was still unclear. Questions remained about which works the copyright protected,<sup>59</sup> to what extent copyright protected those works,<sup>60</sup> and how much control over the completed work remained with the architect.<sup>61</sup>

A copyright protects original work from unauthorized reproduction.<sup>62</sup> With respect to architectural works, there are at least six types of reproduction.<sup>63</sup> One could copy

57. *See, e.g.*, *Eales v. Environmental Lifestyles, Inc.*, 958 F.2d 876, 879 (1992) (holding architectural drawings and plans eligible for protection under copyright code as pictorial or graphic works); *Richmond Homes Management, Inc. v. Raintree, Inc.*, 862 F. Supp. 1517, 1523 (W.D. Va. 1994) (holding that architectural structures and plans subject to copyright protection where author has independently created work and work reflects creativity, regardless of how simple design); *CSM Investors, Inc. v. Everest Dev., Ltd.*, 840 F. Supp. 1304, 1309 (D. Minn. 1994) (holding copyright law protects architectural plans and drawings as pictorial, graphic, and sculptural works and architectural works); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 829 F. Supp. 1314, 1317 (M.D. Fla. 1993) (holding architectural plans are subject to federal copyright protection).

Common law, supplemented by the Copyright act of 1909, Act of Mar. 4, 1909 § 5(1), ch. 301, 35 Stat. 1075, originally furnished protection for plans and technical drawings. *See, e.g.*, *Nucor Corp. v. Tennessee Forging Steel Serv.*, 476 F.2d 386, 389 (8th Cir. 1973) (holding that although the company sent architectural plans to contractors without any restrictions, permitted interested persons to inspect building at all stages of construction and after completion, and distributed catalogs containing photographs of building, this activity did not eliminate company's common law copyright in plans); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 898 (5th Cir. 1972) (stating protected privilege of enjoying fruits of public dissemination is the principal reason for seeking statutory protection rather than relying on common law proprietorship). In 1976, Congress added technical drawings, diagrams, and models to the scope of protection of the Copyright Act. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

58. Berne Convention Implementation Act of Oct. 31, 1988, Pub. L. No. 100-568, § 4(a)(1)(A), 102 Stat. 2854 (codified as amended in scattered sections of 17 U.S.C.). Pictorial, graphic, and sculptural works include diagrams, models, and technical drawings, including architectural plans. *Id.* (codified at 17 U.S.C. § 101).

59. *See supra* notes 43-54 and accompanying text (discussing works protected by various copyright laws).

60. *See infra* notes 62, 63-74 and accompanying text (discussing extent of copyright protection offered architectural works).

61. *See infra* notes 133-149 and accompanying text (discussing statutory limitations of architect's copyright and alienability of copyright).

62. *See supra* notes 32-35 and accompanying text (discussing benefits of copyright protection).

63. Natalie Wargo, *Copyright Protection for Architecture and the Berne Convention*, 65 N.Y.U. L. REV. 403, 439-42 (1990). In October, 1986, a joint World Intellectual Property Organization/United Nations Educational, Scientific, and Cultural Organization (WIPO/UNESCO) committee met to evaluate copyright protection for works of architecture. *Id.* This committee recognized four types of reproduction: (1) copying plans in the form of plans; (2) copying buildings in the form of buildings; (3) copying plans in the form of buildings;

architectural plans as plans, as derivative works, or as a building.<sup>64</sup> One might also copy a building in the form of plans,<sup>65</sup> derivative works,<sup>66</sup> or another building.<sup>67</sup> The 1976 Act adequately protected architectural plans<sup>68</sup> and models from direct duplication.<sup>69</sup> However, because a constructed building is a useful article,<sup>70</sup> courts found that United States copyright law did not prohibit the public from copying a building in the form of plans,<sup>71</sup> derivative works,<sup>72</sup> or other buildings.<sup>73</sup> By preventing

and (4) copying buildings in the form of plans. *Id.* The Committee agreed that building from a plan is not mere execution, but copying. *Id.*

64. *See id.* at 439-42 (discussing possible forms of copying architectural works).

65. *Id.* Copying buildings in the form of plans is also known as "reverse engineering." *Id.*

66. *See, e.g.,* Hart v. Sampley, 1992 U.S. Dist. LEXIS 1154, at \*4-\*6 (holding that defendants infringed the artist's copyright by selling derivative works copied from original work).

67. *See, e.g.,* Donald Frederick Evans & Assocs. v. Continental Homes, Inc., 785 F.2d 897, 914 (11th Cir. 1986) (holding that the builder who constructed a home substantially similar to one already constructed was not liable for copyright infringement).

68. H.R. REP. NO. 1476, 94th Cong., 55 (1976). Architectural plans includes plans, sketches, drawings and renderings. *Id.* The 1976 House Report states that "[a]n architect's plans and drawings would, of course, be protected by copyright . . ." *Id.*

69. *See* Laura E. Steinfeld, *The Berne Convention and Protection of Works of Architecture: Why the United States Should Create a New Subject Matter Category for Works of Architecture Under Section 102(A) of the Copyright Act of 1976*, 24 *IND. L. REV.* 459, 462 (1991) (discussing circumstances when copying of protected architectural plans was permissible under 1988 copyright law); Erika White, Note, *Standing on Shaky Ground: Copyright Protection for Works of Architecture*, 6 *ART & L.* 70, 72 (1981) (discussing copying architectural plans and models). As of December 11, 1996, there were no published cases in which a claimant argues that an architect's copyright in a model has been infringed.

70. *See supra* notes 39-53 and accompanying text (applying useful article doctrine to constructed architectural works).

71. *See* Smith v. Paul, 345 P.2d 546, 553 (Cal. Ct. App. 1959) (holding that anyone with sufficient draftsmanship abilities may duplicate structure's exterior). Because copyright law did not protect the architectural design in a building, unauthorized copying of the design in any media, including plans – as long as copyrighted plans were not used – would not constitute infringement. COPYRIGHT LAW REVISION STUDY NO. 27: COPYRIGHT IN ARCHITECTURAL WORKS 71 (Comm. Print 1960).

72. As of December 11, 1996, there were no published cases explicitly holding this. However, copyright law is applicable only to articles within its scope of protection. 17 U.S.C. § 102(b). Architectural works, falling outside that scope, are therefore not protected from unauthorized copying in the form of derivative works. *See, e.g.,* Michael F. Clayton & Ron N. Dreben, *Copyright Protection for Architectural Works: Congress Changes the Rules*, 4 *NO. 3 J. PROPRIETARY RTS.* 15, 15 (stating that federal copyright law has not traditionally protected copyright owners against direct copying of buildings themselves). *But see* Hart v. Sampley, 1992 U.S. Dist. LEXIS 1154, at \*5 (rejecting "useful article" argument as defense against copyright infringement when defendants sold t-shirts and photographs depicting sculpture).

73. *See* Robert R. Jones Assoc., Inc. v. Nino Homes, 858 F.2d 274, 280 (6th Cir. 1988) (holding that one may build house identical to house depicted in copyrighted architectural plans, but may not directly copy those plans to construct house). Courts have had difficulty in determining copyright protection for the architectural plans embodied in buildings. *See* Scholz Homes, Inc. v. Maddox, 379 F.2d 84, 87 (6th Cir. 1967) (holding that making plans and

architects from copyrighting their constructed works, the United States copyright law provided far less protection than the copyright laws of most every other developed nation.<sup>74</sup>

*C. The United States and the Berne Convention for the Protection of Literary and Artistic Works*

The United States approach of granting only property rights to the author is contrary to the prevailing European view that copyright is a natural or moral right<sup>75</sup> and is

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constructing house was not infringement of corporation's copyrighted booklet containing architectural plan and design of same house); *Demetriades v. Kaufmann*, 680 F. Supp. 658, 664 (S.D.N.Y. 1988) (holding that building imitating that depicted in copyrighted architectural plans does not constitute infringement of those plans); *Herman Frankel Org. v. Tegman*, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973) (holding copyright does not prevent building of house similar to that taught by copyrighted plans, but may prevent another from copying plans and using them to build house).

While an architect's drawings are the expression of her ideas, many courts considered the structure depicted therein was the idea itself. *See supra* notes 39-53 and accompanying text (discussing idea/expression distinction). Therefore, any copy of a building was permissible if the builder did not duplicate the protected blueprints themselves. *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 899 (5th Cir. 1972). No infringement occurs because a structure is merely a result of the plans, not a "copy" of them. COPYRIGHT OFFICE REPORT, *supra* note 51, at 37. It was therefore permissible to have a draftsman copy or adapt architectural plans. *DeSilva Constr. Corp. v. Herrald*, 213 F. Supp. 184, 195 (M.D. Fla. 1962). In addition, a builder could use the plans directly, without copying them, to construct a structure substantially similar to the one depicted in the protected drawings. *See id.* at 195 (stating that architect does not have exclusive right to build structures embodied in technical writings); *see also Imperial Homes*, 458 F.2d at 899 (stating that copyrighted drawings do not "clothe their author" with exclusive right to reproduce dwelling); *Schuchart & Assoc. v. Solo Serve Corp.*, 540 F. Supp. 928, 941 (W.D. Tex. 1982) (holding that architect does not have exclusive right to execute drawings). Although copyright law granted architects protection for their drawings, the actual protection provided was extremely limited. David Shipley, *Copyright Protection for Architectural Works*, 37 S.C. L. REV. 393, 410 (1986). Absent a right to prevent infringing construction, the effectiveness of copyright protection of architectural works was sharply diminished. *Id.* The value of architectural plans depends on control over the right to build; protection for plans but not buildings renders copyright protection almost meaningless. *Id.*

74. *See* COPYRIGHT OFFICE REPORT, *supra* note 51, at 223 (stating that virtually every Berne member country makes express reference to copyright protection for buildings and structures).

75. *Belanger*, *supra* note 22, at 383. Moral rights, or *le droit moral*, are authors' personal rights. *Id.* Moral rights typically include the right to be known as the author of one's work and the right to prevent others from being named as author of that work. 1 NIMMER ON COPYRIGHT, *supra* note 28, § 8D.01A. Generally, moral rights also grant the author the right to prevent others from claiming authorship of her work, the right to withdraw a published work, and the right to prevent others from deforming or defacing her work. *Id.* Finally, moral rights may include the author's right to prevent others from using her name or work in a way that would violate the author's good name or professional standing. *Id.*

personal to the artist.<sup>76</sup> Although each country's laws vary, European copyright laws typically provide the basic protection afforded by United States' law.<sup>77</sup> In addition, European copyright generally includes the artist's right to claim authorship<sup>78</sup> and to control alterations,<sup>79</sup> public display,<sup>80</sup> and resale of the protected work. Some countries also recognize the artist's right to withdraw a work from the public and to receive protection from excessive criticism.<sup>82</sup> Thus, American copyright law falls short of the protection most European nations grant.<sup>83</sup>

Furthermore, many European authors and artists have enjoyed international copyright protection for the past 100 years.<sup>84</sup> Under the Berne Convention for the

76. NIMMER ON COPYRIGHT, *supra* note 28, at § 8D.01A. As a moral right is personal to the artist, it is inalienable and non-waivable. *See, e.g.*, Christine L. Chinni, *Droit d'auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145 (1992) (comparing Anglo-American copyright law to French copyright law, which is based upon moral rights).

77. Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L. J. 431, 439 (1994). Countries recognizing moral rights believe those rights are inherent in the creative process and are only minimally subject to government intervention. *Id.* Therefore, those countries grant broad copyright protection. *Id.*

78. Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 91 (1993). The right of attribution (or paternity right) includes the right to claim authorship and the right to prevent the false designation of authorship. *Id.* The author also has the right to prevent the use of her name on a work which another has distorted, mutilated, or modified in a manner prejudicial to her honor or reputation. *Id.* Attempts to claim the right of attribution under United States copyright law have been rejected. *See, e.g.*, *Weinstein v. University of Ill.*, 811 F.2d 1091, 1095 (7th Cir. 1987) (rejecting claim to right of attribution as contributing author in published work); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948) (rejecting claim for right of attribution for drawings published in *Esquire Magazine*).

79. *Wargo*, *supra* note 63, at 433. The right of integrity in a work is the right of the author to prevent distortions and to control alterations or modifications of her work. *Id.* U.S. copyright law does not grant this right. Phelan, *supra* note 78, at 91. *But cf.* *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S. 2d 575 (Sup. Ct. 1948) (stating that under doctrine of moral rights, court can prevent use of musical composition or literary work in such manner as will be violative of the composer's or author's rights), *aff'd*, 87 N.Y.S. 2d 430 (App. Div. 1949).

80. *See Gerstenblith*, *supra* note 77, at 439 (discussing moral rights included in European copyright laws).

81. *Id.*

82. *Id.* at 439-40.

83. Compare *supra* notes 9-74 and accompanying text (discussing copyright protection granted by U.S. laws) with *supra* notes 75-82 and accompanying text (discussing copyright protection granted by European laws).

84. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (Paris Revision, July 24, 1971) [hereinafter Berne Convention Text]. The Berne Convention is an international treaty representing nations from all over the world. *Id.* Beginning with a membership of only ten countries, by January 1, 1988 77 nations were party to the Berne Convention. JOSEPH GREENWALD AND CHARLES LEVY, INTRODUCTION, PROTECTION OF INTELLECTUAL PROPERTY RIGHTS; BERNE CONVENTION OF SEPTEMBER 9, 1886 FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 1 B.D.I.E.L. 711 (1989) [hereinafter

Protection of Literary and Artistic Works,<sup>85</sup> authors and artists were eligible for copyright protection in countries throughout the world that recognized the Berne Convention.<sup>86</sup> This protection was automatic, with its sole condition being first publication of the work in any country acceding to the Convention.<sup>87</sup> The United States, however, originally declined to join this international alliance.<sup>88</sup> In rejecting the Berne Convention, Congress asserted that fundamental differences in copyright protection regarding duration,<sup>89</sup> formalities,<sup>90</sup> and moral rights<sup>91</sup> prevented the United

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GREENWALD & LEVY].

85. Berne Convention Text, *supra* note 84. The drafters concluded the Treaty on September 9, 1886, and the signatories completed it in Paris on May 4, 1896. WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 5 (1978) [hereinafter WIPO GUIDE TO THE BERNE CONVENTION]. The parties revised the Treaty in Berlin on November 13, 1908, completed it in Berne on March 20, 1914, again revised it in Rome on June 2, 1928, Brussels on June 26, 1948, Stockholm on July 14, 1967, and in Paris on July 24, 1971, and amended it on October 2, 1979. *Id.* at 6.

86. *See* GORMAN & GINSBURG, *supra* note 9, at 8 (discussing the Berne Convention).

87. *Id.*

88. GREENWALD & LEVY, *supra* note 84, at introduction. The United States declined to join the Berne Convention, electing to develop its own system of international copyright relations. *Hixon*, *supra* note 13, at 631. Prior to joining the Berne Convention, the United States remained a "copyright island," with copyright law inconsistent with the laws of most Berne Convention nations. *Id.* at 632 n.15.

89. Berne Convention Text, *supra* note 84. Article 7(1) of the Berne Convention provides that copyright protection endures for a term equal to the author's life plus 50 years. *Id.* at art. 7(1). Prior to 1988, the United States followed the dual system of limited statutory copyright protection for certain published and unpublished works. Wargo, *supra* note 63, at 404 n.6. *See also* Copyright Act of 1909, ch. 320, §§ 2, 24, 35 Stat. 1075, 1080, *repealed by* Copyright Act of 1976, Pub.L. No. 94-553, §§ 302-303, 90 Stat. 2541, 2572-73 (codified as amended at 17 U.S.C. §§ 302-303).

90. Berne Convention Text, *supra* note 84. Article 5(2) of the Berne Convention prohibits subjecting copyright protection on compliance with any formalities such as registration or notice. *Id.* at art. 5(2). Under the United States' 1909 Act, failure to comply with requirements of notice, registration, renewal, and mandatory deposit of copies could result in loss of copyright protection. Copyright Act of 1909, ch. 320, §§ 10, 14, 24, 35 Stat. 1075, 1078, 1080-81, *repealed by* Copyright Act of 1976, Pub. L. No. 94-533, §§ 401-412, 90 Stat. 2541, 2576-83 (codified as amended at 17 U.S.C. §§ 401-412).

91. Berne Convention Text, *supra* note 84. Article 6<sup>bis</sup> of the Berne Convention provides that an author has the right to claim authorship in her work (right of paternity) and the right to object to any distortion, mutilation, or other modification of the work prejudicial to her honor or reputation (right of integrity). *Id.* at art. 6<sup>bis</sup>(1). United States copyright law does not provide specifically for moral rights. Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655, 661-63 (1986). Although U.S. copyright law does not provide any meaningful protection for moral rights, this protection may be available, to some degree, through contract, unfair competition, or tort theories, or through state statutes. *Id.*



States from joining the Convention.<sup>92</sup>

However, by the latter-half of this century the international dimension of copyright law assumed increasing importance in the United States.<sup>93</sup> American popular culture and information products had become export commodities of immense economic value.<sup>94</sup> Efforts to provide adequate and effective copyright protection for these works prompted Congress to bring United States copyright law into compliance with international standards.<sup>95</sup> In 1988, the United States finally subscribed<sup>96</sup> to the Berne Convention, the world's oldest<sup>97</sup> and most important copyright convention.<sup>98</sup> By doing so, it signaled its alignment with most other nations' conceptions of copyright protection.<sup>99</sup>

Nevertheless, the treaty's implementation<sup>100</sup> required that the United States resolve its fundamental copyright differences with the Berne Convention. As early as 1976,

92. See 133 CONG. REC. H1293 (daily ed. March 16, 1987) (statement of Rep. Kastenmeier) (presenting Berne Convention Implementation Act of 1987 and stating reasons why U.S. had not previously joined Convention).

93. See GORMAN & GINSBURG, *supra* note 9, at 874 (discussing importance of international copyright protection).

94. 134 CONG. REC. S14549 (daily ed. Sept. 26, 1988) (statement of Senator DeConcini). The United States was, at this time, the world's largest exporter of copyrighted works, including books, sound recordings, motion pictures, and computer software. 133 CONG. REC. S7369 (daily ed. May 29, 1987) (statement of Senator Leahy). In 1988, worldwide piracy of these works had resulted in an estimated loss of over \$7.2 billion in the computer and entertainment industries. GORMAN & GINSBURG, *supra* note 9, at 874.

95. See 134 CONG. REC. S14549 (daily ed. Sept. 26, 1988) (statement of Senator DeConcini) (debating amendments to Berne Convention Implementation Act); 133 CONG. REC. S7369 (daily ed. May 29, 1987) (statement of Senator Leahy) (introducing Berne Convention Implementation Act). By the mid 1980's, continued U.S. non-participation in the Berne Convention presented a variety of problems. Dawn M. Larson, *The Effect of the Berne Implementation Act of 1988 on Copyright Protection for Architectural Structures*, 1990 U. ILL. L. REV. 151, 157-58 (1990). The primary benefit of joining the Berne Convention was more stringent enforcement and remedies for violations of American overseas copyright. *Id.*

96. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 9, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.) [hereinafter BCIA of 1988]. On October 31, 1988, President Reagan signed the Berne Convention Implementation Act of 1988. *Id.*

97. WIPO GUIDE TO THE BERNE CONVENTION, *supra* note 85, at preface.

98. See H.R. REP. NO. 735, 101st Cong. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6942 (describing Berne Convention as world's "most important" copyright agreement).

99. See Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 1 (1988) (discussing United States acquiescence to Berne Convention's terms).

100. 133 CONG. REC. H1293 (daily ed. March 16, 1987) (statement of Rep. Kastenmeier). Before ratifying the Berne Convention, Congress stated that the Berne Treaty was not self-executing, BCIA of 1988, *supra* note 96, at § 2(1)-(2), and insisted that only congressional action could implement the Berne Convention Treaty's terms. 133 CONG. REC. H1293 (daily ed. March 16, 1987) (statement of Rep. Kastenmeier). The resulting legislation was the BCIA of 1988, *supra* note 96, which, according to Congress, brought United States copyright law into minimal conformity with the standards of the Berne Convention. *Id.*

Congress began this process by enacting provisions for the duration of copyright protection<sup>101</sup> consistent with the Berne Convention's requirements.<sup>102</sup> Although the 1976 Act did not eliminate the statutory formalities of copyright protection,<sup>103</sup> it altered them in an attempt to comply with the spirit of the Convention's terms.<sup>104</sup> The 1976 legislation brought the United States' copyright law closer to conforming with the Berne Convention's standards, but several barriers to complete compliance remained.<sup>105</sup>

With the Berne Convention Implementation Act of 1988,<sup>106</sup> Congress adopted a minimalist approach in accepting the Berne Convention's terms.<sup>107</sup> In so doing, it removed most of the remaining barriers to full compliance.<sup>108</sup> Congress, however, failed to give adequate attention<sup>109</sup> to at least one area in which United States copyright

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101. Compare 17 U.S.C.A. §§ 302-303 (stating copyright in work created after January 1, 1978, subsists from its creation and endures for term consisting of life of author and fifty years after author's death), and Berne Convention Text, *supra* note 84, at art. 7(1) (stating copyright protection granted by Berne Convention shall be life of author and fifty years after author's death).

102. 133 CONG. REC. H1293 (daily ed. March 16, 1987) (statement of Rep. Kastenmeier). In many ways Congress drafted and passed the 1976 copyright Act with a "weather eye" on Berne Convention adherence. *Id.*

103. See 17 U.S.C. §§ 401-412 (1976) (setting notice and registration requirements for copyright protection).

104. 3 NIMMER ON COPYRIGHT, *supra* note 28, § 17.01[B][1], at 17-9. Failure to comply with the formalities set out in 17 U.S.C. §§ 401-412 (1976) does not result in the complete loss of copyright protection, and therefore complies with Article 5(2) of the Berne Convention. *Id.*

However, in both the 1976 Act and the BCIA of 1988, *supra* note 96, Congress failed to address the Berne Convention's treatment of moral rights. Phelan, *supra* note 78, at 92. The Berne Convention Implementation Act did not expand any rights of artists to claim authorship of their work. *Id.* Nor did it affect an author's right to object to any distortion, modification of, or other derogatory action in relation to the work. *Id.*

105. See *The Berne Convention: Hearings on S.1301 and S.1971 before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong., 143 (1988) [hereinafter *Berne Convention Hearings*] (Statement of Ralph Oman, Register of Copyrights) (testifying U.S. copyright law failed to meet terms of Berne Convention in areas of formalities and notice, compulsory license for jukeboxes, architectural works, and moral rights).

106. BCIA of 1988, *supra* note 96.

107. See 133 CONG. REC. S7369 (daily ed. May 29, 1987) (statement of Sen. Leahy) (declaring that in order to examine future Berne issues with specificity, proposed bill designed to only minimally comply with terms of treaty).

108. *Id.*

109. *Berne Convention Hearings*, *supra* note 105, at 54 (testimony of Rep. Kastenmeier). For example, in 1988 Representative Kastenmeier reported there was very little testimony on the desirability of copyright protection for architecture during the House hearings on the Berne Convention. *Id.* He further testified that Congress was not sufficiently prepared to address copyright protection of architectural works. *Id.* at 69. Ralph Oman, Register of Copyrights also cited insufficient public debate on protection of architecture as a reason to exclude architectural works from those covered by the Berne Convention Implementation Act. *Id.* at 138 (statement of Ralph Oman, Register of Copyrights).

Later that year, Representative Kastenmeier reported that because the public did not pressure

protection failed to meet the Berne Convention requirements: architectural works.<sup>110</sup> Because the Berne Convention requires that member nations extend full copyright protection to architectural works,<sup>111</sup> Congress requested that the Copyright Office determine whether the existing copyright law<sup>112</sup> adequately protected architectural works to minimally meet the Berne Convention's requirements.<sup>113</sup> The Copyright Office report concluded that current law did not fulfill the Berne Convention requirements<sup>114</sup> and recommended four possible legislative alternatives. One recommendation was to implement legislation similar to the Architectural Works Copyright Protection Act.<sup>116</sup>

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Congress to provide copyright protection for architectural works, *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 76, 90 (1988) (remarks of Rep. Kastenmeier), they became a neglected area of study during the Berne Hearings. *Id.* at 654. Although neglected, the issue of whether the Berne Convention required protection for architectural works "lurked in the background" of the hearings. *Id.* at 679. However, the limited testimony on the matter left uncertainty whether to offer copyright protection to architectural works, and the issue was left to be resolved at a later date. H.R. REP. NO. 609, 100th Cong., 2d Sess. 49-50 (1988).

110. See *infra* notes 184-194 and accompanying text (showing that Berne Convention requirements do not allow exception for pictorial representations).

111. Berne Convention Text, *supra* note 84, at art. 2(1). Works of architecture include illustrations, plans, sketches and three-dimensional works relative to architecture. *Id.*

112. See S. REP. NO. 352, 100th Cong., 2d Sess. 9 (1988) (stating that Copyright Office is to review protection afforded architecture in United States and other Berne countries and recommend whether increased protection is necessary); Notice of Inquiry: Works of Architecture, 53 Fed. Reg. 21,536, 21,538 (1988), reprinted in COPYRIGHT OFFICE REPORT, *supra* note 51, at Appendix B, (stating Copyright Office studying, at request of congressional subcommittees, whether increased legal protection for architectural works needed).

113. Notice of Inquiry: Works of Architecture, 53 Fed. Reg. 21,536, 21,538 (1988), reprinted in COPYRIGHT OFFICE REPORT, *supra* note 51, at Appendix B; see also 134 CONG. REC. S14,549, S14,552 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy) (stating that Congress modified U.S. law only to extent necessary for acceptance into Berne Convention).

114. COPYRIGHT OFFICE REPORT, *supra* note 51, at xxii.

115. *Id.* at 221-26 (1989). The Copyright Office Report proposed four alternative solutions. *Id.* at 221. The first was to create a new subject matter category in the Copyright Act to cover architectural works. *Id.* at 223. The second proposal was to amend the Copyright Act to expand the protection provided plans to cover unauthorized construction therefrom. *Id.* at 224. The third alternative was to redefine "useful article" to exclude unique architectural buildings. *Id.* at 225. Fourth, the Copyright Report suggested that Congress do nothing, and allow the courts to develop appropriate remedies. *Id.*

116. *Id.* The AWCPA created a new subject matter category in the Copyright Act to cover architectural works. 136 CONG. REC. E259 (daily ed. Feb. 7, 1990) (statement of Rep. Kastenmeier).

II. THE CURRENT STATE OF UNITED STATES COPYRIGHT PROTECTION  
FOR ARCHITECTURAL WORKS

A. *The Architectural Works Copyright Protection Act of 1990*

In 1990, Congress amended the 1976 Copyright Act<sup>117</sup> with the Architectural Works Copyright Protection Act<sup>118</sup> ("AWCPA"). Prompted by the Copyright Office report, Congress enacted the AWCPA to more closely align United States copyright protection with that required by the Berne Convention.<sup>119</sup> In adopting the AWCPA, Congress determined that, as a form of artistic expression, architecture performs significant domestic and international societal purposes.<sup>120</sup> The primary function of the AWCPA is to provide protection for architectural works embodied in constructed buildings.<sup>121</sup> The AWCPA also ensures copyright protection for architectural plans, drawings and models<sup>122</sup> under its provisions for pictorial, graphic and sculptural works.<sup>123</sup> American architects<sup>124</sup> now enjoy some amount of copyright protection in a building's design as embodied in any tangible medium of expression, including buildings, plans, models or drawings.<sup>125</sup>

When an architectural design is embodied in a building, however, the architect's copyright is very limited.<sup>126</sup> Of the five exclusive privileges enumerated in the 1976

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117. See H.R. REP. NO. 735, 101st Cong. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6941 [hereinafter HOUSE REPORT 101-735] § 1 (reciting that Copyright Act of 1990 is amendment of prior law).

118. Pub. L. No. 101-650, §§ 701, 703, 104 Stat. 5128, 5133 (1990) (codified at scattered sections of 17 U.S.C.) [hereinafter AWCPA].

119. See HOUSE REPORT 101-735, *supra* note 117, § 1 (citing reasons for enacting Architectural Works Copyright Protection Act).

120. Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (101 Stat.) 6936.

121. *Id.* at 6942.

122. HOUSE REPORT 101-735, *supra* note 117, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6950. An architect possesses two separate copyrights for a completed architectural work: a copyright in the constructed building as defined in 17 U.S.C.A. § 102(a)(8), and a copyright in the plans, drawings and models, protected by 17 U.S.C.A. § 102(a)(5). *Id.* Congress' intent was to keep the two forms of protection separate; a person may infringe either or both copyrights, and each may separately provide for damages. *Id.*

123. 17 U.S.C. § 102(a)(5).

124. COPYRIGHT OFFICE REPORT, *supra* note 51, at 7. In this article, "architect" is used interchangeably with "copyright owner," as the architect or designer is generally the creator of the work and initially holds the copyright. *Id.*

125. See 17 U.S.C. § 101 (defining "architectural work").

126. HOUSE REPORT 101-735, *supra* note 117, *reprinted in* 1990 U.S.C.C.A.N. 6935, 6950. An architectural design embodied in a building receives only the limited protection offered an architectural work under 17 U.S.C. § 102(a)(8). *Id.* A design embodied in any tangible medium of expression other than a building (such as architectural plans and models) has "dual" protection. *Id.* U.S. laws grant the architect one copyright in the architectural work, and the other in the plans or drawings under 17 U.S.C. § 102(a)(5). *Id.* A copy may infringe either or both of these copyrights. *Id.*

Act,<sup>127</sup> architects may fully enjoy only two when seeking to protect a constructed building's design. Architects hold only the exclusive right to exactly duplicate an architectural structure<sup>128</sup> and the exclusive right to distribute those duplicates to the public.<sup>129</sup> The right to publicly perform<sup>130</sup> or display<sup>131</sup> the work does not apply to architectural design, and the AWCOPA virtually eliminates the architect's exclusive right to prepare derivative works.<sup>132</sup>

*B. Limitations on the Architects' Right to Create and Distribute Derivative Works*

A derivative work is the recasting, transformation or adaptation of a protected work.<sup>133</sup> Copyright owners enjoy the exclusive right to recast, transform or adapt a protected work,<sup>134</sup> unless that work is an architectural design embodied in a building.<sup>135</sup> When a built structure is the architect's chosen medium of expression, she no longer has the exclusive right to transform or adapt her work,<sup>136</sup> nor does she possess the exclusive right to recast her design in other mediums of expression.<sup>137</sup>

Under the AWCOPA's provisions, the architect must forego the exclusive right to adapt her design, as embodied in a building, in favor of the building's owner.<sup>138</sup> Congress recognized that, to fully utilize a built structure, a building owner must be

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127. See 17 U.S.C. § 106 (granting exclusive rights to do or authorize: (1) reproduction of copyrighted work in copies or phonorecords; (2) derivative works based upon copyrighted work; (3) distribution of copies or phonorecords of copyrighted work to public; (4) public performance of copyrighted work; and (5) public display of copyrighted work).

128. See 17 U.S.C. § 106(1) (granting exclusive right to reproduce or authorize reproduction of copyrighted work).

129. See *id.* § 106(3) (granting exclusive right to distribute or authorize distribution of copies to public).

130. See *id.* § 106(4) (applying section only to literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, other audiovisual works).

131. See *id.* § 106(5) (applying section only to literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including architectural sketches and renderings).

132. See *infra* notes 133-141 and accompanying text (discussing limitations on architect's exclusive right to derivative works).

133. See 17 U.S.C. § 101 (defining "derivative work").

134. See *id.* § 106(2) (granting copyright owner exclusive right to authorize or prepare derivative works).

135. See *supra* note 126 and accompanying text (discussing differences between copyright protection afforded plans and buildings).

136. See 17 U.S.C. § 120(b) (limiting architect's exclusive right to make alterations to copyrighted work).

137. See *id.* § 120(a) (eliminating architect's exclusive right to make pictorial representations of copyrighted work).

138. *Id.* § 120(b). The owner of a building embodying an architectural work may destroy or make alterations to the building. The owner is free to do so without the consent of the author or copyright owner of the architectural work. *Id.*

able to freely adapt and change the building.<sup>139</sup> Consequently, Congress gave building owners the right to modify and to alter the building's design, and even to destroy the building, without the copyright owner's permission.<sup>140</sup>

The AWCPA also denies the copyright owner the exclusive right to recast protected works in other mediums of expression.<sup>141</sup> Allowing the public to create and to exploit pictorial representations<sup>142</sup> of protected works, the AWCPA eliminates the architects' exclusive rights to prepare derivative works.<sup>143</sup> On the surface, this limiting provision seems unambiguous and necessary.<sup>144</sup> Without the "pictorial representation exception," a tourist could not photograph a spectacular building and a movie director

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139. See Winick, *supra* note 8, at 1623 (discussing purpose of excluding exclusive right of transformation).

140. See 17 U.S.C. § 120(b) (establishing building owner's right to destroy or make alterations to building). Architects readily conceded this point. Winick, *supra* note 8, at 1624. They recognized that if the copyright owner held the exclusive right to alter or destroy the building, building owners would demand that the architect give up their copyright. *Architectural Design Protection: Hearings on H.R. 3990 and 3991 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 16 (1990) (statement of Michael Graves). Thus, architects agreed with Congress' decision to restrict their rights in their design's copyright. Winick, *supra* note 8, at 1624. Under the AWCPA, an architect who wants to retain the right to approve alterations to her work may still reserve that right as a matter of contract law. *Id.* State law claims of conversion, misappropriation, and unjust enrichment also remain available to architects. *Id.* at 1623 n.128.

Additionally, local historic preservation and landmark laws can protect a work that the community deems to be of historic or aesthetic value. *Id.* at 1624. These laws typically define the conditions under which a building owner may alter or destroy the protected building. For example, California law provides that the Department of Natural Resources will register those buildings that it deems to be important historical resources or of sufficient historical interest as historical landmarks. CAL. PUB. RES. CODE § 5021 (West Supp. 1995). To carry out historic preservation projects, the State Office of Historic Preservation may preserve and manage historical resources under its control. CAL. PUB. RES. CODE § 5079.22 (West Supp. 1995). The Architectural Works Copyright Protection Act explicitly defers to the protection provided by such local laws. 17 U.S.C. § 301(b)(2). It does not preempt state and local landmark, historical preservation, zoning, or building codes, relating to architectural works protected under 17 U.S.C. § 102(a)(8). *Id.* Therefore, although Congress has declined to extend copyright protection to encompass transformation of a constructed design, the architect has other available protection for deserving works. *Id.*

141. 17 U.S.C. § 120(a). As applied to architectural works constructed in public view, the architect's copyright does not include the right to prevent others from making, distributing, or publicly displaying pictorial representations of the work. *Id.*

142. *Id.* The pictorial representation exception allows the general public to make, distribute, and publicly display pictures, paintings, photographs, or other pictorial representations of the copyrighted work. *Id.*

143. See *id.* § 106(2) (granting copyright owner exclusive right to recast, transform, or adapt protected works).

144. See Winick, *supra* note 8, at 1625 n.133 (discussing pictorial representation provision and stating that Congress included it as practical necessity).

could not film scenes in a neighborhood of protected structures.<sup>145</sup> Moreover, an individual looking for design inspiration could not even sketch a building to borrow design elements<sup>146</sup> without potentially violating the architect's copyright.<sup>147</sup> To avoid this, Congress created the exception justifying it by declaring that such an exception would not interfere with the architects' "normal exploitation" of their works.<sup>148</sup> Because pictorial representations are not a normal exploitation of an architectural work, Congress reasoned, the allowed reproductions do not affect the architect.<sup>149</sup>

145. COPYRIGHT OFFICE REPORT, *supra* note 51, at 172. French law allows architects to control two-dimensional reproductions of their work. *Id.* When the film *Last Tango in Paris* was set in recognizable architectural spaces, the film makers avoided a verdict of infringement only because the spaces were not absolutely recognizable. Judgment of June 13, 1973, Trib. gr. inst., 94 GP 27, 28 (Fr.).

146. HOUSE REPORT 101-735, *supra* note 117. The Report states that millions of tourists take home photographs, posters, and other pictorial representations of prominent architectural works as souvenirs from their trip. *Id.* Additionally, it says that scholarly books on architecture rely on the ability to freely use photographs of architectural works. *Id.* The public purpose served by such uses coupled with a "lack of harm to the copyright owner" prompted Congress to provide the pictorial representation exception, rather than rely on the fair use doctrine. *Id.*

147. WIPO GUIDE TO THE BERNE CONVENTION, *supra* note 85, at 54. The right to reproduce protected works is the very essence of copyright. *Id.* The Berne Convention encompasses all means of reproduction, either by processes known or those yet to be discovered. *Id.* But see *infra* notes 175-183 and accompanying text (discussing fair use exception to copyright protection).

148. HOUSE REPORT 101-735, *supra* note 117. This is true if the only normal exploitation is the construction of a similar structure and not the reproduction of the structure in other forms such as pictures, posters, postcards, etc. See *infra* notes 154-158 and accompanying text (showing frequency that derivative works are copied from protected architectural works). However, exploitation of architectural works has been a highly profitable enterprise for many. For example, the San Francisco Museum of Modern Art, *infra* note 157, has sold \$5.5 million of merchandise — T-shirts, tote bags, caps, & umbrellas depicting a logo based on the museum's design — in one year, including 10,000 postcards of the building. Jesse Hamlin, *SFMOMA: The Main Attraction*, S.F. EXAM. & CHRON., Jan. 14, 1996, Datebook, at 29. A three-dimensional replica of the museum enshrined in a version of the snow globe, called the "Fog Dome," is also a "big seller." *Id.* See also *infra* notes 150-158 and accompanying text (discussing architects' market interest in derivative works).

149. HOUSE REPORT 101-735, *supra* note 117. Since copyright protection is to benefit the general public, Congress will only grant a monopoly to the artist to provide incentive for the creative process. *Id.* Congress believed that the pictorial representation exception would not significantly deter architectural creativity. *Architectural Design Protection: Hearings on H.R. 3990 and 3991 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 70-71 (1990) [hereinafter *AWCPA Hearings*] (statement of Ralph Oman, Register of Copyrights).

### III. ANALYSIS

#### A. A Closer Look at the Pictorial Representation Exception

Congress's normal exploitation justification is inconsistent with the traditional view of United States copyright protection. Historically, Congress has enacted copyright laws to benefit the public by protecting the author's market interest.<sup>150</sup> A protected market interest enables an author to recoup revenues generated from all different uses of the artistic works.<sup>151</sup> This approach provides copyright protection in each market segment that an author might commercially exploit the protected work, either in original or derivative form.<sup>152</sup> Accordingly, a conventional application of United States copyright law would protect both original and derivative forms of an architect's work, whether it was normal exploitation of the work or not.<sup>153</sup>

Although the pictorial representation exception applies only to two-dimensional copying,<sup>154</sup> the implications of this exception are untested as it relates to three-dimensional derivative works.<sup>155</sup> For example, a souvenir vendor can legally sell

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150. See *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164, 1175 (1994) (holding that the licensing of derivatives is an important economic incentive to the creation of originals); *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (holding artist's legally protected interest is not his reputation, but his interest in potential financial returns from his works that derives from lay public's recognition of his efforts); *King Features Syndicate v. Fleischer*, 299 F. 533, 536 (2d Cir. 1924) (holding that artist or author entitled to any lawful use of his property by which he may get a profit out of it; copyright protects commercial value of property to encourage arts); *Falk v. Donaldson*, 57 F. 32, 37 (C.C.N.Y. 1893) (rejecting argument that because publication of lithograph did not impair value of original photograph, lithograph did not infringe photographer's copyright). The effect the copy may have on the value of the original does not affect the question of infringement; copyright entitles an artist to any lawful use of her property. *Id.* See also *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (holding that labors of original author appropriated by another, however minor, is sufficient to constitute piracy pro tanto). Copyright protection, in its entirety, is the property of the author, and it is no defense that another person has appropriated only a small portion of that property. *Id.*

151. See J.H. Reichman, *Review Essay: Goldstein on Copyright Law: A Realist's Approach to a Technological Age*, 43 STAN. L. REV. 943, 956 (1991) (discussing market interest purposes for historical copyright legislation).

152. *Id.*

153. *Id.* at 956 n.92 (stating that market interest approach enables author to recoup revenues generated from all uses of work in each market segment that author may commercially exploit). Conventional application of copyright law incorporates the market interest approach to copyright protection. See *supra* notes 151-152 and accompanying text (discussing market interest approach to copyright protection).

154. See Gerstenblith, *supra* note 77, at 448 (explaining that pictorial representation exception does not apply to three-dimensional copies).

155. As of December 11, 1996, there were no published cases involving a 17 U.S.C. § 120(a) determination. Three-dimensional copies may include models, figurines, statuettes, paperweights, snow domes, pencil sharpeners, clocks, furniture, etc., each duplicating the architect's design as originally manifested in a building. Carl M. Sapers, *Second Thoughts on the 1990 Architectural Works Copyright Protection Act*, 13 A.P.R. CONSTRUCTION L. 16, 17



unauthorized postcards<sup>156</sup> depicting the San Francisco Museum of Modern Art.<sup>7</sup> Arguably, however, the vendor would violate the architect's copyright if she were to sell three-dimensional paperweights depicting the same building.<sup>158</sup> How, then, is the law applied when the vendor sells a model kit comprised of two-dimensional pieces that the purchaser is to assemble into a three-dimensional model? A computer-generated model? A CD-ROM? A hologram? Under the AWCPA, the answer to these questions remains unclear.

This two-dimensional/three-dimensional ambiguity dramatizes some difficulties created by the pictorial representation exception. Other difficulties arise in works described as both sculptural and architectural, such as the Washington Monument.<sup>159</sup> If the courts classify the structure as neither a building nor a sculptural work, the structure has no copyright protection.<sup>160</sup> If they classify the structure as a building, the

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(1993).

156. 17 U.S.C. § 120(a). A postcard would come under the pictorial representation exception as making and distributing pictures, photographs, or other pictorial representations of the work. *Id.*

157. Karen D. Stein, *A Monument to Art*, ARCHITECTURAL RECORD, Nov. 1994, at 74. Designed by Mario Botta, the San Francisco Museum of Modern Art is a modern building, constructed in 1994. *Id.* at 77-82. It is of a distinctive design, consisting of a stepped facade, a central cylindrical skylight, and brick and granite cladding. *Id.* Mr. Botta's design, as embodied in the building, has been copied as posters, postcards, model kits, magnets, models and snow-domes, all for purchase by mail-order and in the museum's gift shop. SAN FRANCISCO MUSEUM OF MODERN ART, MAIL ORDER CATALOG 2-8 (Fall 1995). See also *supra* note 148 and accompanying text (discussing architects' market interest in architectural works).

158. See Jane C. Ginsberg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 495 (1990) (stating that pictorial representation exception does not apply to three-dimensional reproductions). Assuming, of course, that a paperweight is not a useful article. See *supra* notes 39-53 and accompanying text (discussing useful articles); *infra* notes 165-171 and accompanying text (discussing application of separability test to AWCPA).

The market value of such souvenirs is not trivial. The tradition of collecting miniature buildings can be traced to Victorian times, when travelers on the European grand tour would purchase architectural models as souvenirs of their journeys. Eric Adams, *A Little Sprawl: Souvenir building Collectors Chase After the World's Monuments*, AIARCHITECT, Oct., 1995, at 7. Today, there are hundreds of collectors represented by the Souvenir Building Collectors Society, and private collections can exceed 2,000 miniature architectural replicas. *Id.*

159. See *Jones Bros. Co. v. Underkoffler*, 16 F. Supp. 729, 730-31 (M.D. Pa. 1936) (holding monuments analogous to sculptural works and, therefore, subject to full copyright protection); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 55 (1976) (describing purely nonfunctional or monumental structures as sculpture subject to full copyright protection); Shipley, *supra* note 73, at 404 n.48 (stating that purely nonfunctional structures are analogous to sculptural works and, thus, subject to copyright protection).

160. H.R. REP. NO. 735, 101st Cong. 1990, reprinted in 1990 U.S.C.C.A.N. 6935. Congress deleted the phrase "or three-dimensional structure" from the definition of an "architectural work." This phrase was originally intended to cover architectural works embodied in innovative structures that defy easy classification. However, it was deleted because the phrase also could be interpreted as covering interstate highway bridges, cloverleaves, canals, dams, and pedestrian walkways. Congress determined that protection for these works is not necessary to

copyright law would afford the structure some protection.<sup>161</sup> However, if the courts classify the structure as a non-functional sculpture,<sup>162</sup> the structure receives full copyright protection under the Visual Artists Rights Act (VARA).<sup>163</sup> It remains to be seen, however, whether sculptural components of an architectural work are protected as visual arts or as architectural works.<sup>164</sup>

To determine, then, whether the copyright law protects a structure as a work of visual art,<sup>165</sup> an architectural work,<sup>166</sup> both<sup>167</sup> or neither,<sup>168</sup> one must return to the conceptual separability test. This test requires that the building's function be readily

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stimulate creativity or prohibit unauthorized reproduction. *Id.*

161. *See supra* notes 117-149 and accompanying text (discussing protection offered architectural works under AWCPA).

162. *See Phelan, supra* note 78, at 92 (discussing Visual Artists Rights Act of 1990 as it applies to architectural works). The Visual Artists Rights Act provides moral rights for visual artists. *Id.* The Act grants visual artists the right of attribution and the right of integrity. 17 U.S.C. § 106A(a) (Supp. V 1993).

163. The Visual Artist Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5089 (codified in scattered sections of 17 U.S.C.) [hereinafter VARA], offers full copyright protection to the visual arts, including sculpture. *See* 1990 U.S.C.C.A.N. (104 Stat.) 5128 (applying pictorial representation exception to only two-dimensional copies).

164. As of December 11, 1996 there were no published cases addressing this issue. The House Committee's Report accompanying the 1976 Copyright Act contemplated that at least selected works of architecture -- those containing elements physically or conceptually separable from their utilitarian function -- would be protected as sculptural works to the extent of their separability. H.R. REP. NO. 1476, 94th Cong. 55 (1976). Furthermore, the definition of an "architectural work" does not include individual features of a structure. 17 U.S.C. § 101.

165. 17 U.S.C. § 106A(d). A work of visual art is a painting, drawing, print, or sculpture existing in a single copy or a limited edition of 200 copies that are signed and consecutively numbered by the artist. *Id.* § 101.

166. *See supra* notes 39-53 and accompanying text (discussing conceptual separability as applied to architectural works). This approach is analogous to the separability test required under the 1976 Act, where the courts separated -- either physically or conceptually -- the utilitarian aspects of a work to determine what, if anything, was copyrightable in the work. *Id.* Rather than suggesting that the courts look at the utilitarian aspects of a structure, Congress requires that the courts completely separate the structure's functional aspects from its aesthetic aspects. H.R. REP. NO. 735, 101st Cong. 20-21 (1990).

167. *See* 17 U.S.C. § 113 (defining scope of exclusive rights in pictorial, graphic, and sculptural works). This section gives little guidance to the courts when asked to separate functional works from the nonfunctional. *Id.* Instead of allowing an all-encompassing protection to architectural works, the section creates confusion as to what is an architectural work, what is a pictorial, graphic or sculptural work, and what is denied copyright completely. *Id.*

168. *See supra* notes 39-53 and accompanying text (explaining that if useful article's function is not conceptually separable from its aesthetic aspects, it is not copyrightable). The AWCPA grants copyright protection only to architectural works. 17 U.S.C. § 102(a)(8). It follows, then, that a "useful article" that is not an "architectural work" still has no copyright protection.

and separately discernible from its design.<sup>169</sup> Within the parameters of this test, elements that are separable from the building's function receive full copyright protection as sculptural works,<sup>170</sup> while the AWCPA provides only limited protection to the remaining portions.<sup>171</sup> In essence, the public may legally photograph the building's functional portions,<sup>172</sup> but not its decorative elements.<sup>173</sup> One commentator illustrated this anomaly by noting that under such a scheme, a tourist is free to photograph the Notre Dame in Paris, but not the famous gargoyles attached to the Cathedral.<sup>174</sup> This example typifies one difficulty created by the pictorial representation exception. This illustration, however, is not an entirely accurate description of the state of the law. The courts have created an exception to the artist's copyright protection, known as the "fair use" doctrine.<sup>175</sup>

### B. The Fair Use Doctrine

The fair use doctrine limits the breadth of copyright law, balancing the artists' pecuniary interests against the public's interest in free use of the work.<sup>176</sup> If the

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169. See COPYRIGHT OFFICE REPORT, *supra* note 51, at xviii-xx (discussing four different applications of conceptual separability).

170. VARA, *supra* note 163. In addition to the exclusive rights to make and distribute copies and derivative works of a copyrighted work, the VARA moral rights provisions apply to works of visual art. 17 U.S.C. § 106A. The statutory definition of a "work of visual art" includes sculptures, drawings (except technical drawings), paintings, prints, and, in some cases, photographs. *Id.* § 101.

171. See *supra* notes 126-141 and accompanying text (discussing limitations on copyright protection of architectural works under AWCPA).

172. 17 U.S.C. § 120(a). The copyright in a constructed architectural work does not include the right to prevent the public from making, distributing, or publicly displaying pictures, paintings, photographs, or other pictorial representations of the work. *Id.* This provision, however, applies only if the building in which the work is embodied is located in or ordinarily visible from a public place. *Id.*

173. 17 U.S.C. § 106(2). The 1976 Act expressly grants the copyright owner the exclusive right to make derivative copies of the protected work. *Id.*

174. See Winick, *supra* note 8, at 1627 (illustrating application of AWCPA and VARA to different elements of one structure).

175. 17 U.S.C. § 107. Copying protected works for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is considered fair use of the work, and therefore not a copyright infringement. *Id.* To determine whether a purported infringement constitutes fair use, the courts are to consider four factors. *Id.* First, they are to assess the purpose and character of the use. *Id.* Second, the courts are to look at the nature of the copyrighted work. *Id.* Third, they are to determine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. *Id.* Finally, they are to consider the effect of the infringing use upon the potential market for or value of the copyrighted work. *Id.*

176. See *New Era Publications Int'l v. Henry Holt & Co., Inc.*, 873 F.2d 576, 588 (2d Cir. 1988) (Oakes, C.J., concurring) (stating that fair use must serve public interest; required use of original work must outweigh author's pecuniary interests); *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977) (holding that fair use doctrine balances exclusive rights of copyright holder with public's interest in information affecting areas of universal concern such as art, science,

public's interest outweighs that of the copyright owner, there is no infringement of the owner's copyright.<sup>177</sup> For example, copying for purposes such as criticism, news reporting, teaching or research weigh heavily in favor of the free use of copyrighted material.<sup>178</sup> Although the fair use doctrine must be applied on a case-by-case basis,<sup>179</sup> courts have held that fair use allows copying protected works for private use.<sup>180</sup> Therefore, a tourist photographing the Notre Dame gargoyles for her personal use would not infringe the artist's copyright.<sup>181</sup> This holds true even though the copyright

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history, or industry), *cert. denied*, 98 S. Ct. 727 (1978); *Wainright Sec., Inc. v. Wall Street Transcript Co.*, 558 F.2d 91, 98 (2d Cir. 1977) (holding fair use doctrine offers means of balancing exclusive rights of copyright holder with public's interest in dissemination of information). The fair use doctrine distinguishes between a "true scholar" and "chiseler who infringes a work for personal profit." *Id.* See also Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 533 (1945) (explaining fair use of protected works requires discerning advantages that public derives from copy and weighing those advantages against author's interests).

177. *ORMAN & GINSBURG*, *supra* note 9, at 548. The traditional concept of fair use excused reasonable unauthorized appropriations from an original work. *Id.* See *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (holding courts must subordinate copyright holder's interest in maximum financial return to greater public interest in development of art, science and industry), *cert. denied*, 385 U.S. 1009 (1967). The courts have evolved a set of criteria which provides guidelines for balancing the interests of the copyright owner with those of the public. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65-66 (1976) *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670. These criteria can essentially all be reduced to the four standards which Congress adopted in the 1976 Act, including the purpose and character of the use, the nature of the copyrighted work, the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the value of the copyrighted work. 17 U.S.C. § 107.

178. See 17 U.S.C. § 107 (enumerating non-exclusive list of purposes for which fair use exemption may apply).

179. *Stewart v. Abend*, 495 U.S. 207, 236 (1990). The fair use doctrine permits and requires courts to avoid rigid application of the copyright statute. *Id.* See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) (Holding that fair use is not to be simplified with bright line rules, but calls for case-by-case analysis).

180. See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 449-50 (1984) (holding that home videotaping is fair use); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 780 F. Supp. 1283, 1292 (N.D. Cal. 1991) (holding private home use of video game accessory was presumptively fair for purpose of determining whether use infringed copyrights for video game cartridges), *aff'd*, 964 F.2d 965 (1992), *cert. denied*, 113 S. Ct. 1582 (1993).

181. *Id.* The tourist in the above illustration photographed the gargoyles for her own use. Applying Congress' test in 17 U.S.C. § 107, the court would first look to the purpose and character of the use, including whether such use is of a commercial nature. *Id.* In this example, the use is not a commercial use and not for profit, weighing in favor of fair use. *Universal City Studios v. Sony Corp. of America*, 464 U.S. 417, 449 (1984). The second factor, the nature of the copyrighted work, also weighs in favor of fair use because it is a sculptural work located in a highly visible public place. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841). Although the third consideration — the amount of the copyrighted work taken — may weigh against fair use, the final factor is given the most weight. *Sony*, 464 U.S. at 449-50. The courts are to look to the effect the use has upon the potential market for or value of the copyrighted

law fully protects the gargoyles,<sup>182</sup> both domestically and internationally.<sup>183</sup>

### C. United States Compliance With International Law

By enacting the AWCPA, Congress purported to comply with its international obligations arising from the Berne Convention.<sup>184</sup> However, the Berne Convention's minimum standards require that the copyright owner hold the exclusive right to reproduce protected works in any medium.<sup>185</sup> In addition, the Berne Convention requires that copyright protection extend to the exclusive right of adaptation<sup>186</sup> for all protected works, including architectural works.<sup>187</sup> Furthermore, the terms of the Berne

work. *Harper & Row Pub., Inc. v. Nation Ents.*, 471 U.S. 539, 566 (1985). Arguably, the only impact such photographs would have on the pecuniary interests of the artist would be lost royalties of the sale of those photographs. The photographer in the above illustration had very little impact on the pecuniary interests of the artist, and, thus, probably did not infringe the artist's copyright. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1177 (1994). Although it is ultimately a matter for the courts, public interests and difficulties in enforcing the artist's rights would likely greatly outweigh the artist's pecuniary interests, and therefore constitute "fair use." For a general discussion of applying the fair use doctrine, see *Campbell*, 114 S.Ct. and *American Geophysical Union v. Texaco, Inc.*, 37 F.3d 881 (1994). See also *supra* notes 175-180 and accompanying text (discussing private use as qualifying for fair use exemption to copyright infringement).

182. See *infra* notes 221-223 and accompanying text (discussing VARA). In the United States, the Visual Artists Rights Act offers full copyright protection, including moral rights, to visual arts (such as gargoyles). *Id.*

183. Berne Convention Text, *supra* note 84. The Berne Convention also recognizes fair use of protected works. *Id.* art. 10(1). The Berne Convention applies the doctrine through a three-prong test. WIPO GUIDE TO THE BERNE CONVENTION, *supra* note 85, at 58-59. If one reproduces a protected work under a claim of fair use, the court will determine whether the infringing use is compatible with, and only to the extent justified by, fair practice. *Id.* In deciding fairness, the courts consider the extent to which the infringing work, by competing with the original, cuts in upon the original artist's pecuniary interests. *Id.*

184. See 136 CONG. REC. E259 (daily ed. February 7, 1990) (statement of Rep. Kastenmeier) (stating that AWCPA was designed to place United States "unequivocally in compliance" with its Berne Convention obligations).

185. See Berne Convention Text, *supra* note 84 at art. 9 (providing authors and artists exclusive right to reproduce protected works, "in any manner or form").

186. See *id.* at art. 12 (providing authors and artists exclusive right to authorize adaptations of protected works).

187. See *id.* at art. 2(1) (defining "literary and artistic works" as including architectural works and illustrations, plans, sketches and three-dimensional works relative to architecture).

Convention do not allow signatories to make reservations<sup>188</sup> to the treaty.<sup>189</sup> Upon ratifying the treaty,<sup>190</sup> then, the United States pledged to adhere, without exception, to each of the Convention's terms.<sup>191</sup>

Contrary to the Berne Convention's requirements, the pictorial representation exception deprives architects of the exclusive right to make and to sell copies of copyrighted architectural works.<sup>192</sup> Although Congress enacted the AWCPA to bring the United States into compliance with the Berne Convention's terms,<sup>193</sup> the Act fails

188. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/Conf. 39/27, art. 2, ¶ d, 8 I.L.M. 679, 681 [hereinafter Vienna Convention]. The Vienna Convention defines a reservation as a "unilateral statement" made by a country when acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions as they apply to that country. *Id.*

189. Berne Convention Text, *supra* note 84. Excepting four situations in which parties to the Berne Convention may make reservations, the Treaty otherwise prohibits them. *Id.* at art. 30(1). Two of the four exceptions are applicable only to countries who were members of the Berne Convention at the time of the Paris revisions of 1971. *Id.* art. 30(2) and art. 28(1)(b). Another applies to the settlement of disputes between member countries. *Id.* art. 33(2). The last contains special rules for developing countries. *Id.* at Appendix. None are applicable to the United States. *Id.*

In addition, a "minor reservation" exemption to the Berne Convention, intended to act as an exemption to the exclusive rights of public performance (Articles 11, 11<sup>bis</sup>, and 11<sup>ter</sup>), recording musical works (Article 13), and cinematographic rights (Article 14), WIPO GUIDE TO THE BERNE CONVENTION, *supra* note 85, at 65, allows some exceptions to the exclusive right of adaptation. *See* Belanger, *supra* note 22, at 396 n.184 (discussing minor reservation exemption). The minor reservation exemption covers gratuitous performances given by popular societies, military bands, students and the like. *Id.* This reservation exemption does not apply to architectural works, WIPO GUIDE TO THE BERNE CONVENTION, *supra* note 85, at 65, and therefore does not encompass the U.S. exception, 17 U.S.C. § 120(a), for making two-dimensional reproductions of architectural works. *See also* Berne Convention Text, *supra* note 84, at art. 12 (stating that authors shall enjoy exclusive right to exploit derivative works produced from original work).

190. SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 123 (1987). The Director General of the World Intellectual Property Organization formally accepted the United States' Notice of Adherence to the Berne Convention on March 1, 1989. *Id.*

191. Vienna Convention, *supra* note 188, at art. 26. One of the most fundamental principles of international law is *pacta sunt servanda*: every treaty in force is binding upon the parties to it and must be performed by them in good faith. LINDA A. MALONE, INTERNATIONAL LAW 18 (1995) [hereinafter INTERNATIONAL LAW]. Although the United States has not ratified the Vienna Convention, the State Department recognizes it as the authoritative guide to current treaty law and practice. *Id.* at 4.

192. *Compare supra* notes 184-194 and accompanying text (discussing copyright protection for architectural works required by terms of Berne Convention) with *supra* notes 133-149 and accompanying text (discussing copyright protection offered by AWCPA).

193. *See, e.g.,* Wargo, *supra* note 63, at 407 nn.18-19 (stating that purpose of AWCPA was to increase U.S. copyright protection for architectural works to comply with minimum requirements of Berne Convention). Congress sought to provide architectural works with only the minimum protection required to comply with the Berne Convention. *Id.*

to do so. Consequently, the failure of Congress to provide architects the exclusive right to reproduce their works is inconsistent with the terms of the Berne Convention and, therefore, a violation of international law.<sup>194</sup> There are, however, two arguments refuting this conclusion.

Proponents of one position argue that the Copyright Act of 1976 conformed substantially to the Berne Convention's requirements.<sup>195</sup> They believe that the copyright law adequately protected notable architectural works as sculptural works.<sup>196</sup> To support this position, they rely on the World Intellectual Property Organization's (WIPO)<sup>197</sup> acceptance of the United States as a signatory to the Berne Convention based upon the copyright protection provided under the 1976 Act.<sup>198</sup>

Under international law, a treaty *creates* international legal obligations.<sup>199</sup> Therefore, when a country ratifies a treaty, that country manifests its intent to abide by the treaty's terms.<sup>200</sup> Acceptance in a multilateral treaty is not recognition of existing compliance,<sup>201</sup> but rather, it is acknowledgment of a country's consent to abide by the treaty's terms.<sup>202</sup> Accordingly, that the WIPO accepted the United States' articles of ratification is not evidence that the United States was in compliance with the Berne

194. See Stat. of the I.C.J., art. 38, ¶ 1(a) (stating that international conventions, whether general or particular, establish rules expressly recognized by consenting nations).

195. COPYRIGHT OFFICE REPORT, *supra* note 51, at 215. Representative Kastenmeier, chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, suggested that the protection afforded architectural works under the 1976 Copyright Act was sufficient to meet the minimum standards of the Berne Convention. *Berne Convention Hearings*, *supra* note 105, at 689. The testimony of Professor Paul Goldstein and former Register of Copyrights Barbara Ringer in earlier House hearings influenced Representative Kastenmeier to adopt this position. COPYRIGHT OFFICE REPORT, *supra* note 51, at 216.

196. See COPYRIGHT OFFICE REPORT, *supra* note 51, at 208-20 (discussing architectural works as qualifying for copyright protection as pictorial, graphic, or sculptural works under 1976 Act).

197. See Berne Convention Text, *supra* note 84, at arts. 23-26 (establishing criteria for WIPO). The World Intellectual Property Organization is the international association responsible for administering the Berne Convention. *Id.*

198. See, e.g., Bucher, *supra* note 12, at 1285 (stating that WIPO judged 1976 Act sufficient to allow U.S. to join Convention, and questioning why previous copyright law is inadequate to fulfill requirements of Berne Convention).

199. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 109 (2d ed. 1995) (defining treaty).

200. See Vienna Convention, *supra* note 188, at art. 46-52 (stating that treaties are expression of consent to be bound by international agreement).

201. See U.N. CHARTER pmb. (declaring that obligations arise from international treaties).

202. See Michael Bothe, *Legal and Non-Legal Norms -- A Meaningful Distinction in International Relations*, NETH. Y.B. INT'L L. 65, 67 (1982) (stating that treaty is created by corresponding declarations of countries expressing their consent to be so bound); Marian Nash, *International Acts not Constituting Agreements*, 88 AM. J. INT'L L. 515, 517 (1994) (quoting internal United States State Department Memorandum indicating parties "must intend their undertakings to be legally binding" in order to constitute international agreement).

Convention. Furthermore, after concluding an extensive study,<sup>203</sup> the U.S. Copyright Office conceded that copyright protection offered to architectural works failed to meet the United States' Berne Convention obligations.<sup>204</sup>

Others argue that the Berne Convention allows the pictorial representation exception because an international ad hoc committee has endorsed the position taken by the United States.<sup>205</sup> In creating guidelines for conforming with the Berne Convention, a joint WIPO/United Nations Educational, Scientific and Cultural Organization (UNESCO) committee drafted a Model Copyright Law for member nations.<sup>206</sup> One preliminary draft principle interpreted the Berne Convention as allowing pictorial representations of architectural works.<sup>207</sup> Because of this preliminary interpretation, some commentators believe that the pictorial representation exception is an acceptable deviation from the Berne Convention's terms.<sup>208</sup>

Interpreting the treaty's terms, however, is not within the WIPO's authority or that of any other ad hoc committee.<sup>209</sup> Signatories must interpret a treaty according to its terms' ordinary meanings.<sup>210</sup> Member nations may resort to supplementary means of

203. See generally COPYRIGHT OFFICE REPORT, *supra* note 51 (conducting general inquiry into scope and nature of copyright protection for works of architecture).

204. *Id.* at 220-23.

205. See Wargo, *supra* note 63, at 439 (discussing findings of WIPO/UNESCO committee). In October 1986, a WIPO/UNESCO committee of governmental experts met in Geneva to evaluate and synthesize principles for appropriate copyright protection for works of architecture. *Id.*

206. See COPYRIGHT OFFICE REPORT, *supra* note 51, at 148 (stating that in late 1980's, WIPO/UNESCO ad hoc committee formulated draft principles for Model Copyright Law).

207. *Id.* at 150. Principle WA7 of the WIPO/UNESCO Draft Model Copyright Law specifies that the author's permission is not required to reproduce the external images of publicly located works of architecture by photography, drawing, cinematography, or other similar methods. *Id.* This exemption applies whether the copy was made for private or commercial purposes. *Id.*

208. See, e.g., Wargo, *supra* note 63, at 443-44 (discussing WIPO/UNESCO committee's views on reproduction of works of architecture as justification for pictorial representation exception).

209. INTERNATIONAL LAW, *supra* note 191, at 19. There are three basic approaches to treaty interpretation. The first, advocated by the Institute of International Law, looks *only* to the text of the treaty and the "plain and natural meaning of the words." *Id.* The second approach, incorporated into articles 31-32 of the Vienna Convention, looks first to the text, then to the intent of the parties. *Id.* Subsequent agreements, subsequent practices, and other relevant rules of international law may indicate the intent of the parties. *Id.* The last approach, to which no international organization subscribes, interprets the terms of a treaty by the intent of the parties, as gleaned from the text of the treaty and all pre- and post-treaty communications. *Id.*

210. Vienna Convention, *supra* note 188, at art. 31-32. A treaty shall be interpreted in good faith according to the ordinary meaning of the terms. *Id.* at art. 31. Supplementary means of interpretation, including preparatory work, may be considered only when the plain meaning of the term is obscure or renders the agreement manifestly absurd or unreasonable. *Id.* at art. 32.



interpretation<sup>211</sup> only when the ordinary meaning of the term or clause is ambiguous or obscure.<sup>212</sup> Under the ordinary meaning of the Berne Convention's terms, architectural works should receive the same copyright protection as other protected works.<sup>213</sup> Whether failure to do so violates the treaty, and therefore international law, is a question for the Berne Convention's signatories.<sup>214</sup> Congress, however, could easily avoid this issue by eliminating the pictorial representation exception of the AWCPA.<sup>215</sup>

#### D. A Proposed Solution

In creating the pictorial representation exception, Congress attempted to eliminate the legal ambiguities of the fair use doctrine.<sup>216</sup> Congress theorized that it did not have

211. See Stat. of the I.C.J., art 38, ¶ 1(d) (defining subsidiary means for determining rules of international law). The WIPO/UNESCO Draft Model Copyright Law is most likely a supplementary means of interpretation. *Id.*

212. Vienna Convention, *supra* note 188, at art. 32.

213. Berne Convention Text, *supra* note 84. Article 2(1) of the Berne Convention provides that member nations shall protect all works, including "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as . . . works of . . . architecture. . . ." *Id.* at art. 2(1) (emphasis added). The framers of the Berne Convention intended its wording to include all works capable of protection. WIPO GUIDE TO THE BERNE CONVENTION, *supra* note 85, at 13. The clause covering works of architecture includes virtually all artistic works, whether two dimensional or three, independent of their nature or their purpose. *Id.* at 16.

214. Oscar Schachter, *International Law in Theory and Practice*, 178 REC. DES COURS 111-21 (1982), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 118-19 (2d ed. 1995). A country believing itself to be a victim of a treaty violation is justified in using all means permissible under international law to cause a cessation of that violation and to obtain reparation. *Id.* One such means is to have the case heard by the International Court of Justice. Statute of the I.C.J., art. 36.

Nations adhering to the Berne Convention have not reached unanimous consent as to whether the treaty allows architects to control two-dimensional reproductions of their works. COPYRIGHT OFFICE REPORT, *supra* note 51, at 165-93. For example, Denmark, Finland, and Cyprus permit two-dimensional reproductions of architectural works. *Id.* Belgium, Germany, and France do not, although Germany makes an exception for architectural works located on public roads and Belgium makes an exception for two-dimensional reproductions necessary for reporting of public events. *Id.*

215. See *supra* notes 184-194 and accompanying text (discussing pictorial representation exception as violation of international law). By eliminating the pictorial representation exception to the AWCPA, Congress would eliminate one area of potential non-compliance with the terms of the Berne Convention. *Id.*

216. See Michael E. Scholl, *The Architectural Works Copyright Protection Act of 1990: A Solution or a Hindrance?*, 22 MEM. ST. U. L. REV. 807, 819 (1992) (stating that Congress based pictorial representation limitation on policy of classifying architecture as public art form). Congress' other reasons included that it would rather provide an express exemption to copyright than rely on the doctrine of fair use as a defense to infringement. *Id.*

to protect two-dimensional representations<sup>217</sup> to provide architects with the economic incentives for creativity.<sup>218</sup> The exception, however, created international and domestic legal ambiguities and inconsistent copyright policies that far outweighed the stated purpose of avoiding the fair use doctrine.<sup>219</sup> Therefore, by amending the copyright law to provide architects with the exclusive right to control all forms of their works' reproduction, Congress would provide a benefit to architects, the courts and the public.<sup>220</sup> As demonstrated, the pictorial representation exception is unduly burdensome, and Congress should eliminate it.

Besides bringing the United States into compliance with its Berne Convention obligations, eliminating the exception would reduce the need to categorize structures as architectural works or sculptural works. Despite the similarity of the works,<sup>221</sup> there

217. COPYRIGHT OFFICE REPORT, *supra* note 51, at 76-77. By eliminating pictorial representations from the scope of copyright protection, Congress finally took a position on this controversial issue. *Id.* The debate over the ability to photograph buildings in the United States began as early as 1906. *Id.* This issue derailed the initial discussions of adding architectural works to the legislation that eventually became the Copyright Act of 1909. *Id.*

218. See *AWCPA Hearings*, *supra* note 105, at 70-71 (statement of Ralph Oman, Register of Copyrights) (discussing reasons why Congress should not establish full copyright protection for architectural works).

219. Compare *supra* notes 216-218 and accompanying text (discussing purposes for pictorial representation exception) with *supra* notes 218-219 and accompanying text (discussing ambiguities created by pictorial representation exception).

220. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 n.10 (1984) (stating that Congress' enactment of copyright legislation confers benefit upon public that outweighs evils of temporary monopoly); *Princeton University Press v. Michigan Document Servs., Inc.*, No. 94-1778, 1996 WL 54741, at \*4 (6th Cir. Feb. 12, 1996) (stating that copyright law is derived from Framers' conviction that secure economic incentive to individuals is best way to stimulate development of "Science and useful Arts" to ultimate benefit of general public); *Universal Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 435 (C.D. Cal., 1979) (stating that Copyright Act is premised on belief that the public will benefit when authors are given exclusive rights leading to economic reward and encouragement for continued contribution to arts and sciences); see also *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 4 (S.D.N.Y. 1992) (stating that copyright law "celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge") (emphasis in original).

221. See HOUSE REPORT 101-735, *supra* note 117, reprinted in 1990 U.S.C.C.A.N. 6935, 6951 (discussing what Congress meant by the term "building"). Recognizing the difficulty in using the term "building" as used in the AWCPA, the legislative history attempts to refine the definition of architectural works. *Id.* Congress determined that the term "building" encompasses structures that human beings use and inhabit, such as houses, office buildings, gazebos, and garden pavilions. *Id.* See also Regulations of the U.S. Copyright Office, 37 C.F.R. § 202.11(b)(2) (1991) (defining "building" as permanent and stationary humanly habitable structure).

The legislative history, however, restricts the definition of "building" to exclude "bridges and related nonhabitable three-dimensional structures" from protection. HOUSE REPORT 101-735, *supra* note 117, reprinted in 1990 U.S.C.C.A.N. 6935, 6951. See also Regulations of the U.S. Copyright Office, 37 C.F.R. § 202.11(d)(1) (1991) (stating that structures other than buildings are not proper subject of copyright). These exclusions raise the question of how an architect can

is a vast difference between the protection copyright law offers sculptural works<sup>222</sup> and that which the AWCPA offers architectural works. Furthermore, it is unclear whether copyright law offers copyright protection for purely aesthetic features incorporated in architectural structures as sculptural works.<sup>223</sup> Assuming it does, Congress has reintroduced the problem of classifying an architectural work as either functional or nonfunctional, useful or aesthetic.<sup>224</sup> Given the difficulty courts have historically had with this distinction, the pictorial representation exception has not significantly clarified copyright law as it applies to architectural works. Allowing the copyright owner to control pictorial representations of protected works would more closely align the AWCPA with the protection Congress has granted for pictorial, sculptural and graphic works. Accordingly, it would greatly reduce the significance of deciding which Act provides protection for a particular work.<sup>225</sup> Eliminating the pictorial representation exception would also abrogate the current anomaly that one may

know whether a work is categorized as a protected architectural work or as an unprotected "nonhabitable three-dimensional structure." Vanessa N. Scaglione, *Building Upon the Architectural Works Copyright Protection Act of 1990*, 61 *FORDHAM L. REV.* 193, 197 (1992). Under these guidelines, it is impossible to determine whether structures that blur the distinction between a "building" and a nonhabitable structure will qualify as architecture or sculpture, or as an unprotected structure. *Id.* at 198.

222. 17 U.S.C. § 106. Authors of sculptural works enjoy the exclusive right to reproduce the sculpture in copies and derivative works, and the exclusive right to authorize distribution of those copies. *Id.* Furthermore, the Visual Artists Rights Act provides moral rights for visual artists, including a paternity right and a right of integrity. 1990 U.S.C.A.N. (104 Stat.) 6915. This Act marks the first express federal statutory recognition of moral rights under U.S. law. *Id.* Section 106A of the Act confers the rights of attribution and integrity to the copyright owner. 17 U.S.C. § 106A (Supp. V 1993). The right of attribution includes the right to claim authorship, and the right to prevent the false designation of authorship. *Id.* § 106A(1). The author has the right to prevent the use of his name on a work that another has distorted, mutilated, or modified in a manner prejudicial to the artist's honor or reputation. *Id.* § 106A(2). The integrity right allows the author to prevent any intentional distortion, mutilation, or modification that may be prejudicial to the author's honor or reputation. *Id.* § 106A(3). The author also has the right to prevent the destruction of a work "of recognized stature." *Id.* § 106A(3)(b).

When a structure is a work of visual art, or a work of visual art has been incorporated into a building in a way that removing the work from the building would cause its destruction, the Visual Artists Rights Act protects that work. *Id.* § 113(d)(1)(A)-(B). The owner of a building who wishes to remove a work of visual art that is part of the building must notify the artist of the owner's intended action. *Id.*

With respect to architectural works protected by the AWCPA, the owner of a building embodying that work may authorize or make alterations to the building, and destroy the building, without the consent of the copyright owner. *Id.* § 120(b).

223. See Scaglione, *supra* note 221, at 202 (discussing works that have both sculptural and architectural aspects).

224. See *supra* notes 39-51 and accompanying text (discussing conceptual separability).

225. See *supra* notes 221-225 and accompanying text (comparing copyright protection provided sculptural works with that provided under AWCPA).

photograph a building, but not the decorative art applied to it, or incorporated within it.<sup>226</sup>

Finally, the AWCPA denies the architect of viable market interests.<sup>227</sup> Commercial representations of architectural works are a potentially lucrative source of secondary income on notable works.<sup>228</sup> However, Congress has decided that since this is not a normal exploitation of the work, copyright law need not entitle architects to control two-dimensional reproductions of their works.<sup>229</sup> Congressional reasons for depriving an architect of the income from two-dimensional souvenirs, but allowing him to profit from commercially produced three-dimensional souvenirs are dubious.<sup>230</sup> A better solution would be to prohibit two-dimensional reproductions, and to rely on the Copyright Act's fair use provision to prevent only commercial exploitation.

#### CONCLUSION

Traditionally, the United States has provided very little copyright protection for architectural works. However, influenced by the Berne Convention, United States copyright law is slowly evolving to reflect international expectations. The AWCPA was a necessary step in that evolution.<sup>231</sup>

The evolution, however, is not complete. The AWCPA fails to bring the United States into compliance with the Berne Convention. As the pictorial representation exception applies only to two-dimensional works, the AWCPA arbitrarily restricts the architect's right to control derivative works. Because the architect no longer has exclusive control of those works, the copyright law deprives her of a significant portion of her market interest. Also, because the AWCPA permits pictorial representations of a building but not applied decorative art, the courts still must apply the fair use doctrine to excuse many potential copyright infringements. Finally, because the Visual Artists Rights Act covers sculptural works, architects creating nonfunctional architecture enjoy considerably more protection than those creating useful architectural works. This dichotomy reintroduces the problem of classifying

226. See *supra* notes 170-174 and accompanying text (discussing ability to photograph works protected by AWCPA but not works protected by VARA).

227. See *AWCPA Hearings, supra* note 105, at 138 (statement of Richard Carney on behalf of the Frank Lloyd Wright Foundation) (noting that commercial uses of models and photographs of architectural works deprive architects of fruits of their labor without compensation).

228. See *supra* notes 148 & 157-158 and accompanying text (discussing marketability of two- and three-dimensional reproductions of architectural works); Winick, *supra* note 8, at 1626 (stating that substantial market exists for derivative works representing notable architectural works).

229. See *supra* notes 148-149 and accompanying text (discussing congressional view that allowing pictorial representations does not interfere with architects' normal exploitation of architectural works).

230. See *supra* notes 142-149 and accompanying text (discussing congressional reasons for pictorial representation exception).

231. See 136 CONG. REC. E259 (daily ed. February 7, 1990) (statement of Rep. Kastenmeier) (introducing Architectural Works Copyright Protection Act in House of Representatives, discussing Act and purposes for its implementation).

structures as either functional or aesthetic, and providing significantly different protection based on this determination.<sup>232</sup>

Congress could easily resolve four of these anomalies, and alleviate the last, by eliminating the pictorial representation exception. Such action would resolve the question of compliance with the Berne Convention requirements because United States law would grant copyright protection to all reproductions of protected works. Additionally, there would no longer be significant differences between the treatment of two-dimensional and three-dimensional reproductions of architectural works. Architects would enjoy the exclusive right to all market interests that they might have in their works. Architectural works would be subject to the fair use doctrine, just as are all other subjects of copyright law. The difference between rights to grant an architectural work would not be significantly different from those granted to a sculptural work.

The fair use doctrine adequately protects the purposes for which Congress enacted the pictorial representation exception. Architects should receive the same copyright protection as that enjoyed by other artists.<sup>233</sup> The resulting increase in copyright protection will maximize public welfare by encouraging the individual efforts of creative designers rather than promote the interests of subsequent copiers.

232. See *supra* notes 159-171 & 221-224 and accompanying text (discussing difficulties created in applications of conceptual separability test).

233. HOUSE REPORT 101-735, *supra* note 117, reprinted in 1990 U.S.C.C.A.N. 6935. The design of an architectural work is a "writing" under the Constitution and deserves full protection under the Copyright Act. *Id.* Architecture is an art form that performs a very public, social purpose and, as a work of art, plays a central role in our daily lives. *Id.* Ada Louise Huxtable, an architecture critic, compared architecture to poetry, explaining that architects can make "poetry out of visual devices, as a writer uses literary or aural devices. As words become symbols, so do objects; the architectural world is an endless source of symbols with unique ramifications in time and space." A. ROSSI, MEMORY AND METAPHOR IN ARCHITECTURE ANYONE? 45-46 (1986). See also *Hearing on Architectural Design Protection Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. at 136 (1990) (statement of Frank Lloyd Wright Foundation) (testifying that architecture is no less an art form than sculpture or painting); *id.* at 49 (statement of Register of Copyrights Ralph Oman) (testifying that architecture is one of world's oldest and most revered forms of art).