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Copyright in Memoriam

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Copyright *in Memoriam*

*Julie Cromer Young**

ABSTRACT

Can a government infringe upon a work dedicated to the memory of its people? The February 2010 Federal Circuit decision Gaylord v. United States addresses that question, but any satisfaction from the decision presupposes that the government should be held liable for such an infringement. Consistent with the 1976 Copyright Act, the Gaylord decision preserves the author's rights, paying no regard to the identity of the audience or the infringer. From a policy perspective, however, the result is dubious. Arguably, if a work is a public memorial, and paid for with public funds, it should immediately enter the public domain.

This Article focuses on one of the first, easy steps toward an expansion of the public domain: a policy decision that copyrights for creative works intended for the public are inherently unenforceable. Using Gaylord as an example, the Article examines expectations regarding the copyright of national monuments and memorials, as well as ownership of that copyright. It considers rights applicable to memorials, both under § 106 of the Copyright Act and § 106A, the Visual Artists Rights Act (VARA). It questions whether these works should be categorized as works of the United States government or, alternatively, as architectural works, and whether either answer would run afoul of the Berne Convention. Ultimately, it offers a solution under fair use that would create room in the public domain—not only for national monuments and memorials—but any work intended to belong to the public, for the public to use freely.

TABLE OF CONTENTS

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In February 2010, the Federal Circuit decided *Gaylord v. United States*, a copyright infringement case regarding the federal government's derivative use of the Korean War Memorial.[1] The United States Postal Service (USPS) had issued a stamp depicting *The Column*, a set of nineteen statues making up part of the Korean War Memorial, but had failed to secure the consent of the sculptor whom the federal government had commissioned to create the work.[2] The Court of Federal Claims had held the stamp to be a fair use of the work, deeming the stamp transformative in purpose and finding the remaining fair use factors—nature of the copyrighted work, amount of the original work used, and effect on the copyrighted work's marketplace—to be unpersuasive.[3] On appeal, the Federal Circuit had the opportunity to declare that national memorials and other works dedicated to the public are meant for public consumption, freely allowing the public to use works dedicated to the United States' national heritage.

Instead, the Federal Circuit affirmed an award of damages to the copyright owner, finding that the federal government had indeed infringed a national monument.[4] The appellate court reversed the

1. Gaylord v. United States, 595 F.3d 1364, 1368–69 (Fed. Cir. 2010).
2. *Id.* at 1368.
3. *Id.* at 1373.
4. *Id.* at 1381.

ruling of fair use based on the Court of Federal Claims' misinterpretation of what makes a work transformative, but did not expand upon the remaining three factors beyond a cursory treatment. Without the fair use defense, concluded the Federal Circuit, the government had made an unauthorized derivative work of *The Column*, thus incurring liability.[5]

From a private rights perspective, the decision was correct. The USPS infringed upon the author's rights by not procuring a license before using a photograph—itself an unauthorized derivative work—of *The Column*. The author owned the copyright and duly registered it with the Copyright Office. The USPS admitted that its stamp incorporated the copyrighted work.[6] As the Copyright Act decrees that anyone who violates any of the exclusive rights of the copyright owner is an infringer, finding the USPS liable for infringement was the only logical result absent fair use, a valid license, or some other defense.[7] This decision, however, produces a lingering dissatisfaction rooted not in traditional principles of copyright, but in traditional notions of the public domain—that which encompasses "intellectual elements that are not protected by copyright or whose protection has lapsed, due to the expiration of the duration for protection."[8] The national memorial, created with taxpayer money, seems to be the prototypical "public work" for this designation under copyright law.

This Article focuses on one of the first, easy steps toward an expansion of the public domain: a declaration that works intended for the public have copyrights that are inherently unenforceable. Part I explains why a memorial or monument presents the archetypal example of a work protectable by copyright but intended for the public domain. Part II details the problems that enforcing that copyright presents, examining *Gaylord* as an example. Part III offers ways to create room in the public domain for those works, limiting the monopoly the author can exert over the copyright once he has acknowledged the public nature of the work. Part IV recognizes obstacles to these solutions, including VARA and the Berne

5. *Id.* A "derivative work" is "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (2006).

6. *Id.* § 1371; *Gaylord*, 595 F.3d at 1371.

7. 17 U.S.C. § 501.

8. Pamela Samuelson, *Challenges in Mapping the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 7–21 (Lucie Guibalt & P. Bernt Hugenholtz eds., 2006). Samuelson notes that the definition may be broader, "welcoming in its ambit uses of works still protected by copyright, but legitimized through the operation of an exception or of a license." *Id.*

Convention. Finally, Part V offers insight for extending the application of laws applying to monuments and memorials to other works intended for the public domain, such as Twitter tweets.

I. MONUMENTS, MEMORIALS, AND MONOPOLIES

A monument is "something set up to keep alive the memory of a person or event, as a tablet, statue, pillar, building, etc."[9] The Washington Monument, for example, was erected to memorialize George Washington.[10] Monument Avenue in Richmond, Virginia, is composed of several large statues, mainly commemorating Civil War generals.[11] Similarly, a memorial is "anything made or done in memory of some person or event."[12] The nation's capital is populated with memorials honoring great leaders, remembering fallen heroes, and acknowledging significant events: the Jefferson Memorial, the Vietnam Veterans Memorial, the Marine Corps War Memorial (perhaps better known as the Iwo Jima Memorial), as but a few examples.[13] Memorials and monuments are also frequently erected on a smaller scale; cemeteries nationwide are replete with personal tributes to individual lives.

Because monuments and memorials exist to "help people remember," or, "keep alive the memory,"[14] many are erected on a larger scale, seemingly better to achieve the purpose of imprinting themselves on viewers' memories. The *Monument of African Renaissance*, for example, stands at 164 feet tall (higher than the Statue of Liberty) on the coast of Senegal and can be seen from miles away.[15] Berlin's Holocaust Memorial, *Memorial to the Murdered Jews of Europe*, occupies four city blocks of space and can be seen by

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9. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 934 (4th ed. 2004).

10. *See, e.g.*, Washington Monument, NAT'L PARK SERVICE, http://www.nps.gov/wamo/index.htm (last visited Apr. 10, 2011).

11. *See, e.g.*, Monument Avenue Historic District, NAT'L HISTORIC LANDMARKS PROGRAM, http://tps.cr.nps.gov/nhl/detail.cfm?ResourceId=-1209891467&ResourceType=District (last visited Apr. 10, 2011). The most recent addition to Monument Avenue, and the only African-American addition, is Arthur Ashe. *Id.*

12. WEBSTER'S, *supra* note 9 at 898.

13. As an example, the website dcMemorials.com lists more than five hundred persons with statues dedicated to them in Washington, D.C.. *Subject Index*, DCMEMORIALS.COM, http://www.dcmemorials.com/index_subject.htm (last visited May 11, 2011).

14. *Id.* at 898, 934.

15. Annie Look, *Senegal's Colossal Statue Stirs Big Controversy*, GLOBALPOST (May 30, 2010, 1:18 PM), http://www.globalpost.com/dispatch/senegal/100113/renaissance-monument-wade.

satellite.[16] Napoleon designed his massive tomb and its home in Paris's Les Invalides, purely as a memorial to his life.[17]

If it were not for their nature of perpetuating memory, the question of what property rights creators enjoy in monuments and memorials would be (and may still be) a foregone conclusion. Generally, individual artists or architects are responsible for the design of the work, which is usually protectable as intellectual property. At first glance, it would appear this should end the inquiry. But there is a tension, albeit subtle, that persists. When a memorial of public events or people is created for the public and supported by public funds, the communal element to the work challenges the idea that private rights to later uses of the work should subsist. In other words, although legally one can recognize that a federal memorial is the type of work that ordinarily would be subject to intellectual property protection, policy interests might lead one to question if those rights do in fact trump that norm.

A. Copyrighting Memory

As the monument is a creative work and an artist is a legal "author,"[18] if a work is protectable, that protection would primarily fall under copyright law.[19] Courts have long deemed three-dimensional art, such as statutes and sculptures, copyrightable. In 1954, the Supreme Court in the seminal case *Mazer v. Stein* first held "statuettes" copyrightable, although the 1909 Copyright Act did not enumerate such items.[20] The 1976 Copyright Act expressly includes

16. *See, e.g.*, *Memorial to the Murdered Jews of Europe*, SATELLITE SIGHTS (Apr. 4, 2008), http://www.satellitesights.com/satelliteimage/Memorial_to_the_Murdered_Jews_of_Europe_Berlin_Germany.

17. Although the tomb itself is huge, it is placed on a story beneath the public entrance to Les Invalides, so members of the public must bow their heads to acknowledge Napoleon in his tomb. *See, e.g.*, Hôtel National Des Invalides and Napoleon's Tomb, PLACESINFRANCE.COM, http://www.placesinfrance.com/les_invalides_napoleons_tomb.html (last visited Apr. 10, 2011).

18. According to 17 U.S.C. § 201 (2006), copyright in a work "protected under this title vests initially in the author or authors of the work." The Copyright Act fails to define what an "author" is, but as this article refers to creators of "pictorial, graphic, or sculptural works," as specified in 17 U.S.C. § 102(a)(5), it is safe to assume that the creator of an otherwise copyrightable sculptural work is in fact an author for purposes of the Copyright Act.

19. Of course, if a monument or memorial achieves identifying significance, then it is possible that the work is also protected under trademark law for that particular use. *See, e.g.*, Annette Lesieutre Honan, Comment, *The Skyscraping Reach of the Lanham Act: How Far Should the Protection of Famous Building Design Trademarks Be Extended?*, 94 NW. U. L. REV. 1509 (2000). *But see* Rock & Roll Hall of Fame Museum, Inc. v. Gentile Prods., 134 F.3d 749 (6th Cir. 1998) (reversing a motion for summary judgment protecting the Rock & Roll Hall of Fame Museum on Lanham Act grounds).

20. Mazer v. Stein, 347 U.S. 201, 214 (1954) ("'[W]orks of art' and 'reproductions of works of art' are terms that were intended by Congress to include the authority to copyright

"sculptural works," erasing any ambiguity.[21] Additionally, the Copyright Office has accorded copyright protection to memorials. For example, Frank Gaylord, the sculptor and legal author of *The Column*, received more than a dozen different copyright registrations for various aspects of his rendering of foot soldiers for the Korean War Memorial.[22] Felix de Weldon, who used the famous photograph *Raising the Flag on Iwo Jima* to create a sculpture of Marines raising the U.S. flag during the Battle of Iwo Jima, received a copyright registration for the resulting memorial.[23] These registrations will last for the life of each respective author, plus seventy years.[24]

Copyright law, however, does not afford protection to all three-dimensional memorials. The Mount Soledad Cross—formerly the Easter Cross—is unsurprisingly a cross-shaped structure in San Diego, California, formed of several connected rectangles, giving the figure an almost hollow look. The Mount Soledad Cross was erected in 1954 to commemorate the Korean War, and ebony plaques honoring and memorializing individual military members decorate its base.[25] But the cross structure itself may lack the originality required to satisfy the Copyright Act. According to § 102(a), to receive copyright protection, a work must be an original work of authorship and must be fixed in a tangible medium of expression.[26] In turn, originality requires independent creation and a minimal amount of creativity.[27] Although the level of creativity is not high, a basic shape such as a cross, square, or sphere may not rise to a level acceptable for protection under § 102(a).[28] Only if the statue reaches this creativity

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these statuettes. Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.").

21. 17 U.S.C. § 102(a)(5). According to 17 U.S.C. § 101, "'Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."

22. *See infra* text accompanying note 69.

23. *See, e.g.*, MARINES RAISING FLAG ON IWO-JIMA, Registration No. VAu000265428.

24. *See* 17 U.S.C. § 302.

25. Ultimately the copyrightability of the Mount Soledad Cross is a moot point, as the Ninth Circuit found the memorial to be a violation of the First Amendment prohibition against the establishment of religion. For more information, see Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011).

26. 17 U.S.C. § 102(a). Because the subjects of this Article would necessarily be fixed in a tangible medium of expression, I am not addressing that particular point. I can foresee an instance in which a piece of performance art is dedicated to the memory of a particular person or event. I consider that outside the scope of this particular article, but would welcome a dialogue on that particular point.

27. Feist Publ'g Co. v. Rural Tel. Co., 499 U.S. 340, 345 (1991).

28. While I recognize that 102(b) also governs the copyrightability of a work, it seems unlikely that a sculptural monument or memorial would be composed entirely of an "idea,

threshold does the author of the work receive copyright protection upon its completion.[29]

B. Owning Memory

It seems counterintuitive that one can be liable for the copyright infringement of monuments and memorials. After all, public monuments (or any large piece of sculpture displayed on public grounds) become part of the landscape and the public consciousness. One can hardly imagine New York Harbor without the Statue of Liberty, Daley Plaza in Chicago without the Picasso,[30] or the banks of the Potomac River without the Iwo Jima Memorial. Yet these works are subject to copyright, and their authors can receive registrations from the Copyright Office.[31] Frank Gaylord, whose work on *The Column* is discussed below, received twelve copyright registrations on those works.[32]

Although copyright protection clearly attaches to a work, it is often unclear to whom that copyright belongs. If the federal government creates the monument or memorial, ownership of a copyright may not be possible; ownership of copyright is statutorily disfavored for government works. According to § 105 of the Copyright Act, "copyright protection . . . is unavailable for any work of the United States Government."[33] This provision extends to works that are

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procedure, process, system, method of operation, concept, principle, or discovery." 17 U.S.C. § 102(b). To the extent that a memorial commemorates a discovery, clearly, the idea of a monument or memorial commemorating such an event would not be subject to copyright. Otherwise, for example, the bronze head of George Washington at George Washington University might risk infringing the Washington Monument based on idea alone.

29. *See id.* § 302, providing that copyright protection subsists from its creation.

30. The Cubist sculpture, dedicated on August 15, 1967, stands at fifty feet tall and weighs 162 tons. *1967 August 15 – Picasso Statue Unveiled in Civic Center Plaza*, CHICAGO PUB. LIBRARY, http://web.archive.org/web/20060831142953/http://www.chipublib.org/004chicago/timeline/picasso.html (last updated Aug. 1997).

31. For instance, Felix de Weldon received Registration Number VAu000265428 on August 20, 1993, listing 1986 as the date of creation. MARINES RAISING FLAG ON IWO-JIMA, Registration No. VAu000265428. Interestingly, DeWeldon did not credit Joe Rosenthal, who took the iconic photograph *Raising the Flag on Iwo Jima*, as a preexisting work in his copyright registration. *Joe Rosenthal, Photographer at Iwo Jima, Dies*, N.Y. TIMES, Aug. 21, 2006, http://www.nytimes.com/2006/08/21/business/media/22rosenthalcnd.html.

32. *See infra* note 69.

33. 17 U.S.C. § 105(a). A "work of the United States Government" is "a work prepared by an officer or employee of the United States Government as part of that person's official duties." 17 U.S.C. § 101. This is not necessarily a problem that is shared by works of state governments; corresponding federal prohibitions against state government ownership of copyright do not exist. *But see* Skinner v. MicroDecisions, Inc., 546 U.S. 1033 (2005) (noting that the Florida state legislature had enacted authorization to the Department of the Lottery and universities to hold copyrights, but made no such grant to property appraisers in the course of their official duties). For purposes of this section, discussion will be limited to federal memorials.

created by governmental employees in the scope of their employment[34] but not to works commissioned by the federal government.[35] To the extent that an employee of the U.S. government creates a national monument, therefore, it would not be capable of being protected by copyright laws.

Neither would a work treated as a "work made for hire" qualify for copyright protection. If a work of authorship is considered a work made for hire, the employer is deemed the author and owns the rights of copyright in the work.[36] Works made for hire encompass works created by employees as well as works created by non-employees with the understanding that the employer will own the copyright when the work is finished. Specifically, a work made for hire is a work:

> specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[37]

Sculptures are outside the statutory purview of this definition, and Supreme Court precedent further suggests that without a contractual stipulation, sculptures are presumptively not works made for hire. In *Community for Creative Non-Violence v. Reid*,[38] the sculptor created a work for the Community for Creative Non-Violence, which then wished to move the sculpture to different locations.[39] The Supreme Court considered various aspects of the work, including who supplied the materials for the work, who hired help for the work, and whether the organization paid taxes for the sculptor.[40] These factors helped illuminate whether the relationship was truly one of employer-employee, which the statute suggests is necessary for work-made-for-hire status.[41] Ultimately, weighing these factors, the Court determined that the sculptor was an independent contractor.[42] In

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34. *See* 17 U.S.C. § 101 (definition of "work of the United States government").

35. *See, e.g.*, M.B. Schnapper Pub. Affairs Press v. Foley, 667 F.2d 102 (D.C. Cir. 1981) (finding nothing in § 105 precludes a private copyright even if works were to be funded by the government).

36. 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.").

37. *Id.* § 101.

38. Cmty. for Creative Non-Violence v. Reid (*CCNV*), 490 U.S. 730 (1989).

39. The statue, *Third World America*, depicted a modern holy family huddled around a street grate, homeless. *CCNV*, 490 U.S. at 733.

40. *Id.* at 752.

41. *See* 17 U.S.C. § 101 (definition of "work made for hire").

42. *CCNV*, 490 U.S. at 752.

other words, while the Court did not require a contractual provision for the work to be considered a work made for hire, the evidence had to be strongly in favor of an employer-employee relationship.[43] A payment would not suffice. As a result, the sculptor may receive a copyright in his work, despite adequate compensation from the entity commissioning the work.

Since many monuments and memorials are sculptures, *CCNV* is instructive for protecting government works. Even if the federal government did commission a sculpture intended to be a federal monument, it probably would not be considered a work made for hire, absent a contractual provision declaring it as such. Since a contract must be in place to grant the government ownership rights in the work, it would make sense also to assign the government all rights in the copyrighted work at that time, bypassing the work-made-for-hire analysis altogether. After all, even though the government cannot author a copyrightable work outright, it can own a copyright assigned to it.[44] Nevertheless, there are two problems inherent in relying upon contract to cure copyright's ills. First, regardless of the federal actors, contracts rely on various state laws and courts for interpretation and validity.[45] Second, and perhaps more important, reliance on contract law ignores human fallibility. Unless Congress implements some statutory mechanism to assign the work automatically, it is entirely likely that some contracts could fail to pass judicial muster, or they may simply not be executed beforehand due to mere negligence.

Thus, the conundrum for the memorial continues. The federal government is unable to author a copyrighted federal work, and perhaps it will not receive the copyright of the work through assignment.[46] In the case of a memorial, a private artist could very well create the work and then receive the copyright in addition to the compensation the government grants. The funding for that compensation, in turn, comes from taxes on citizens, who are also the intended beneficiaries of such memorials. Ironically, if the government commissions a work to benefit the American public, and some American uses that work for his own benefit—which he might feel entitled to do, having helped pay for the work—he may be held responsible for infringing it.

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43. *CCNV*, 490 U.S. at 752–753.

44. *See* 17 U.S.C. § 105 ("[T]he United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.").

45. *See* 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 12.01[A][2] (1994) ("Because contractual rights arise under state law, jurisdiction lies solely with the state courts in an action to enforce contracts relating to works subject to statutory copyright or rights under those contracts.").

46. *See* 17 U.S.C. § 105 and discussion *infra* Part IV.A.1.

C. Copying Memory

The Copyright Act identifies acts of copyright infringement primarily as violations of the exclusive rights set out under §§ 106 and 106A.[47] An author of a statue or sculpture receives certain rights under § 106, but only two of the § 106 rights practically apply to statues or memorials.[48] First, § 106 grants the author the exclusive right to reproduce his work.[49] A person, therefore, cannot make an exact copy of a statue and claim ownership of the copyright therein. Second, § 106 conveys the right to make derivative works, which include adaptations and translations.[50] Only the author has the right to create works incorporating the original work, and as a result, it is an infringement for a person to use that underlying work to make another work.[51] In the case of a sculpture, for example, copyright law would prohibit a person from taking a photograph, selling a miniature replica, or creating a two-dimensional drawing without license from the author.[52]

As authors of visual works of art, sculptors also enjoy rights under the Visual Artists' Rights Act (VARA).[53] First, VARA gives the author the right of attribution—the right to be associated with and known as the author of the work.[54] Second, the author has the right of integrity, which is the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation . . . and to prevent any destruction of a work of recognized stature."[55] Like the rights afforded

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47. *See* 17 U.S.C. § 501(a).

48. *See id.* § 106. The remaining rights, although included in the grant of copyright, seem ill suited for the owner of a copyright in a memorial. The right to distribute would scarce apply, since a memorial is by nature a single work that is created not for purposes of resale. The right to display is subsumed in the transfer of the physical work to the government. The right to perform does not apply to a statue by the nature of the work, and per § 106, the right to perform digitally applies only to sound recordings.

49. *Id.*

50. *See id.* § 101.

51. *See id.* §§ 106, 501(a).

52. Additionally, in the case of memorials incorporating names or other text, such as the Vietnam Veterans Memorial, even a simple rubbing would infringe the underlying copyrighted work.

53. *See* 17 U.S.C. §106A(a)(1)–(2) ("[T]he author of a work of visual art shall have the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create; shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.").

54. *See id.* § 106A.

55. *See id.* § 106A(a)(3)(A)–(B). For example, in Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38 (1st Cir. 2010), artist Christoph Büchel conceived a football-field-sized art installation to be exhibited at the Massachusetts Museum of Contemporary Art.

under § 106, VARA rights are also limited. For example, the First Circuit in *Phillips v. Pembroke Real Estate* held that an author does not have the right to include the site of the work as part of the "integrity" of the work of art,[56] so the work can be moved if needed. Unlike § 106 rights, however, § 106A rights are not transferable. These moral rights, such as identity and reputation, are considered personal to the author and thus incapable of assignment.[57] As a result, as VARA currently reads, even if the author were to transfer the rights under § 106 to the government, rights of attribution and integrity would remain with the author.

II. *GAYLORD V. UNITED STATES*

The practical implications of granting copyrights for public memorials were highlighted last year in the Federal Circuit, which determined that the federal government could infringe its own memorial. *Gaylord* dealt with *The Column*, a group of statues sculpted by Frank Gaylord as part of the Korean War Memorial on the National Mall in Washington, D.C.[58] *The Column* is comprised of nineteen larger-than-life statues of ponchoed U.S. soldiers depicted walking through rice fields in the Korean War. Gaylord constructed the statues of clay and then stainless steel,[59] placing them in a triangular pattern on a green field lined with reflective granite, evocative of water.[60]

In 2002, the USPS issued a stamp depicting *The Column* in winter.[61] This stamp was based on the photograph *Real Life* taken by

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Id. at 41. Büchel was dissatisfied with how the Museum implemented his instructions and procured items necessary for the installation, and ultimately the project lapsed. *Id.* at 44–45. After announcing the cancellation of the project, the Museum opened Büchel's exhibit, though most of the work had been by Museum employees. *Id.* at 45. The court found that VARA applied to the work, however, genuine disputes of material facts foreclosed summary judgment on Büchel's claim that the Museum violated his right of artistic integrity by modifying his installation. *Id.* at 62–66.

56. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 140 (1st Cir. 2006) ("By concluding that VARA applies to site-specific art, and then allowing the removal of site-specific art pursuant to the public presentation exception, the district court purports to protect site-specific art under VARA's general provisions, and then permit its destruction by the application of one of VARA's exceptions. To us, this is not a sensible reading of VARA's plain meaning. Either VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all.").

57. *See* 17 U.S.C. § 106A(e) ("The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author.").

58. Gaylord v. United States, 595 F.3d 1364, 1368–69 (Fed. Cir. 2010).

59. *Id.*

60. From the author's personal observations.

61. *Id.* at 1370.

John Alli, who subsequently selected that photo for use in a collection of photographs as a retirement gift for his father, a Korean War veteran.[62] Alli wanted to sell prints of *Real Life* and sought the owner of the copyright for permission, securing a license from architectural firm Cooper-Lecky.[63]

U.S. postage stamp "Korean War Veterans Memorial"[64]

How Cooper-Lecky and Gaylord became involved with the creation of the Korean War Memorial is interesting, if not exactly straightforward. Congress enacted legislation "to erect a memorial in Washington, D.C. to honor veterans of the Korean War" in 1986.[65] The American Battle Monuments Commission sponsored a contest, and a team from Penn State University submitted the winning idea.[66] The Penn State team eventually withdrew, and the Army Corps of Engineers hired Cooper-Lecky for the "creation, construction, and installation" of the memorial.[67] Cooper-Lecky then held a contest to find a sculptor for the idea proposed by Penn State, and ultimately selected Frank Gaylord.[68] With input from Cooper-Lecky and the Veterans' Administration, Gaylord finished *The Column* and

62. *Id.*
63. *Id.*
64. *Gaylord*, 595 F.3d at 1370–71.
65. *Id.* at 1368.
66. *Id.*
67. *Id.*
68. *Id.*

registered multiple copyrights of various aspects the work with the Copyright Office as its sole author.[69]

Gaylord received $775,000 for the completion of *The Column*.[70] The USPS, which paid Alli $1,500 for use of his photograph, did not compensate Gaylord.[71] Nearly 48 million stamps were sold, resulting in total sales of $17 million.[72] Gaylord sued the USPS in 2006, and the Court of Federal Claims determined the government's use of the memorial to be fair use, transformative of *The Column*.[73]

The U.S. Court of Appeals for the Federal Circuit reversed the fair use finding on transformative grounds, and, giving cursory attention to the remaining three fair use factors, found that fair use did not apply.[74] Additionally, the Federal Circuit held that *The Column* was neither a joint work of authorship, permitting the architects to license rights,[75] nor an architectural work exempting the work from infringement.[76] As a result, the Federal Circuit remanded the case to the Court of Federal Claims for a determination of damages.[77]

In dissent, Judge Newman relied primarily relied on an argument grounded in statute. The provision 28 U.S.C. § 1498(b) permits a copyright holder to sue the United States, but withholds that right "with respect to any copyrighted work prepared by a person while in the employment or service of the United States . . . or in the preparation of which Government time, material, or facilities were

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69. Taken in order, the copyright registrations tell an interesting progression over the years of the project: KOREAN WAR MEMORIAL SKETCH MODELS, Registration No. VAu000187193 (sculptures); THE COLUMN, Registration No. VAu000228439 (19 sculptures); KOREAN WAR MEMORIAL SKETCH COMPOSITION, Registration No. VAu000206990 (sculpture); KOREAN WAR MEMORIAL SKETCH NO. 2, Registration No. VAu000207794 (sculpture); 3 PONCHO SKETCH MAQUETTES, 19 PONCHO SKETCH SOLDIERS, Registration No. VAu000214488 (sculptures); COLUMN HEAD STUDIES, Registration No. VAu000214489 (sculptures); THE COLUMN, Registration No. VAu000306934 (19 sculptures); THE COLUMN, Registration No. VAu000237832 (sculpture); THE COLUMN, Registration No. VAu000280954 (19 clay sculptures); THE COLUMN, Registration No. VAu000280955 (sketch models for National Korean War Veterans Memorial); and THE COLUMN, Registration No. VAu000342493 (new matter: stainless steel casting with some sculptural revisions). Only one copyright registration, NATIONAL KOREAN WAR VETERANS MEMORIAL, Registration No. VAu000447698, lists additional authors Louis Nelson, W. Kent Cooper, and William P. Lecky.

70. *Gaylord*, 595 F.3d at 1383.

71. *Id.* at 1371.

72. *Id.*

73. *Id.* at 1371–73. Fair uses of a copyrighted work, discussed at length *infra*, are not considered to be infringement, but instead a preservation of the constitutional freedom of speech in areas such as comment, criticism, and news reporting. *See* 17 U.S.C. § 107 (2011).

74. *Gaylord*, 595 F.3d at 1372–76.

75. *Id.* at 1376–80.

76. *Id.* at 1380–81.

77. *Id.* at 1381.

used."[78] Clearly, noted Judge Newman, *The Column* fell into such a category, and artists should not be permitted to sue the U.S. Government for copyright infringement of works done "in the service of the United States.[79] Judge Newman advanced the supporting policy argument as well:

> The Korean War Veterans Memorial is a work of public art and a national monument. It was authorized by Congress, installed on the National Mall, and paid for by appropriated funds . . . . [The majority] holding is contrary to the contract provisions, contrary to statute for works done in the service of the United States, contrary to copyright law, and contrary to national policy governing access to public monuments.[80]

She reemphasized this position several times in her opinion, stating: "The use for governmental purposes of a photograph of the Korean War Veterans Memorial, *a public monument that was designed and built with public money*, is unambiguously covered by the contract and statutes under which this Memorial was built."[81]

The *Gaylord* decision and Judge Newman's dissent highlight the problem inherent in public memorials and monuments. Statutorily speaking, a copyright owner such as Frank Gaylord has every right to enforce his copyright. If his work is not "made for hire" (because it fails the test of *CCNV*), then a presumption arises that it was also not performed "in service of the United States." Legally, nothing prevents the creator of a public memorial or monument from enforcing the copyright, even against the United States, which supplied the funding for the project in the first place.

Even so, applying copyright here *feels* wrong. From a policy standpoint, a public memorial or monument belongs to the people. If the United States or one of its citizens creates a derivative work of that public memorial or monument, then we may presume that the derivative work reflects a work already in the public domain—not due to passage of time, but to the public nature of the work.

III. SOLUTIONS FOR "PUBLIC WORKS"

The solution may be in the play on words that describes what these monuments and memorials are: public works. "Public works" are "works (as schools, highways, docks) constructed for public use or enjoyment especially when financed and owned by the government."[82] Given that public memorials or monuments are generally constructed

78. 28 U.S.C. § 1498(b) (2010).

79. *Gaylord*, 595 F.3d at 1383 (Newman, J., dissenting).

80. *Id.* at 1381.

81. *Id.* at 1386 (emphasis added).

82. *Public Works*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/public%20works (last visited Apr. 10, 2011).

for public use and enjoyment and are financed and owned by the government, it makes sense that those works could be classified as public works as well. But, as our intellectual property system establishes, ownership of the work does not necessarily mean ownership of the copyright.[83]

In the case of these public and government works, however, it should. There are several ways to achieve government ownership of the copyright, or at least, treatment of the work as if it were in the public domain. First, Congress could amend the relevant statutes to specify that works created for the public remain in the public domain and cannot be infringed. Congress could do this either by amending § 101[84] to extend the definition of "work of the United States" specifically to include commissioned works as works of the United States Government under § 105, or by amending the definition of "architectural works" under § 101 to treat monuments and memorials as architectural works under § 120.[85] Second, Congress could add a category of intellectual property outside the traditional parameters of copyright to include works of cultural importance that automatically enter the public domain, basing the legislation on similar enactments passed in other countries, such as Egypt.[86] Third, and perhaps most pragmatically, courts could guard the public domain by incorporating into the interpretation of fair use—specifically, the nature of the copyrighted work—an element of the author's intended use for the work. This would create a flexible case-by-case approach to perceived infringement while strengthening the position of the public domain with respect to these works.

A. Solutions within the Copyright Act

First, Congress could amend the Copyright Act to limit the rights copyrights provide for authors. Ostensibly, the authors would still receive copyright in these works; however, the scope and the enforcement of their copyrights would be sharply defined by the amendments to the Copyright Act itself. The most practical amendments would be to § 105 and § 101 to the definition of "works of the U.S. Government," and possibly to § 120 and § 101 for "architectural works."

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83. *See, e.g.*, Forward v. Thorogood, 985 F.2d 604 (1st Cir. 1993).

84. *See* 17 U.S.C. § 101 (2011) (defining "work of the United States Government").

85. *See id.* §§ 101, 105, 120.

86. *See, e.g.*, Law No. 117 of 1983 (Law on the Protection of Antiquities), 11 Aug. 1983 (Egypt), *amended by* Law No. 12 of 1991, *amended by* Law No. 3 of 2010, *available at* http://www.cemml.colostate.edu/cultural/09476/pdf/egyptian-law-117-of-1983.pdf [hereinafter Egyptian Antiquities Law].

1. Sections 105 and 101: Works of the U.S. Government

As noted above, § 105 prevents the federal government from receiving copyrights in the works it creates: "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."[87]

Section 101 defines a "work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."[88] Courts have interpreted §§ 105 and 101 to deny protection to federal statutes and regulations,[89] internal Central Intelligence Agency reports,[90] military ranks and insignia,[91] and printed versions of Congressional hearings.[92] However, § 105 "is not necessarily subverted by assigning to the Government the copyright in a commissioned work that is neither produced by current or former employees nor related to the official duties of any Government employee;"[93] therefore, commissioned works do not automatically fall within the ambit of § 105.

Section 105 does not grant the United States copyright in works of the U.S. Government, but instead, places such works directly into the public domain:

> The effect of section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain. This means that the individual Government official or employee who wrote the work could not secure copyright in it or restrain its dissemination by the Government or anyone else, but it also means that, as far as the copyright law is concerned, the Government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term

87. *Id.* § 105.

88. *Id.* § 101.

89. *See, e.g.*, Veeck v. S. Bldg. Code Cong. Int'l., Inc., 293 F.3d 791, 796 (5th Cir. 2002) ("Significantly, the 1976 Copyright Act specifically denies protection to federal statutes and regulations.").

90. *See* Pfeiffer v. C.I.A., 60 F.3d 861 (D.C. Cir. 1995). In *Pfeiffer*, the plaintiff had worked for the C.I.A. for years, and when he left the agency, he took with him a copy of the unedited version of a Bay of Pigs report. *Id.* at 863. While the court held that he was correct in that no governmental copyright protection existed over the report, the report still rightfully remained in the possession of the United States Government. *Id.* at 864–65.

91. *See* Faessler v. U.S. Playing Card Co., No. 1:05CV581, 2007 WL 490171, at *10 (S.D. Ohio Feb. 9, 2007).

92. *See* Harper & Row Publishers, Inc. v. Nation Enters, 723 F.2d 195, 205 (2d Cir. 1983) (noting that *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93rd Cong., 2d Sess. at 90–151 (1974), was a "work of the United States Government" and not copyrightable), *rev'd on other grounds*, 471 U.S. 539 (1985).

93. Schnapper v. Foley, 667 F.2d 102, 109 (D.C. Cir. 1981).

> "work of the United States Government" does not mean that a work falling within the definition of that term is the property of the U.S. Government.[94]

A simple phrase added to the definition of "work of the United States Government" could eliminate the problem that a work commissioned by the U.S. government presents. For example, adding "or commissioned by the United States Government" at the end of the § 101 definition would mean that works commissioned by the government, such as *The Column*, would be precluded from copyright protection.

This solution is not without drawbacks. First, such an amendment may provide a disincentive to those who would create memorials for the government in the first place. If authors could not receive a copyright, perhaps there would be less motivation for authors to serve their government by creating memorials without the right to profit further. This argument, while valid, should not hinder change. First, under a properly executed contractual arrangement, most authors would not retain the copyright in the work regardless of whether the definition is amended to encompass commissioned works. Second, lack of copyright does not mean lack of compensation. As noted earlier, Frank Gaylord received $775,000 for his work on *The Column*.[95] Additionally, while lack of copyright may provide a deal-breaker for established, well-known artists, burgeoning artists may not mind relinquishing a copyright as long as they retain rights of attribution.

Second, the elimination of moral rights for these government works under § 106A, in addition to copyrights under § 106, would cause further problems. Because Congress added § 106A to the Copyright Act in 1990,[96] Congress did not initially draft all provisions of the Copyright Act with moral rights in mind.[97] Current works of the U.S. government under § 105 do not enjoy VARA rights and are not copyrightable; however, most of the works of the U.S. government, because they are not works of visual art, do not qualify for VARA rights in the first place.[98] If § 101 is to be amended to include government-commissioned works as "works of the United States Government," then an amendment should be made to § 106A to note

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94. H.R. REP. NO. 94-1476, at 58–60 (1976).

95. Gaylord v. United States, 595 F.3d 1364, 1383 (Fed. Cir. 2010).

96. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128 (1990) [hereinafter VARA].

97. VARA did encompass some other sections of the Copyright Act, but not all. For example, § 107 made express acknowledgement that its provisions applied "[n]otwithstanding the provisions of sections 106 and 106A." 17 U.S.C. § 107 (2006).

98. *See id.* § 106A.

that the rights of attribution and integrity remain with an artist, regardless of the inapplicability of § 106 rights to such works.

Finally, this change would only apply to works created or commissioned by the federal government, excluding other works also meant to be public. For example, state or city memorials, unlike federal monuments, would still be copyrightable. Amending the definition of "work of the United States Government" is the most tailored potential solution, if the copyrightability of a federal memorial is to be solved. However, amending a different section of the Copyright Act could place more works into the public domain, if that is the desired outcome.

2. Sections 120 and 101: Scope of Rights in Architectural Works

Another possibility, one which the *Gaylord* majority considered, is to classify a work the size of *The Column* as an architectural work. Unlike a work of the U.S. government, an architectural work is eligible for copyright protection, absent work-specific problems such as inherent uncopyrightability.[99] The provisions in § 120, however, limit the scope of that protection. While "architectural works" are specifically listed under § 102(a)(8) as works entitled to copyright protection,[100] the Copyright Act provides that certain activities cannot be enforced as instances of copyright infringement.[101] Section 120(a) provides:

> The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.[102]

In turn, an "architectural work" under § 101 is "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features."[103]

The *Gaylord* court considered whether it could consider *The*

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99. *See id.* § 102(a)(8).

100. *Id.* ("Works of authorship include the following categories: . . . (8) architectural works.").

101. *See id.* § 120(a).

102. *Id.* Section 120(b), which permits owners of a building embodying an architectural work to make alterations to or destroy a building without the copyright owner's consent, seems inapplicable for purposes of this article.

103. *Id.* § 101. In 1990, the Architectural Works Copyright Protection Act amended section 101 by adding the definition for "architectural work." Pub. L. No. 101-650, 104 Stat. 5089, 5133 (1990) [hereinafter AWCPA].

Column to be an architectural work under the Architectural Works Copyright Protection Act (AWCPA):

> The Government argues that the [Korean War Veterans' Memorial] was designed for "human occupancy" in a similar manner as museums, gazebos, or garden pavilions and thus fits within the Copyright Office's definition. To support this argument, Defendant cites to a passage of AWCPA's legislative history, which indicates that Congress intended to extend coverage of the AWCPA to structures "'that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions.'"[104]

Ultimately, the Federal Circuit, like the Court of Federal Claims before it, found that the word "building" prevented the court from treating *The Column* or the entire memorial as an architectural work.[105] Although Congress may have intended to extend coverage beyond permanent and stationary structures designed for human occupancy, it is clear that the Copyright Office does not share that intent, limiting "buildings" to "humanly habitable structures that are intended to be both permanent and stationary, such as houses and offices, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos, and garden pavilions."[106] The Copyright Office also excludes from registration under AWCPA other structures it does not consider to be buildings, such as walkways and bridges.[107]

There are some logical impediments preventing the consideration of memorials such as *The Column* as an architectural work under copyright. Under § 102 of the Copyright Act, "pictorial, graphic, and sculptural works" are listed separately from "architectural" works in the Act's list of works eligible for copyright protection.[108] Moreover, most large sculptures are incapable of human habitation and therefore not "buildings" to be included in the § 101 definition.[109] It might be problematic simply to lump large sculptures in as architectural works within the scope of § 120 or the definition of architectural works under § 101.

Ignoring the semantics, however, the restriction at play in § 120 also makes sense for public memorials. The AWCPA excludes the right to "prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or

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104. Gaylord v. United States, 85 Fed. Cl. 59, 71 (Fed. Cl. 2008) ((citing Def's Post Tr. Br. at 29), (quoting H.R. REP. NO. 101-173 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6951)).

105. Gaylord v. United States, 595 F.3d 1364, 1381 (Fed. Cir. 2010).

106. 37 C.F.R. § 202.11(b)(2) (2011).

107. *Id.* § 202.11(d)(1).

108. 17 U.S.C. § 102(5), (8) (2006).

109. 37 C.F.R. § 202.11(b)(2).

ordinarily visible from a public place,"[110] because when a building becomes part of the landscape, it is impossible to represent the landscape without including the building with it.[111] The same is true for sculptures or large memorials. For example, the Washington, D.C. skyline would be incomplete without the Washington Monument in the center of the Mall.[112] Likewise, a photograph of the Mall would be incomplete without the Korean War Veterans' Memorial, including *The Column*.

Instead of calling memorials "architectural works," perhaps the optimal solution is to amend the title of § 120 to include "large sculptural works" in addition to architectural works. The current title is, "Scope of exclusive rights in architectural works";[113] an amendment could enlarge the reach of the provision to "Scope of exclusive rights in architectural and public artistic works." Congress could then add a definition of "public artistic works" that would reflect the definition of "public works" seen earlier in this section: "Works of authorship constructed for public use or enjoyment, especially when financed and owned by the government."

This definition could avoid the situation in Chicago in the mid-2000s upon installation of the sculpture *Cloud Gate*, by artist Anish Kapoor.[114] *Cloud Gate* measures 33 feet by 66 feet by 42 feet and weighs 110 tons.[115] Initially, security guards shooed photographers away, noting that *Cloud Gate* was under copyright protection, and that copyright had been licensed to the City of Chicago.[116] The City issued permits "priced at $350 a day for professional still photographers, $1,200 a day for professional videographers and $50 an hour for wedding photographers."[117] While the City was within its rights under copyright law to issue the regulations, the public reaction

110. *Id.* § 120(a).

111. *Id.*

112. The Washington Monument, completed in 1884, is admittedly outside any possible scope of copyright. Moreover, because inside the Monument flights of 896 steps surround an elevator that takes visitors to the observation level, it is even possible that the Washington Monument could be considered a building. *See, e.g.*, Washington Monument, NAT'L PARK SERVICE, http://www.nps.gov/nr/travel/wash/dc72.htm (last visited Apr. 10, 2011).

113. 17 U.S.C. § 120.

114. *Chicago Tonight: The Bean Unveiled*, (television broadcast May 15, 2006). *Cloud Gate*, informally called "the Bean" until Kapoor formally named it, is located in Millennium Park, which is at the north end of Chicago's Grant Park, alongside Lake Michigan. *Id.*

115. ROBERT SHAROFF, BETTER THAN PERFECT: THE MAKING OF CHICAGO'S MILLENNIUM PARK 61 (2004).

116. *See, e.g.*, Charles Storch, *Millennium Park Loosens Its Photo Rules*, CHICAGO TRIB., May 27, 2005, http://articles.chicagotribune.com/2005-05-27/features/0505260318_1_millennium-park-great-park-professional-photographers.

117. *Id.*

was largely unfavorable.[118] Partially in response to the negative public reaction to the photographic permits, the City no longer issues these permits and has appeared to back off of requiring permits to film *Cloud Gate*.[119]

Amending § 120 to permit derivative works in the form of two-dimensional representations of public works of art could avoid problems such as this. However, this type of amendment may cover more than works that the government sponsors. Larger private works, such as wrapped installations by renowned artists Christo and Jeanne-Claude, would also be covered by an amendment to this provision, although the work is a private venture not having government sponsorship, permanence, or particular significance to the location.[120]

B. New Protections to Works

Congress also could amend the Copyright Act by providing for automatic government ownership of all works of public significance. This would not mandate automatic entry into the public domain, but it would require that the U.S. Government, not any private author, would become the copyright owner of such a work of authorship.[121] As such, the government could decide not to exercise any rights for works of national significance.

International precedent for this type of proposal exists. In March 2010, Egypt passed antiquities legislation that nationalized ownership of any item achieving national significance.[122] Specifically, "each and every property or movable shall be considered an antiquity,"

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118. *See, e.g.*, Kelly Kleiman, *Who Owns Public Art?*, CHRISTIAN SCI. MONITOR, Mar. 30, 2005, http://www.csmonitor.com/2005/0330/p15s01-usju.html. Gallery owner Bob Horsch commented, "We're taxpayers . . . . [w]e've been representing Chicago for 32 years. . . . I don't care what they say; it's public domain." *Id.*

119. *See Permits for Filming*, CITY OF CHICAGO, http://www.cityofchicago.org/city/en/depts/dca/provdrs/chicago_film_office/svcs/permits_for_filming.html (last visited Apr. 10, 2011).

120. The artists Christo and Jeanne-Claude are known for large temporary installations such as *Wrapped Monuments*, *Running Fence*, *Pont Neuf Wrapped*, and *The Umbrellas*. *See Common Errors*, CHRISTO AND JEANNE-CLAUDE, http://www.christojeanneclaude.net/error.shtml (last visited Apr. 10, 2011). They are emphatic that they are private artists and do not accept grants for their work. However, they do work with governments for their installations. For example, for the work *Pont Neuf Wrapped*, the project director received approval for the work from authorities of the City of Paris, the Département of the Seine and the State. *The Pont Neuf Wrapped*, CHRISTO AND JEANNE-CLAUDE, http://christojeanneclaude.net/pn.shtml (last visited Apr. 10, 2011).

121. Although, according to the legislative history of §105, such a provision would provide direct entry into the public domain. *See supra* text accompanying note 94.

122. Egyptian Antiquities Law, *supra* note 86. As the author is writing this article, it is unclear to what extent the laws of Egypt will remain in place with any new government that will take the place of the current regime. Still, it remains an interesting precedent.

if it falls within one of three categories:

> (1) A production of the Egyptian or subsequent civilizations or a production of art, science, literature or religion found on Egypt's land from the pre-historical era up to one hundred years before the present time.
>
> (2) Of archaeological, artistic or historic value, as it reflects one of the civilizations that existed in Egypt – whether Egyptian or others.
>
> (3) Created or established in Egypt or has a historic relationship to it.[123]

At first glance, this modern law covers only very old works, and not necessarily works that are newly created or works still covered under the copyright laws of the country. However, the Egyptian legislation anticipates works that achieve instant national distinction, providing that "any property, real or movable, of historic, scientific, religious, artistic, or literary value may. . . be deemed an antiquity, if the State has a national interest in preserving and maintaining the same, *without observing* the [hundred-year] time limit."[124] This means that even new works, as long as they possess "historic, scientific, religious, artistic, or literary value," originate in Egypt, and share a cultural or historical relationship with Egypt, may be declared state-owned "antiquities." Though the antiquities become state-owned properties, the Supreme Council of Antiquities becomes the manager of all antiquities and receives all intellectual property rights, trademarks, and exploitation protections, even those for "archaeological products, photos of the pieces, and the archaeological sites."[125]

Similar legislation in the United States could extend to artistic works intended to be part of the American culture or reflect its history without entangling current intellectual property laws in the property analysis for works of national significance. *The Column*, for example, could be declared a property of historic or artistic value, and then the United States would assume intellectual property rights, including rights of marketing derivative works merely reflecting the works in paraphernalia sold as souvenir items or as part of the landscape.

This option, of course, has its own drawbacks. Again, there is a problem when limiting federal—but not state—works. "Antiquity" law is not an overly developed area in the United States; several disparate laws protect artifacts and cultural property—not a cohesive body of law.[126] It seems artificial to add another stopgap in antiquities law to

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123. *Id.* at art. 1.

124. *Id.* at art. 2 (emphasis added).

125. *Id.* at art. 36.

126. For example, the protection and control of artifacts is covered by the National Stolen Property Act, 18 U.S.C. §§ 2314, 2315 (2006); the protection of art and cultural property of American indigenous peoples is covered by the Archaeological Resources Protection Act of 1979,

cover works generally covered by copyright. And, if recent attempts at *sui generis* protection in Europe are any indication, implementing a new law to cure a problem just outside of traditional intellectual property bounds—patent, copyright, trademark, trade secret—rarely succeeds.[127]

C. Compulsory Licensing

Compulsory licensing is another way Congress could work within the strictures of the Copyright Act to allow more public access to certain works. A compulsory license allows the copyright owner to retain the license in a copyrighted work, but mandates that any person meeting the requirements of the Copyright Act receive a license to use the work, for a fee.[128]

One of the most common schemes for compulsory licensing in the Copyright Act extends to musical works under § 115: "A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use."[129] The person may not change the "basic melody or fundamental character" of the work, and the work shall not receive copyright protection as a derivative of the copyrighted work.[130] The person must deliver notice of his intention to use the copyrighted work to the copyright owner,[131] and, upon distribution of the licensed work, must pay royalties to the copyright owner.[132]

The problems with a compulsory license scheme for public art are comparable to problems already apparent in the compulsory

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16 U.S.C. §§ 470 *et seq.*; Native American remains and burial goods are covered by the Native American Graves Protection and Repatriation Act, 25 U.S.C §§ 3001–3013 (2006). The U.S. Antiquities Act, 16 U.S.C. §§ 431–433 (2006), is quite narrow and has been held to be unconstitutionally vague. *See* United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). *But see* United States v. Smyer, 596 F.2d 939 (10th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979); United States v. Jones, 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980) (both allowing the government to prosecute under the Act).

127. For example, the European Union Database Directive was instituted in Europe in 1996 with the stated purpose of giving European database providers a competitive edge over their non-European providers. Council Directive 96/9, 1996 O.J. (L 077) 20 (EC) (on the legal protection of databases). Ten years later, a commission found that the Directive had failed to achieve that goal, and was largely ineffective as a piece of intellectual property legislation. *DG Internal Market and Services Working Paper: First Evaluation of Directive 96/9/EC on the Legal Protection of Databases*, § 1.1 (Comm'n of European Cmtys., Working Paper Dec. 12, 2005), *available at* http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf.

128. BLACK'S LAW DICTIONARY 938 (8th ed. 2004).

129. 17 U.S.C. § 115(a)(1) (2006).

130. *Id.* § 115(a)(2).

131. *Id.* § 115(b)(1).

132. *Id.* § 115(c).

license scheme for music. For example, as Professor Jane Ginsburg notes in connection with music, one concern would be pricing.[133] What is the value of using a work of art, and does that value change if it is a recognized symbol of the country? Additionally, Ginsburg notes the difficulty of determining royalty distributions in the music industry.[134] At least in a digital medium, technology may allow authors to be traced and tracked with automatic payment accounts.[135] In the world of fine art, the government would need, for example, to establish an independent registry, specifying individual works of art eligible for compulsory licensing, and attempting to locate the address of the author to provide fees.[136]

D. Interpretation of Fair Use

A fourth solution involves judicial reinterpretation of fair use in the Copyright Act. Fair use, found in § 107 of the Copyright Act, is simultaneously a defense for infringement of copyright and a claim of non-infringement of copyright.[137] Intended to address First Amendment concerns in the Copyright Act, fair use offers a test by which to determine whether a later use of a copyrighted work is a permissible one, as opposed to an infringement of the author's rights.[138] Section 107 sets forth a non-exhaustive list of uses that might ultimately be deemed fair: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[139] Courts consider four factors to determine fair use:

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133. *See* Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1642–43 (2001).

134. *Id.* at 1644.

135. *See, e.g.*, Ken Fisher, *Universal to Track DRM-Free Music Online via Watermarking*, ARS TECHNICA (Aug. 16, 2007, 12:05AM), http://arstechnica.com/old/content/2007/08/universal-to-track-drm-free-music-online-via-watermarking.ars.

136. This is not without precedent. In California, the Resale Royalties Act, California Civil Code Section 986, provides that whenever a work of fine art is sold and the seller resides or the sale takes place in California, the seller pays to the artist 5 percent of the amount of such sale. CAL. CIV. CODE § 986(a) (West 2011). The fund is managed by the California Arts Council, a state agency which has the mission to "advance California through the arts and creativity." *See About the CAC*, CALIFORNIA ARTS COUNCIL, http://www.cac.ca.gov/aboutus/aboutus.php (last visited Apr. 10, 2011).

137. Although 17 U.S.C. § 107 states that the fair use of a copyrighted work "is not an infringement of copyright," one making fair use of a copyrighted work typically has to raise the argument of fair use on defense, and the Supreme Court has called it an "affirmative defense." *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985)); H.R. REP. NO. 102–836, at 3, n. 3 (1992).

138. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219–220 (2003) (citing *Harper & Row*, 471 U.S. at 560).

139. 17 U.S.C. § 107 (2006).

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and the substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[140]

No one factor is dispositive when determining fair use.[141]

Over time, courts have interpreted the factors on a case-by-case basis. They have expanded the first factor, for example, to include transformative uses—those uses that "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[142] The Supreme Court has clarified the third factor, noting it includes copying not only a large amount of the work, but even a small amount of copying constituting the "heart" of the work—a qualitative, as opposed to quantitative, amount of copying.[143] The Supreme Court has found that the fourth factor can also mean effect on the ability of the copyright owner to license the copyrighted work.[144]

Courts, however, have rarely chosen to expand the second factor, the nature of the copyrighted work, and some scholars find it the least significant of the four factors.[145] Generally, courts have viewed the second factor as one resulting from two inquiries: whether the work is creative and whether the work is published.

First, courts note that if a copyrighted work is creative, any subsequent use is less likely to be deemed fair.[146] The Supreme Court has noted that "fair use is more likely to be found in factual works than in fictional works,"[147] and in original works as opposed to derivatives.[148] Given the relatively low threshold for creativity in the

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140. *Id.*

141. *See, e.g.*, *Campbell*, 510 U.S. at 577–78.

142. *Id.* at 579.

143. *Harper & Row*, 471 U.S. at 565.

144. *Id.* at 567–68.

145. Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 27–28 (1997).

146. *See, e.g.*, Brewer v. Hustler Magazine, Inc., 749 F.2d 527, 529 (9th Cir. 1984) (contrasting all creative works with works of an informational nature). *But see* M.C.A., Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981) (noting that the courts may consider whether the work was "creative, imaginative, and original").

147. Stewart v. Abend, 495 U.S. 207, 238 (1990) (citing MELVILLE NIMMER, 3 NIMMER ON COPYRIGHT § 13.05[A] at 13–88).

148. *See, e.g.*, Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1271 (11th Cir. 2001) ("[O]riginal, creative works are afforded greater protection than derivative works or factual compilations.").

Copyright Act, even among factual works,[149] it is no surprise that the Supreme Court has found it "not much help" in the fair use determination.[150] Furthermore, where the creative work is used for a transformative purpose, "the second factor may be of limited usefulness."[151]

Courts also determine the second factor based on the publication status of the work. The prototypical case of unfair use of an unpublished work, *Harper & Row Publications v. Nation Enterprises*, considered the unpublished memoirs of President Gerald R. Ford.[152] The Supreme Court found that "the unpublished nature of a work is '[a] key, though not necessarily determinative, factor tending to negate a defense of fair use.'"[153] Because most works are both creative and published, one disfavoring fair use and the other supporting it, the second factor is generally neutral in the four-factor test.

Nowhere in the fair use analysis do courts consider the author's intent in creating the copyrighted work. The first factor discusses the "purpose and character" of the allegedly infringing work, but not what the original author intended the copyrighted work to convey. This inquiry is well suited for inclusion in the second factor of fair use; the "nature of the copyrighted work" could include a simple inquiry as to what the author intended when he created the work. If the author intended the work for public use and consumption, such as a national monument or memorial, it should have a bearing on whether any purported infringer's activity should be deemed fair. This inquiry would allow courts to consider on a case-by-case basis whether the author originally intended the underlying work to be in the public domain at some time.

Professor Lydia Loren has explored whether an author's intent should play into the second factor. Instead of intent for the work, however, Loren examines the motivation for creating the work and its dissemination.[154] Loren approaches motivation with an inquiry as to whether the author intended to profit from the creation and

149. Feist Publ'g Co. v. Rural Tel. Co., 499 U.S. 340, 345 (1991).

150. *See* Campbell v. Acuff-Rose, 510 U.S. 569, 586 (1994). The *Campbell* court did not comment on the low threshold of copyrightability in its decision, but instead noted that the factor "calls for recognition that some works are closer to the core of intellectual property than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Id.*

151. Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301, 315 (4th Cir. 2010) (quoting Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006)).

152. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542 (1985).

153. *Id.* at 554.

154. Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 38 (2008).

distribution of the work, or if some other factor figured into the creative calculus the author undertook when deciding whether to create.[155] For example, Loren hypothesizes:

> A court would inquire into the nature of papal decrees and other documents from churches designed to provide guidance to church members. The creation and dissemination of such documents, a court would likely conclude, are motivated not by the market-based incentives that copyright law creates, but by other considerations. That conclusion should influence the result in a fair use analysis, weighing in favor of fair use and thus creating a less robust scope of protection for that type of work.[156]

Professor Loren's expansion of the second factor is a promising start to render it more meaningful in a fair use analysis. This interpretation examines the motivation of the author in creating the work, but in the end, the author's motivation to create is a separate inquiry from the intended use of the work itself. As an example, Frank Gaylord received $775,000 for creating *The Column*.[157] When he created it, however, he understood that the sculpture would be part of a national memorial. As a result, the author's economic motivation need not match his intention for use.

Expansion of the second factor does not mean that courts would automatically find fair use. The *Gaylord* court, for example, considered each of the four factors when determining that the USPS's use was not fair.[158] The crux of the Federal Circuit's holding was to counter the determination by the Court of Federal Claims on the first factor, finding a lack of transformative purpose or character.[159] The Federal Circuit found that the non-transformative stamp generated an estimated $5.4 million in revenue, so the commercial nature of the stamp caused the first factor to weigh "strongly against" a finding of fair use.[160] The Federal Circuit further found that the third factor weighed against fair use because the stamp depicted fourteen of nineteen soldiers and clearly represented *The Column*.[161] The fourth factor weighed in favor of fair use, as the stamp was not likely to adversely impact a market for derivative works of *The Column*.[162]

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155. *Id.* at 10–12.

156. *Id.* at 39.

157. Gaylord v. United States, 595 F.3d 1364, 1383 (Fed. Cir. 2010).

158. *Id.* at 1373–75.

159. *Id.* at 1372. The Court of Federal Claims found that the postage stamp was fair use because it transformed *The Column*. The Federal Circuit disagreed, finding that "the stamp and *The Column* share a common purpose: to honor veterans of the Korean War." *Id.* at 1373. Additionally, to the extent there is a transformation, the argument that the stamp transforms *The Column* is misplaced; if anything, the underlying photograph transforms *The Column*, but the stamp does nothing to transform the photograph.

160. *Id.* at 1370–71.

161. *Id.*

162. *Id.* at 1375.

This left analysis of the second factor. Following the creativity and publication inquiries, the Federal Circuit followed the Court of Federal Claims in declaring the work both creative and published.[163] The Federal Circuit justified its decision by noting the uniquely public nature of national monuments: "Although *The Column* is part of a national monument—perhaps the epitome of a published work—given the overall creative and expressive nature of the work, we conclude that this factor weighs against fair use."[164]

If, however, the Court had considered the intent of the author for the published work, perhaps the balance would have changed. Including the public nature of the copyrighted work in the analysis would have likely shifted the balance of the second factor to weigh in favor of fair use. As a result, two factors would have favored fair use, and two factors would have weighed against it. Although one cannot predict with certainty that the outcome of the case would have changed, the scrutiny of the factors would have made the fair use decision much closer.

The unpredictability of adding authorial intent into the second factor is both its strongest and weakest point. Incorporating intent would create a higher level of subjectivity for that factor; it takes little analysis to determine whether a work is factual or published. A more nuanced analysis of this factor would elevate "the nature of the copyrighted work" to a level of significance and thoughtfulness comparable to what the other three factors require. An intent inquiry also allows for the determination of whether a work belongs in the public domain, or whether a subsequent use of the work constitutes an infringement, on a case-by-case basis. Considering each potential infringement individually would allow a court to decide whether to penalize a significantly commercial use of a copyrighted public work. The *Gaylord* court may still have found the highly profitable stamp not fair use. But, it still would have considered the nature of the copyrighted work in a way that acknowledged its intended use.

On the other hand, the unpredictability might also be problematic. By considering the public nature of a work only at the fair use inquiry, it leaves second-comers uncertain as to whether an anticipated use would in fact infringe. Moreover, leaving an intent inquiry or the public nature of a work to fair use fails to automatically enter works into the public domain, if that is indeed the goal. A case-by-case analysis means that a work could be public in nature, but

163. *Id.* at 1374.

164. *Id.* (citing Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993)).

would lack the same certainty as if the work were in "the public domain."

IV. MORAL RIGHTS OBSTACLES TO PUBLIC WORKS

While in theory public works of authorship seem like a harmless genre of authored works to carve out for the public domain, bypassing copyright altogether may not be possible. The primary obstacle is the existence of moral rights on a national and international level that might prevent copyright regimes from reserving rights to the public.

A. VARA

As mentioned above, authors of public works currently also enjoy rights under the VARA,[165] the vehicle by which Congress incorporated moral rights into the U.S. Copyright Act to meet the Berne Convention standards.[166] Moral rights allow the creator "to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[167] In the United States, the right "to claim authorship" has been interpreted as the right of attribution, and the right "to object" to that prejudicial action has been interpreted as the right of integrity.[168] Regardless of the function of a work, "[t]he entitlement of an author to be correctly attributed, to have some control over the integrity of his work, seems important."[169]

Even if a work directly enters the public domain, VARA may still apply. According to § 106A(b), "[o]nly the author of a work of visual art has the rights [of attribution and integrity] in that work, whether or not the author is the copyright owner."[170] VARA rights are

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165. *See* 17 U.S.C. §106A(a)(1)–(2) (2011) ("[T]he author of a work of visual art shall have the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create; shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.").

166. *See, e.g.*, Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995) (discussing VARA's relationship with the Berne Convention).

167. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, *revised* July 24, 1971, *amended* Sept. 29, 1979, 828 U.N.T.S. 221, *available at* http://zvon.org/law/r/bern.html [hereinafter Berne Convention].

168. *See* 17 U.S.C. § 106A.

169. JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 29 (Yale Univ. Press 2008).

170. 17 U.S.C. § 106A(b).

not the rights conferred by § 106 of the Copyright Act; they attach only to works of visual art and last only for the life of the author, emphasizing their personal nature.[171] Moreover, VARA itself specifies that the rights are independent of the rights conferred by § 106.[172]

Though it predates the adoption of VARA in 1990, *Serra v. U.S. General Services Administration* dealt with an artist commissioned to create a sculpture for the federal government.[173] In *Serra*, the U.S. General Services Administration (GSA) commissioned Richard Serra to create a sculpture for the plaza adjacent to the federal office complex in lower Manhattan.[174] Serra created *Tilted Arc* for $175,000 and signed a contract providing that "'all designs, sketches, models, and the work produced under this Agreement . . . shall be the property of [the United States].'"[175] The contract said nothing about the Government's post-purchase use of the sculpture.[176] After years of intense criticism over *Tilted Arc*, the GSA recommended that it be relocated.[177] Serra sued, and the Second Circuit eventually heard his claims of free expression and due process.[178] The Court found that if any party could claim freedom of speech, it was the U.S. government:

> Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work.[179]

The Court also did not accept the claims that the work was site-specific, and would be destroyed if it were moved, noting, "Notwithstanding that the sculpture is site-specific and may lose its artistic value if relocated, Serra is free to express his artistic and political views through other means."[180] While recognizing the

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171. *See id.* § 106A(d)(1).

172. *See id.* § 106A(a). The only other specific mention of § 106A in the Copyright Act is under § 113, which deals specifically with "pictorial, graphic, or sculptural works." *Id.* § 113. However, the provisions which encompass or exempt § 106A rights from application are tied directly to a work of visual art that was made part of a building, removing the work from moral rights if the building needs to be taken down. *See id.* § 113(d).

173. Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045 (2d Cir. 1988).

174. *Id.* at 1046–47.

175. *Id.* at 1047. The excerpt that *Serra* provides does not state whether copyright and intellectual property rights were expressly included in the contract.

176. *Id.*

177. *Id.*

178. *Id.* at 1048. Interestingly, Serra had initially filed for copyright infringement, but the District Court held that 28 U.S.C. § 1498, the same provision that did not apply in *Gaylord*, created a subject-matter jurisdiction bar against his suit. *See* Serra v. U.S. Gen. Servs. Admin., 667 F. Supp. 1042, 1051 (S.D.N.Y. 1987) (holding that the Court of Federal Claims is the only court that could hear claims of copyright infringement, pursuant to 28 U.S.C. § 1498).

179. *Serra*, 847 F.2d at 1049.

180. *Id.* at 1050.

importance of Serra's message, the Second Circuit found the U.S. government's patronage of the arts just as important:

> We recognize that courts considering First Amendment challenges by artists to governmental decisions to remove purchased works of art must proceed with some caution, lest a removal ostensibly based on unsuitable physical characteristics of the work or an unfavorable assessment of its aesthetic appeal camouflage an impermissible condemnation of political viewpoint. At the same time, artists must recognize that overly intrusive judicial restraints upon the prerogatives of government to decide when, where, and whether to display works of art that it has purchased would pose a serious threat to the vigor of such commendable ventures as GSA's art-in-architecture program. Government can be a significant patron of the arts. Its incentive to fulfill that role must not be dampened by unwarranted restrictions on its freedom to decide what to do with art it has purchased.[181]

Moreover, the Court held that even if Serra had suffered damage to his reputation, it did not amount to a lost property interest that could amount to a due process violation.[182]

While not itself a moral rights case, *Serra* dealt with issues of prejudice and loss to reputation, providing a foundation for later cases decided under VARA.[183] *Serra* serves as an example that works created for the federal government as monuments and memorials are not simultaneously subject to VARA, despite the personal nature of the rights involved.

B. Berne Convention

If Congress decides to exempt public works from copyright protection, it must consider whether such an exemption complies with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the international agreement that the United States formally joined in 1988.[184] Created in 1886, the Berne Convention sought "to help nationals of its member States obtain international protection of their right to control, and receive payment for, the use of their creative works."[185] The Berne Convention specifically protects sculpture as an artistic work.[186] In addition to copyrights, the Convention protects moral rights in works of expression.[187] It requires that member States comply with its

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181. *Id.* at 1051 (citations omitted).

182. *Id.* at 1052 ("[S]uch an injury without loss of government employment would not constitute a constitutionally cognizable deprivation of property or liberty.").

183. *See, e.g.*, Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 (1st Cir. 2006).

184. Berne Convention, *supra* note 167.

185. *WIPO Treaties – General Information*, WIPO, http://www.wipo.int/treaties/en/general (last visited Apr. 10, 2011).

186. Berne Convention, *supra* note 167, at art. 2(1) (including as an "artistic work" "works of drawing, painting, architecture, sculpture, engraving and lithography").

187. *Id.* at art. 6bis.

provisions to receive reciprocal rights from other members.[188] Members must extend protection to benefit "the author and his successors in title."[189]

The Convention does recognize exceptions to the protections that it offers, similar to the ones recognized in the United States. For example, member nations may determine the level of protection granted to "official texts of a legislative, administrative, and legal nature,"[190] justifying the nonprotection of "works of the United States government" under § 105. The same justification could apply to the Convention provision permitting exclusions for political speeches and legal proceedings.[191] It is unclear, however, whether the "public" nature of the Berne Convention exceptions would also extend to monuments or memorials, since sculpture is one class of works specifically identified as protectable under Berne. Additionally, Berne may preclude Congress from reclassifying public memorials as works of architecture, since the Convention expressly extends to works of architecture as well.[192]

However, according to a recent report by the World Intellectual Property Organization (WIPO), the implementing body of the Berne Convention: "States are also free to invoke other public interest motives to exclude some creations from protection and place them in the public domain."[193] For example, the report notes that Chile "puts into the public domain works that have been expropriated by the State," though it notes that there seems to be "no case of application of such provision to creative works so far."[194] This does appear to provide an "out" to any member State that can offer a public policy reason that a work should automatically enter into the public domain. This workaround might also apply to any *sui generis* type of legislation outside copyright extended to public works; once copyright is not an issue, the Berne Convention may cease to pose a problem. For example, Egypt has been a member of the Berne Convention since 1977,[195] yet its Antiquities Law appears not to run afoul of it. This, however, may be because the law offers protections greater than that

188. *Id.* at art. 3(1).

189. *Id.* at art. 2(6).

190. *Id.* at art. 2(4).

191. *Id.* at art. 2bis(1).

192. *Id.* at art. 4(b).

193. SÉVERINE DUSOLLIER, WORLD INTELLECTUAL PROP. ORG., SCOPING STUDY ON COPYRIGHT AND RELATED RIGHTS AND THE PUBLIC DOMAIN 30 (2010), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev_study_inf_1.pdf.

194. *Id.* Moreover, the report notes that the article reflects the spirit of a Socialist Chile when it was enacted, and "expropriations for public interest were a political strategy." *Id.*

195. *Treaties and Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=946C (last visited Apr. 10, 2011).

required by the Convention, which it allows member States to provide.[196] When a law attempts to take rights away from those already afforded, the Berne Convention may still provide an obstacle.

The one solution that the Berne Convention would not prohibit, and would in fact condone, would be the reinterpretation of fair use:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.[197]

This provision does not encompass all uses that could be subsequently deemed fair. However, this interpretation of fair use also excludes many uses currently considered fair, so WIPO may have left this up to individual member States to interpret. Finally, the WIPO report also notes the voluntary entry of expressions into the public domain, where authors choose to put their works into the public domain.[198] The report posits that a regime allowing authors to relinquish copyright should be precisely written, and is not without its own drawbacks:

> Even if one admits this relinquishment, it should be recalled that the work now abandoned to the public domain is not protected against any attempt at appropriation. Once the work is in the public domain, it will be subject to its regime of free use, which can open the possibility for others, with only small but original adaptations, to exploit the new work and gain exclusivity and revenue out of it. This can explain that some authors, wishing to allow the public to benefit from open access to and free enjoyment of their creation, might prefer having recourse to less radical licenses granting such freedoms, while retaining some control, over relinquishing their copyright altogether.[199]

V. CONCLUSION

If any discrete, ordinarily copyrightable category of works could arguably be works intended to be in the public domain from creation, it would be public memorials. These works, meant to remind us of people and events upon which we built the country, are essentially public. As such, private rights in ownership, and the ability to profit from those private rights, seem contrary to the original intent of the work. The default, however, is to grant private ownership rights for individual works of expression, not to create reasons for them not to be in the public domain. As a result, regardless of the public nature of

196. Berne Convention, *supra* note 167, at art. 19 ("The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.").

197. *Id.* at art. 10(2).

198. DUSOLLIER, *supra* note 193 at 33.

199. *Id.* at 35.

certain expressive works, the author can monopolize any future uses. If Congress and the courts do nothing, authors of public artistic works will continue to receive rights to monopolize derivative works. The public, on the other hand, loses the ability to use the works as a part of its culture, and to deepen its collective education and history. Not every American can see the Korean War Memorial firsthand in Washington, D.C., but the USPS sold forty-eight million stamps depicting *The Column*, bringing that heritage to Americans nationwide.[200]

Professor James Boyle explains that the First Amendment does not only capture Americans' rights to freedom of the press, of assembly, of religion, of speech.[201] If the First Amendment offers freedom of speech, it necessarily entails the freedom to hear.[202] If the First Amendment gives the freedom of the press, it also gives the freedom to read, and to learn.[203] These freedoms—the implied freedoms that the First Amendment offers the American public—are what the public domain is intended to safeguard.[204] Ultimately, it makes sense to expand the public domain with works that are targeted for the American public.

The treatment of public artistic works could serve as a prototype for other types of works that the authors release into the public for the public's benefit and only try to claim rights in them once they learn that the works could be profitable. Social networking provides another forum where information may have originally intended to be for public consumption, but then curtailed by the author's rights. "The fundamental currency among users of social networking services is shared information; the greater the perceived value of the information, the higher the status of the user."[205] For Twitter users, a standard of success is the number of times a user's post, or "tweet," is reposted, or "retweeted."[206] But the content is still the author's, both under copyright law and under the Twitter terms of service. In at least one case, whether the redistribution of a tweeted photograph is a violation of copyright law is still at issue.[207]

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200. Gaylord v. United States, 595 F.3d 1364, 1371 (Fed. Cir. 2010).

201. BOYLE, *supra* note 169, at 67.

202. *Id.*

203. *Id.*

204. *Id.*

205. Stephen M. Kramarsky, *Copyright Claims to Images Posted on Twitter*, LAW.COM (Jan. 19, 2011), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202478390584.

206. *Id.*

207. *See* Agence France Presse v. Morel, No. 10 Civ. 2730 (WHP), 2011 WL 147718, at *32 (S.D.N.Y. Jan. 14, 2011) (refusing to dismiss claims of copyright infringement of Tweeted

Comments one author, "It is interesting . . . to consider how the decision plays out against the expectations of typical Twitter users and the social networking economy generally."[208] For decades, the expectations of the public have gone ignored with respect to acceptable uses of copyrighted information. The memorials may lead the way to a new thinking of intended-for-public information—or, quite possibly, the new expectations will provide a template for the memorials to follow.

photos of the aftermath of the Haiti earthquake based on secondary liability and the Digital Millennium Copyright Act).

208. Kramarsky, *supra* note 205.