THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT OF 1990: AT ODDS WITH THE TRADITIONAL LIMITATIONS OF AMERICAN COPYRIGHT LAW

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I. INTRODUCTION

Before December 1990,[1] United States' copyright law afforded very limited protection to architectural works in the form of constructed buildings.[2] American copyright law has traditionally denied protection for buildings based on adherence to basic tenets governing copyrightable subject matter.[3] In a drastic departure from this tradition, Congress enacted The Architectural Works Copyright Protection Act of 1990 (hereinafter the Act) largely for the purpose of increasing the scope of copyright protection available to buildings.[4] Adoption of the Act was an attempt to comply with treaty obligations of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter Berne Convention) to which the United States became a party in 1989.[5] The practical utility of the Act is questionable; it appears that few design professionals are familiar with the Act and even fewer are actually taking advantage of it.[6] More importantly, the Act is at odds with several underlying

1. The Architectural Works Copyright Protection Act was signed into law on December 1, 1990. Copyright Improvements Act of 1990, Pub. L. No. 101–650, Tit. VII, 104 Stat. 5133 (1990) (codified in various sections of 17 U.S.C.). *See infra* notes 62–75 and accompanying text. The Act had the effect of greatly expanding copyright protection available to buildings in physical form. *See infra* sections II(C), (D).

2. This protection was limited to those structures whose use and function were overshadowed by their monumental and sculptural qualities such that they could be characterized as a "pictorial, graphic or sculptural work," 17 U.S.C. § 102(a)(5) (1976). *See infra* note 118.

3. *See infra* section III.

4. H.R. Rep. 101–735, 101st Cong., 2d Sess. (1990). *See supra* note 1.

5. On March 1, 1989 the United States became signatory to the Berne Convention for the Protection of Literary and Artistic Works via the Berne Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853, 2854 (1988) (codified in various sections of 17 U.S.C.).

6. According to the copyright office, very few buildings have been registered for copyright protection since the passing of the Act. This isn't surprising as the architectural profession itself did not push very hard for increased copyright protection for constructed buildings in the course of considering Berne implementation. *See Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 100th Cong., 1st & 2d Sess. 659 (1988) (Comment of Chairman Robert Kastenmeier in questioning David E. Lawson, witness for the American Institute of Architects.) Indeed, it appears that some members of the profession were definitely opposed to such protection. In responding to written questions concerning United States adherence to the Berne Convention submitted by Senator Mathias, the American Institute of Architects stated: "The present proposed language would...frustrat[e] rather than fulfill the Framers' intent by creating a 'chilling effect' on architectural progress...",

principles of the United States copyright system, particularly the prohibition of protection for intrinsically utilitarian articles.[7] This disregard for the traditional limitations of American copyright law sets a dangerous precedent in providing design professionals with broad protection for buildings, thus creating the potential for design monopolies.[8] Given these flaws, the law as it now stands should be abandoned and revised to bring it into compliance with United States copyright guidelines.

This Note is concerned exclusively with protection afforded buildings themselves rather than with already copyrightable architectural plans, three dimensional models and other two-dimensional works "related to" architecture.[9] Part II of this Note will outline the historical impetus and process which led to the final promulgation of the Act. Part III will describe the legal conflicts created by the Act as it is currently written, and Part IV will propose an alternative model rule which will provide sufficient protection to architectural works and will comply more fully with both the Berne Convention and United States copyright law.

U.S. Adherence to the Berne Convention, *Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 733, 733 (1986).

7. *See infra* section III(B).

8. By being able to copyright buildings, architects, designers, engineers, etc., are given proprietary rights to the building thus enabling them to prevent others from duplicating that particular design. This effectively gives the copyright holder a design monopoly on that building. In a position paper in response to the Copyright Office Notice of Inquiry on architectural works protection submitted in consideration of the Act, one commentator expressed the need to imitate as follows:

> Because of the need to "build upon" a previous design or style, it is essential that architects not be prohibited by law from copying design elements or overall styles, seen in magazines, books, or as constructed, as long as the architect does not reproduce a copyrighted drawing or book in the process... Many historical elements are reproduced, copied, varied, [or] rearranged in almost every design. For example, elements of the classic Greek Temple have been incorporated into contemporary designs for churches, banks, residences, office and government buildings and museums. A balance needs to be achieved whereby no one can obtain a monopoly on such common elements...

United States Copyright Office, *Report of the Register of Copyrights: Copyright in Works of Architecture* , app. C (Position Paper of G. William Quatman and Mark E. Brown at 4) (1988). There is further concern with the copyright holder having the legal right to monopolize the utilitarian content of the building. *See supra* section II(B).

9. Architectural plans, three dimensional models, drawings, and other works "related to" architecture were already protected under the 1976 Copyright Act as "pictorial, graphic or sculptural works". *See* Pub. L. No. 100-568, 4(a)(1)(A), 102 Stat. 2853, 2854 (1988) (codified at 17 U.S.C. §§ 101, 102(a)(5)). The House report on the 1976 Copyright Act explicitly states that architectural plans and drawings are protected by the Copyright Act. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. and Admin. News 5659, 5668. *See also* Eales v. Environmental Lifestyles, Inc., 958 F.2d 876 (9th Cir. 1992) (holding as a general rule that architectural drawings and plans are eligible for copyright protection under the copyright code as pictorial, graphic, or sculptural works. (citing 17 U.S.C. §§ 101, 102(a)(5)). In addition, the following cases all held that architectural plans are copyrightable: Robert R. Jones Assoc. v. Nino Homes, 858 F.2d 274, 280 (6th Cir. 1988); Imperial Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972); Demetriades v. Kaufman, 680 F. Supp 658 (S.D.N.Y. 1988); Kent v. Revere, 229 U.S.P.Q. 828, 832 (M.D. Fla. 1985); Wickham v. Knoxville International Energy Exposition, Inc., 555 F. Supp. 154, 155 (E.D. Tenn. 1983); DeSilva Constr. Corp. v. Herrald, 213 F. Supp 184, 196 (M.D. Fla. 1962).

II. THE BERNE CONVENTION AND ASSOCIATED LEGISLATIVE ACTIVITY LEADING TO THE ADOPTION OF THE ACT

A. History & Attempts at Compliance with the Berne Convention

The Berne Convention was completed in Paris on September 9, 1888 and has since undergone several revisions, the last in 1979.[10] The Convention was originally drafted to protect the rights of authors in their literary and artistic works, including books, pamphlets, writings, musical compositions, designs, and scientific works.[11] The basic principles guiding the Berne Convention were threefold: (1) to provide national treatment, under which foreign copyright holders enjoy the same protection as that granted to nationals; (2) to implement automatic copyright protection, defined as protection not subject to any preconditions or specific formalities; and (3) to establish independence of protection which would afford international copyright protection independent of any protection given in the country of origin of the work.[12] The Convention was an attempt at uniform international copyright protection, open to any nation wishing to become part of the union.[13] As of January 1, 1988, seventy–seven individual states were party to the Convention.[14]

The United States declined to join the Berne convention in 1886, electing rather to develop its own system of international copyright relations.[15] During

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10. The Convention was revised in Berlin on November 13, 1908, in Rome on June 2, 1928, in Brussels on June 26, 1948, in Stockholm on July 14, 1967, and in Paris on July 24, 1971 and amended on October 2, 1979. Document IV–B Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 at 1 (A Project of the American Society of International Law Interest Group on International Economic Law) (CCH 1989) (Source of text: Paris Act of July 24,1971, as amended on October 2, 1979) (provided by the World Intellectual Property Organization, Geneva, 1987).

11. *Id.*

12. *Id.*

13. LAWRENCE E. ABELMAN & LINDA L. BERKOWITZ, INTERNATIONAL COPYRIGHT LAW, THE COMPLETE GUIDE TO THE NEW LAW OF COPYRIGHTS 334–35, (New York Law School Law Review eds., 1977).

14. The following states were signatories to the convention as of January 1, 1988: Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Central African Republic, Chad, Chile, Columbia, Congo, Costa Rica, Cote d'Ivoire, Cyprus, Czechoslovakia, Denmark, Egypt, Fiji, Finland, France, Gabon, German Democratic Republic, Germany (Federal Republic of), Greece, Guinea, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Lebanon, Libya, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Mauritania, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Rwanda, Senegal, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, United Kingdom, Uruguay, Venezuela, Yugoslavia, Zaire, and Zimbabwe. Document IV–B Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, *supra* note 10, at 1.

15. *See, e.g.*, EDMUND W. KITCH & HARVEY S. PEARLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 570 (4th ed. 1991). In assessing the development of United States copyright law, one commentator observed:

> For almost two centuries, the United States has been a copyright island, its jurisprudence having evolved in isolation from developments elsewhere. As long as it served American interests, U.S. copyright law did not concern itself with the waves that our statutes or rulings would set in motion outside our borders, and few ripples from abroad affected U.S. copyrights.

David Nimmer, *Nation, Duration, Violation, Harmonization: An International Proposal for the*

this period, minimal legal protection was offered for architectural buildings and designs, making American law inconsistent with the law of the many Berne Union nations.[16] As the United States became increasingly interested in joining the Berne Convention, this disparity was recognized as a potential hindrance to adherence to Berne guidelines.[17] As a result, the United States Congress was required to reassess the scope of the copyright law and the corresponding level of protection provided for buildings.[18] Berne Convention treaty obligations thus provided the primary impetus for the ultimate extension of United States copyright protection to buildings in lieu of the traditional American disregard for such protection.

The United States Congress' first attempt at adherence to the Berne Convention came with the Copyright Reform Act of 1976.[19] The interest in the Berne Convention was a response to growing concern for international protection for American works in the 1970's, a time when the export of copyrighted works of United States' origin and problems with foreign piracy were increasing.[20] The 1976 amendments committed America to a broad scope of protectable subject matter, adopted the Berne Convention term of protection of 50 years, and placed an expiration date on the requirement that foreign authors print their works in the United States to be afforded American protection.[21] The 1976 legislation revised the United States' copyright law to make it more congruent with Berne standards but did not succeed in removing all barriers to complete compliance.[22]

United States Copyright, in 55 SPG-LAW & CONTEMP. PROBS. 211, 211 (1992).

16. *See* ABELMAN & BERKOWITZ, *supra* note 13. The Berne Convention makes specific reference to the protection of architectural works in Article (2)(1) which states that protected works "shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as...works of...architecture". Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971. Nations subscribing to the Convention are thus bound by this provision to afford protection for works of architecture.

17. *See infra* notes 23–61 and accompanying text.

18. *See Report of the Register of Copyrights, supra* note 8. Title 17 of the U.S.C. comprises the copyright law in the United States. Prior to the 1990 amendments, Title 17 limited protection to the following subject matters: literary works; musical works including any accompanying works; dramatic works including any accompanying works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; and sound recordings. 17 U.S.C.A. § 102 (1976). Constructed buildings were excluded from protection except in the rare incident that they could be classified as a sculptural work as is the case with monuments such as the Washington Monument. *See supra* note 2.

19. Pub. L. No. 94–553, 90 Stat. 2541 (1976) (codified in 17 U.S.C. §§ 101–810 (1976)).

20. KITCH & PEARLMAN, *supra* note 15, at 571. Other commentators suggest the ultimate reasons behind United States adherence with Berne were: (1) concern over the lack of effectiveness of domestic and international trade laws in terms of copyright protection; (2) desire for the creation of more comprehensive international copyright protection; (3) concern over the absence of the United States in an effective international copyright organization;(4) threats of retaliatory actions by Berne members; and (5) desire to avoid "back-door" protection. ("Back door" protection entails authors simultaneously copyrighting their works in the United States and in a Berne member country, effectively gaining protection under both systems.) Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 8-11 (1988); Note, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 468 (1987).

21. KITCH & PEARLMAN, *supra* note 15, at 571.

22. *The Berne Convention: Hearings on S.1301 and S.1971 before the Subcomm. on*

B. Congressional Activity Leading to Berne Compliance and Corresponding Concerns for the Protection of Buildings

During the ten years following the 1976 amendments to the Copyright Act, the United States showed a continued interest in joining the Berne Convention[23] specifically for the purpose of simplifying the international copyright process by further removing mandatory international protection formalities.[24] In 1987, H.R. 1623[25] and H.R. 2962[26] were introduced to the House, proposing United States adherence to the Berne Convention. The bills included, among other things, increased protection for architectural works.[27] In terms of such protection, the principal difference in the bills was that H.R. 1623 required the architectural work to have an "original artistic character,"[28] whereas H.R. 2962 contained no such requirement.[29]

Following the introduction of H.R. 1623 and H.R. 2962, the proposition of including architectural works in United States copyright law as a protectable subject matter was met with much apprehension.[30] The Register of Copyrights expressed his concern, suggesting that affording protection for architectural works represented a great obstacle to United States adherence to Berne requirements as it would require a major change in American law.[31] The Register feared that the Act would result in substantial changes to the business environment of the nation's construction industry and impact on the basic processes of transferring real property.[32]

In the two years following the introduction of the above bills, there was little effort to induce Congress to act on the issue of copyright in architectural works.[33] Late in the hearings surrounding the Berne implementation,[34] however, two prominent copyright scholars testified that existing United States

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Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 143 (1988) (Statement of Ralph Oman, Register of Copyrights).

23. *Id.* at 143–47. *See also U.S. Adherence to the Berne Convention, Hearings before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. (1986).

24. KITCH & PEARLMAN, *supra* note 15, at 571.

25. H.R. 1623, 100th Cong., 1st Sess. (1987). The bill was sponsored by the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

26. H.R. 2962, 100th Cong., 1st Sess. (1987). This bill represented the Administration's Berne Convention implementation proposal.

27. H.R. 1623 proposed to amend § 102 of the Copyright Act to include "architectural works" as a protectable subject matter. H.R. 1623, *supra* note 25, at § 5. "Architectural works" were defined in H.R. 1623 as "buildings and other three dimensional structures of original artistic character, and works relative to architecture, such as building plans, blueprints, designs, and models." *Id.* at § 4. H.R. 2962 had very similar language. H.R. 2962, *supra* note 26.

28. H.R. 1623, *supra* note 25, at § 4.

29. H.R. 2962, *supra* note 26.

30. *See infra* notes 31–43 and accompanying text.

31. *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 69 (1988).

32. *Id.* at 85. Although the Register does not elaborate on how the Act would create these changes, it can be assumed that he was referring to the legal ramifications of granting proprietary rights in the building to the designer of a building.

33. *Architectural Design Protection, Hearings on H.R. 3990 and H.R. 3991 before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 55 (1990) (statement of Ralph Oman, Register of Copyrights).

34. *Hearings*, *supra* note 31.

copyright law provided sufficient protection for architectural works and was in compliance with Berne such that changes to the existing law were unnecessary.[35] More specifically, Stanford University Professor of Law Paul Goldstein suggested that the incorporation of express provisions on architecture into the Berne implementation legislation would be a "can of worms...[which] would... introduc[e] a whole new concept into the copyright law, with many of the complications and much of the uncertainty and confusion that surrounded, for example, the introduction of computer software as a protectable subject matter."[36] Goldstein further suggested that existing law provided adequate protection for architectural works in a way that allowed for protection of substantial features without monopolizing their utilitarian content.[37] Barbara Ringer, the former Register of Copyrights, agreed with Professor Goldstein, stating that she did not "think the timing was right for definitive architectural work legislation."[38] Both scholars agreed that the existing classification of pictorial, graphic, and sculptural works included works of architecture.[39] They further agreed that the issue needed further study before any action was taken.[40]

As a result of the concerns of Barbara Ringer, Professor Goldstein, and others, the Subcommittee drastically changed H.R. 1623 and produced H.R. 4262[41](hereinafter the Berne Implementation Act), reflecting the potential problems regarding broadened protection for architectural works.[42] The Berne Implementation Act essentially eliminated the proposals of H.R. 1623 with regard to the protection of architectural works,[43] reflecting the Congressional

35. *Hearings, supra* note 31, at 679–80 (testimony of Paul Goldstein, Stella W. & Ira S. Lillick Professor of Law at Stanford University). *See also Hearings, supra* note 31, at 689 (testimony of Barbara Ringer, former Register of Copyrights).

36. *Hearings, supra* note 31, at 679. (testimony of Paul Goldstein).

37. *Hearings, supra* note 31, at 679–80 (testimony of Paul Goldstein).

38. *Hearings, supra* note 31, at 689 (testimony of Barbara Ringer).

39. *Hearings, supra* note 31, at 679, 689. *See also Report of the Register of Copyrights, supra* note 8, at 133–34.

40. *Hearings, supra* note 31, at 679–80.

41. H.R. 4262, 101 Cong., 1st. Sess. (1988).

42. *Id.* The sole reference to architectural works appeared in the amended definition of "pictorial graphic and sculptural works" in section 101 to include architectural plans. The House Report explained the changed opinion regarding protection for architectural works as follows:

> [H.R. 4262 is] premised on the conclusion that the United States should not move precipitously on an issue that touches very fundamental concepts, long drawn in law, with respect to the non–protection under copyright of creativity more appropriate to design or patent protection. In this regard, the amendment merely clarified that architectural plans are already protected under the general category of pictorial, graphic and sculptural works.

Report of the Register of Copyrights, supra note 8, at 136.

43. *Report of the Register of Copyrights, supra* note 8, at 136. The House Report further explained the legislation's approach as follows:

> During the last day of hearings, both former Register of Copyrights Barbara Ringer and Professor Paul Goldstein testified that the requirements of Berne may not require the explicit treatment of architectural works in the manner contemplated in H.R. 1623. The witness from the American Institute of Architects (AIA) supported the provisions of H.R. 1623, but subsequently the AIA indicated that it would be preferable to make the construction of a building from copyrighted plans an act of copyright infringement.
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> The Committee concluded that existing United States law is compatible with the requirements of Berne. In addition to a degree of protection under copyright against copying plans and separable artistic works, additional causes of action for

intent to take a minimalist approach in implementing Berne legislation.[44] On May 10, 1988 the House unanimously passed the Berne Implementation Act.[45] The vote similarly passed the Senate and was soon thereafter signed into law.[46] Adherence by the United States to the Berne Convention thus became effective on March 1, 1989[47] with virtually no reference to architectural works.[48]

C. Congressional Activity Concerning Architectural Works Protection Following the Berne Implementation Act, 1988–90

On April 27, 1988, before the Berne Implementation Act was actually signed into law, Chairman Kastenmeier asked the Copyright Office to conduct a general inquiry into the nature and scope of protection for works of architecture.[49] The focus of the study was to include an analysis of the existing copyright law, unfair competition, and contractual arrangements as they specifically pertained to works of architecture.[50] In response, the Register of Copyrights, Ralph Oman, presented a report[51] to Chairman Kastenmeier on June 19, 1989.[52] The report concluded that architectural plans, drawings, and models related to works of architecture were adequately protected by U.S. copyright law, but the adequacy of protection provided for the constructed design of architectural works was in doubt in relation to Berne standards.[53] The

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misappropriation may be available under state contract and unfair competition theories.

> The bill leaves untouched, two fundamental principles of copyright law: (1) that the design of a useful article is copyrightable only to the extent that, such design incorporates pictorial, graphic or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the useful article; and (2) that copyright in a pictorial, graphic or sculptural work, portraying a useful article as such does not extend to the reproduction of the useful article itself.

Report of the Register of Copyrights, supra note 8, at 137–38 (citing H.R. Rep. 609 at 49–61).

44. The "minimalist approach" was endorsed by many legislators who wished to make only minimal changes to existing United States copyright law in the process of Berne implementation. *See Hearings, supra* note 22, at 42.

45. *Report of the Register of Copyrights, infra* note 8, at 139.

46. Berne Implementation Act, *supra* note 5.

47. On October 31, 1988 President Reagan signed H.R. 4262 into law as Pub.L. No. 100–568 which became effective on March 1, 1989.

48. The only substantive comments made referring to works of architecture were made by Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Intellectual Property and the Administration of Justice, in his floor comments on H.R. 4262 as follows:

> The protection of architectural works found in current copyright law is adequate to comport with Berne requirements on this matter. Rather than moving precipitously on an issue which touches very fundamental lines, long drawn in our copyright law, with respect to the nonprotection under copyright of creativity more appropriately protected by design or patent protection, H.R. 4262 adds a short amendment to current law, clarifying that architectural works are protected under the general category of pictorial, graphic and sculptural works.

134 Cong. Rec. H3079, H3082, Vol. 134, No. 64 (Daily ed. May 10, 1988).

49. *Report of the Register of Copyrights, supra* note 8, at app. A.

50. *Report of the Register of Copyrights, supra* note 8, at app. A.

51. *Report of the Register of Copyrights:, supra* note 8.

52. H.R. Rep. 101-735, *supra* note 4 at 12.

53. *Report of the Register of Copyrights, supra* note 8. According to Berne guidelines, architectural works, including buildings, were to be afforded protection. Explicit protection for buildings was not available under the American system at the time, thus creating the doubts as to American compliance.

report proposed the following alternative solutions to bring the U.S. in compliance with the Berne Convention:

1. Create a new subject matter category for works of architecture in the Copyright Act and legislate appropriate restrictions.

2. Amend the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans.

3. Amend the definition of "useful article" in the Copyright Act to exclude unique architectural structures.

4. Do nothing and allow the courts to develop new legal theories of protection under existing federal statutory and case law, as they attempt to come to grips with U.S. adherence with the Berne Convention.[54]

Chairman Kastenmeier introduced two bills to the 101st Congress on February 7, 1990 in response to the Register's concerns: H.R. 3990[55] (the "Architectural Works Copyright Protection Act of 1990"); and H.R. 3991[56] (the "Unique Architectural Structures Copyright Act of 1990"). H.R. 3990 proposed to amend Title 17 of the United States Code by creating a new category of copyright subject matter protecting architectural works.[57] H.R. 3991 similarly proposed amendments to Title 17, but it entailed modifying the meaning of "useful article" to specifically exclude "unique architectural structures".[58] H.R. 3990 and H.R. 3991 are essentially codifications of the solutions number two (2)[59] and number three (3)[60]proposed by the Register of Copyrights in his report of June 1989.[61]

On March 14, 1990, the legislature held a hearing regarding copyright in architectural works.[62] In his introductory comments to the meeting, Chairman Kastenmeier acknowledged the great controversy the issue of architectural works had created within the copyright office.[63] Later in the hearing several

54. *Report of the Register of Copyrights, supra* note 8, at 223–26.
55. H.R. 3390, 101st Cong., 2d Sess. (1990).
56. H.R. 3391, 101st Cong., 2d Sess. (1990).
57. H.R. 3390, *supra* note 55.
58. H.R. 3391, *supra* note 56. The bill proposed "that one–of–a kind buildings and other three-dimensional structures that possess a unique artistic character are not useful articles." H.R. 3391, *supra* note 56, at 2.
59. *See Report of the Register of Copyrights, supra* note 8 at 224 and text accompanying note 54.
60. *See Report of the Register of Copyrights, supra* note 8 at 224 and text accompanying note 54.
61. *See Report of the Register of Copyrights, supra* note 8 and text accompanying note 51.
62. *Hearing on H.R. 3990 and H.R. 3991, supra* note 33.
63. 136 Cong. Rec. E259-01 (Daily ed. February 7, 1990). In commenting on the copyright office report, Kastenmeier observed:

> In reading the document, I was surprised to learn that the study had generated sharp conflict within the Copyright Office. In his preface to the report, Mr. Oman noted: 'I know of no other issue to arise in the Copyright Office that has engendered such deep and bitterly fought professional disagreements.' Ralph Oman added, however, that the dispute had 'less to do with attitudes about the Chrysler Building than toward designs of Chrysler cars.' The disagreement in the Copyright Office revolved around whether existing law provides protection for at least some works of architecture, a disagreement I also found surprising, in light of the Copyright Office's apparent agreement with the views of the two aforementioned copyright experts that the 1976 House Judiciary report formed a

prominent professionals in the architectural and copyright communities provided testimony on the protection of architectural works.[64] Not surprisingly, the individual witnesses expressed differing concerns regarding the proposed legislation and its resultant effect on their particular interests. The general consensus, however, was in support of H.R. 3990, the bill proposing a new subject matter in architectural works, and in opposition to H.R. 3991, the bill proposing modifications to the meaning of "useful articles".[65] Following this hearing, on August 3, 1990, Mr. Kastenmeier introduced revised proposals regarding the protection of architectural works as Title III of H.R. 5498.[66] Shortly thereafter, on September 14, 1990 the full Committee passed the proposal. [67]

D. Final Promulgation of the Architectural Works Copyright Protection Act of 1990.

The Architectural Works Protection Act of 1990[68] was signed into law on December 1, 1990. In final form The Act made changes to existing Title 17 §§ 101[69], 102[70], 106[71], and 301[72], and added section 120[73]. The enactments had

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basis for Berne compliance. In any event, on two critical points, all Copyright Office experts agreed: the Berne Convention requires protection for works of architecture, and U.S. law should be amended to expressly so provide.'

Id. at 1.

64. Testimony was provided by the following individuals: Michael Graves, FAIA, a prominent American architect; Ralph Oman, the Register of Copyrights; Jeffrey M. Samuels, the Assistant Commissioner for Trademarks, Patent and Trademark Office; David A. Daileda, AIA, on behalf of the American Institute of Architects; and Richard Carney, Managing Trustee, Chief Executive Officer of The Frank Lloyd Wright Foundation. Written statements were received from Columbia University Associate Law Professor Jane Ginsberg, the American Consulting Engineers Council and the American Society of Magazine Photographers. *Hearings*, *supra* note 33.

65. *Hearings, supra* note 33.

66. H.R. 5498, 101st Cong., 2d. Sess. (1990).

67. H.R. Rep. 101-735, *supra* note 4 at 6.

68. Pub. L. No. 101–650, tit. 7, 104 Stat. 5133 (1990) (codified in various locations of 17 U.S.C.); *supra* note 1.

69. 17 U.S.C. § 101. This section added "architectural works" as a copyrightable subject matter. The Act defines an "architectural work" as "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." *Id.*

70. 17 U.S.C. § 102(a)(8). The amendment to § 102 entailed simply adding "architectural works" to the categories of copyrightable subject matter. *Id.*

71. 17 U.S.C. § 106 (1995). The amendments to § 106 indicate the creation of the new § 120. *See* 17 U.S.C. § 120.

72. 17 U.S.C. § 301(b) (1995). The amendments make several minor grammatical changes and add the following: "(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8)." *Id.*

73. 17 U.S.C. § 120 (1995). The addition of § 120 limits the exclusive right in architectural works by adding the following:

> (a) PICTORIAL REPRESENTATIONS PERMITTED.
> 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.
> (b) ALTERATIONS TO AND DESTRUCTION OF BUILDINGS. Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or

the net effect of placing the United States in full compliance with its treaty obligations as specified in the Berne Convention by adding a new category of copyrightable subject matter for the constructed design of buildings.[74] The Act had an effective date of December 1, 1990 and did not apply retroactively.[75]

The most significant change to Title 17 was the addition of a new subject matter of copyrightable material in 'architectural works'.[76] The true scope of protection according to the definition provided by the act is unclear. The question of what is specifically covered by the act is loosely addressed in 37 CFR 202.[77] The regulations state that a building by definition encompasses habitable structures such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings including but not limited to churches, museums, gazebos, and garden pavilions."[78] The regulation goes further in stating that structures other than buildings such as "bridges, cloverleafs, dams, walkways, tents, recreational vehicles, mobile homes, and boats" are excluded from protection.[79] Furthermore, "standard features", defined as "standard configurations of spaces, and other individual standard features such as windows, doors, and other staple building components" cannot be registered for copyright protection.[80] Due to the vague nature of the regulations, the true scope of copyright is subject to judicial interpretation, leaving open the possibility of confusion and disparity in subsequent suits.[81]

By introducing the new subject matter of "architectural works" into U.S. copyright law, Congress has effectively contravened traditional copyright fundamentals.[82] The inclusion of this subject matter sets a dangerous precedent by introducing protection for traditionally utilitarian articles.

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copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

Id.

74. *See Hearings, supra* note 33, at 9 (opening statement of Chairman Kastenmeier).

75. Section 706 of Pub. L 101-650 provided that:

The amendments made by this title apply to—
(1) any architectural work created on or after the date of the enactment of this Act; and (2) any architectural work that, on the date of the enactment of this Act, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under title 17, United States Code, by virtue of the amendments made by this title, shall terminate on December 31, 2002, unless the work is constructed by that date.

76. 17 U.S.C. § 102(a)(8).

77. 37 C.F.R. § 202.11 (1994).

78. *Id.* at (b)(2).

79. *Id.* at (d)(1).

80. *Id.* at (d)(2). The regulations provide a further restriction in disallowing registration for the design of buildings which were constructed before December 1, 1990 or for plans or drawings of buildings which were published before December 1, 1990. *Id. at* (d)(3).

81. For a thorough discussion of the implications of the definition of "building" as provided by the Act, *see,* Vanessa, N. Scaglione, *Building upon the Architectural Works Protection Copyright Act of 1990*, 61 FORDHAM L. REV. 193, 197–201 (1992). Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1612–16 (1992).

82. *See infra* section III.

III. THE ARCHITECTURAL WORKS PROTECTION ACT OF 1990: AT ODDS WITH TRADITIONAL PRINCIPLES OF UNITED STATES COPYRIGHT LAW

Throughout the evolution of American copyright law, Congress has adhered to several basic principles in determining the relative copyrightability of specific subject matters.[83] As alluded to earlier, constructed buildings have historically been outside the scope of copyright protection of American copyright law.[84] A brief summary of the evolution of American copyright law provides insight into the policy considerations and basic tenets which have, up until recently,[85] afforded buildings only minimal protection.

A. Statutory History of United States' Copyright Law

At the time the Constitution was drafted, all but one of the states had individual copyright statutes.[86] The inconsistencies between the several state statutes made obvious the need for congressional power to provide for federal copyright legislation. In response, Article I of the Constitution was drafted to specifically recognize the framers' intent to give Congress the power to create individual property rights in literary works and inventions.[87] Article I provides for the affirmative grant of exclusive rights to authors and inventors of such works.[88] The Constitution thus regarded copyright as an affirmative privilege rather than a natural right. In the minds of the framers the dominant motivation for granting intellectual property rights in the form of copyright appears to have been the greater societal purpose of promoting learning, with a secondary interest in securing protection for the author.[89]

The first codification of federal copyright law was enacted by the First Congress in the second session in 1790.[90] The Act limited protection to the copies of maps, charts, and books.[91] The 1790 law made no reference to copyright protection for architectural structures.[92] Furthermore, the legislative history of the 1790 act gives no indication that copyright protection for buildings was even in the contemplation of the drafters at that time.[93]

Thereafter, the expansion of statutory copyright occurred through a process of refinement and revision. The Act of 1790 was followed by four

83. *See infra* section III(B) & (C).
84. *See supra* note 2 and accompanying text.
85. *See supra* notes 2–3 and accompanying text.
86. Massachusetts, Rhode Island, Virginia, Maryland, New Jersey, Pennsylvania, North Carolina, Connecticut, New York, South Carolina, Georgia, and New Hampshire all had individual copyright statutes. LYMANN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE, 183–92 (1968).
87. U.S. Const. art. I, § 8, cl.8.
88. The Constitution specifically grants Congress the right "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". *Id.*
89. PATTERSON, *supra* note 86, at 193.
90. PATTERSON, *supra* note 86, at 197.
91. The legislation was defined as "an act for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned." Act of 1790, 1 Stat. 124.
92. *Id.*
93. *See generally*, COPYRIGHT IN CONGRESS 1789–1904: BIBLIOGRAPHY AND CHRONOLOGICAL RECORD 112–26 (Library of Congress, 1904).

general revisions, in 1831,[94] 1870,[95] 1909[96] and 1976.[97]

Since 1831, the tendency of Congress has been to increase the scope and types of protectable subject matter and to decrease the corresponding limits placed upon that protection.[98] This expansion of rights illustrates Congress' intent to specify every conceivable creation of an author's intellectual endeavors which should be entitled to statutory copyright protection.[99]

B. Protection of Architectural Works in the History of American Copyright Law

In the context of copyright legislation, discussion regarding protection for architectural designs and buildings first occurred during the time immediately preceding the passage of the 1909 Act.[100] The first significant discussion occurred in 1905[101] at a copyright revision conference when a delegate of the Architectural League of America argued for the inclusion of works related to architecture as a protectable class.[102] Soon thereafter, in 1906 at a meeting at the copyright office, the American Institute of Architects proposed that works of architecture be included in the revision act.[103] Despite these endorsements, works of architecture were ultimately left out of the 1909 Act.[104]

Although dozens of copyright bills in favor of architectural works protection and design legislation were proposed following the 1909 revision, interest in implementing such legislation was extremely limited.[105] It was not

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94. In the Act of 1831, Congress broadened the scope of protection granted in the original Copyright Act of 1790 by including musical compositions in the statutory scheme. Further, the term of protection was expanded to 28 years with the privilege of renewal. Act of Feb 3, 1831, ch.16, 4 Stat. 436.

95. In the Copyright Act of 1870 Congress extended copyright protection to include paintings, drawings, chromos, statues, and models or designs of the fine art..." Act of July 8, 1870, ch. 230, 16 Stat. 198.

96. The Copyright Act of 1909 expanded the scope of copyright protection beyond the traditional fine arts to include works of art, and models or designs for works of art. Act of March 4, 1909, ch. 30, 35 Stat. 1075 (codified in various locations of 17 U.S.C. (1976)).

97. Pub. L. No. 94–553, 90 Stat. 2541 (1976). The 1976 revision again expanded the scope of copyrightable subject matter. The scope of the types of protected works was expanded from an enumerated list to a general principle as explained in § 102 which states: "copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated..." *Id.*; *See generally*, KITCH & PEARLMAN, *supra* note 15, at 565–66; ALAN LATMAN, THE COPYRIGHT LAW 11–14 (5th ed. 1979).

98. Mark A. LoBello, *The Dichotomy Between Artistic Expression and Industrial Design: To Protect or not to Protect*, 13 WHITTIER L. REV. 107 (1992).

99. *Id.*

100. Act of March 4, 1909, ch. 30, 35 Stat. 1075, *supra* note 96.

101. 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Part C at 33 (Brylawski & Goldman eds., 1976).

102. *Id.*

103. 3 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Part E at 11 (Brylawski & Goldman eds., 1976) at 11.

104. *Report of the Register of Copyrights*, *supra* note 8, at 77.

105. *Report of the Register of Copyrights*, *supra* note 8, at 81. Mention of architectural works during this time is limited to a hearing in 1916 on design bills H.R. 6458 and H.R. 13618. During the cross examination of a witness in this hearing, Representative Nolan expressed his view that architectural works were covered by the bills. *Id.* (citing *Registration of Designs: Hearing on H.R. 6458 and H.R. 13618, Before the House Committee on Patents, House of Representatives*, 64th Cong., 1st Sess. 68 (1916)).

until 1955 that substantial interest was again shown in including works of architecture as a copyrightable subject matter.[106] At that time, a Senate subcommittee produced a report reviewing copyright in architectural works.[107] The report presents an in-depth discussion of the protection afforded architectural works under the 1909 Act, focusing on the distinction between protection afforded architectural plans and the protection afforded when the architecture is classified as a work of art.[108] The report apparently had little impact, for during the twenty years following its publication there was virtually no Congressional action regarding inclusion of architectural works in the scope of protectable subject matter.[109]

The next major push for copyright protection of buildings came in 1976 with the passing of the Copyright Act of 1976.[110] In final form, the 1976 Act expressly noted that registration of a set of plans would provide no protection for the building represented.[111] The 1976 Act further limited protection of buildings to those which could be classified as "pictorial, graphic and sculptural" works subject to a separability test,[112] which resulted in very few buildings being afforded protection. The legislative history of the 1976 Act describes that the separability test was intended to restrict protection to those "works of architecture" that contained "elements physically or conceptually separable from their utilitarian function...to the extent of their separability."[113] The limiting effects of the stringent separability criteria indicate the continued apprehension of lawmakers towards granting copyright protection to architectural structures.

The actions of previous legislatures in excluding buildings from copyright protection demonstrates the continuing reluctance to create such a right. Upon examination of the prevalent underlying doctrines of the copyright law during this time, their reluctance can be more easily understood.

C. The Useful Article Doctrine

1. Statutory guidelines

As previously discussed,[114] prior to the Architectural Works Copyright Protection Act of 1990, the only possible protection for buildings was as

106. *See generally, Report of the Register of Copyrights, supra* note 8, at 81–85.

107. *Report of the Register of Copyrights, supra* note 8, at 86 (citing WILLIAM S. STRAUSS, COPYRIGHT OFFICE STUDY NO. 27, COPYRIGHT IN ARCHITECTURAL WORKS (1959) *in* Senate Committee Print, 86th Cong., 2d Sess., 1966 Copyright Law Revision Study at 67).

108. *Report of the Register of Copyrights, supra* note 8, at 86–91 (citing WILLIAM S. STRAUSS, COPYRIGHT OFFICE STUDY NO. 27, COPYRIGHT IN ARCHITECTURAL WORKS (1959) *in* Senate Committee Print, 86th Cong., 2d Sess., 1966 Copyright Law Revision Study at 67).

109. *Report of the Register of Copyrights, supra* note 8, at 93–98.

110. *Report of the Register of Copyrights, supra* note 8, at 97.

111. H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 55 (1976), *reprinted in* 1976 U.S. Code & Admin. News 5659, 5668.

112. 17 U.S.C. § 101. The separability test limited protection to those elements of articles which could be identified separately from their utilitarian function. *See infra* notes 121–24 and accompanying text.

113. H.R. Rep. No. 101-735, *supra* note 4 at 11 (citing H.R. No. 94-1476, 94th Cong., 2d Sess. 55 (1976)).

114. *See supra* note 2 and accompanying text.

"pictorial, graphic, and sculptural works."[115] The copyright code had specifically forbidden copyright protection for any article which had an intrinsically utilitarian function.[116] This limitation is commonly referred to as the useful article doctrine.[117] The policy rationale behind the useful article doctrine is a desire to prevent the monopolization of useful articles and the ideas underlying them.[118]

Under traditional notions of United States copyright law a building was not protectable because its functional aspects were considered inseparable from its aesthetic elements.[119] The current codification of Title 17 provides that a useful article[120] can be protected only to the extent that it incorporates features that can be identified separately from the form and are capable of existing independently from the utilitarian aspects of the article.[121] Additionally, an article that is a part of a useful article is considered a "useful article".[122] As previously indicated, useful articles are denied protection under the current promulgation of the statute unless they pass a separability test.[123] The Architectural Works Copyright Protection Act of 1990 itself contravenes the useful article doctrine by essentially allowing copyright protection for useful articles in the form of buildings, limited only by denying protection to those elements that are functionally required.[124]

The question has been raised whether copyright afforded to buildings via the "architectural works" subject matter of the Act actually violates the useful article doctrine, or if it instead creates a simple illusion with regards to allowing protection.[125] The skepticism arises from the Congressional statement

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115. 17 U.S.C. § 101.

116. *Id.*

117. The useful article doctrine is synonymously referred to as the "utility rule" by other commentators.

118. Useful articles are subject to the patent laws rather than copyright statutes. *See infra* notes 194–98 and accompanying text.

119. 17 U.S.C. § 101. Further explanation can be found in the definition of pictorial, graphic, and sculptural works which

> 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. Such works shall include works of artistic craftsmanship *insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.*

Id. (emphasis provided).

120. A useful article is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." *Id.*

121. 17 U.S.C. § 101. *See also supra* notes 112–13 and accompanying text.

122. 17 U.S.C. § 101.

123. *Supra* note 113.

124. H.R. Rep. 101–735, *supra* note 4, at 20–21. The legislative history envisions a two step analysis to determine whether a specific element of a building is "functionally required." First an architectural structure should be examined to see if there are original design elements present, including overall shape and interior architecture. If such elements are present and are not functionally required, they are protectable without regard to physical or conceptual separability. *Id.* The aesthetically pleasing overall shape of an architectural work could thus be protected under this bill. *Id.*; *see also* NIMMER, NIMMER ON COPYRIGHT § 2.20, at 2–227.1 to 2–228.1 (1991).

125. David A. Gerber, *Recent Copyright and Copyright-Related Legislation, in*

that protection for architectural works is afforded only where "the design elements are not functionally required."[126] It has been further argued that if the functionality test is rigidly applied, buildings may not be protectable anyway as their functional aspects are intertwined with their aesthetic qualities.[127] As currently written, the true scope of the Act will ultimately be determined by judicial interpretation. If the courts choose to define "functionally required" broadly the Act will have a very limited effect in affording protection to works of architecture. In contrast, a narrow interpretation of "functionally required" will allow for broad protection. Regardless of the ultimate judicial interpretation, this equivocal statutory use of "functionally required" creates a great potential for abrogation of the useful article doctrine by allowing for protection of an intrinsically utilitarian article such as a building.

2. The judicial evolution of the useful article doctrine

The case law contemplating the useful article doctrine confirms the legislative aim of limiting copyright protection to only those elements of a particular article not intertwined with the utility of the article.[128] To date, very few cases have been brought under the Act, and thus, the copyrightability of a building under the provisions of the Act has not been thoroughly tested. Several cases, however, have considered the extent of copyright protection available to articles comprising both utilitarian and non–functional features.[129] These cases provide insight into judicial attitude regarding separability and relative copyrightability of useful articles.

The 1976 Copyright Act specifically incorporated the 1954 Supreme Court decision in *Mazer v. Stein*,[130] relating to the copyrightability of useful articles, into the American copyright law.[131] *Mazer* considered the validity of copyrights obtained for the protection of statuettes of male and female dancing

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CORPORATE LAW PRACTICE HANDBOOK SERIES, CALIFORNIA MCLE MARATHON WEEKEND, at 24-25 (PLI Corp. Law & Practice Course Handbook Series No. B4-7027, 1993) The author notes that if the functional separability language "is definitional (and protection for 'architectural works' is narrowed accordingly) the Act by and large will continue the demarcation line that precluded functional building designs from obtaining copyright protection. The reason building designs remain excluded from the category of 'pictorial, graphic, and sculptural works' is because of their intrinsic utilitarian nature—i.e., their 'functionality.' If such 'functionality' is required to qualify as 'architectural works' the same limitation will prevent building designs from eligibility under the new category as well." *Id.*

126. H.R. Rep. 101–735, supra note 4 at 20–21.

127. *See supra* note 125.

128. *See supra* note 119 and accompanying text.

129. *See infra* notes 130–56 and accompanying text.

130. Mazer v. Stein, 347 U.S. 201 (1954), *reh'g denied* 347 U.S. 949 (1954); *see also* 17 U.S.C.A. § 113 which states:

> Section 113 [this section] deals with the extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in Mazer v. Stein, 347 U.S. 201 (1954) [74 S.Ct. 460, 98 L.Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 949, 98 L.Ed. 1096], and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of Mazer, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles.

Id. (citing Notes of Committee on the Judiciary, House Report No. 94-1476 (1994)).

131. *See* H.R. No. 94-1476, 94th Cong., 2d. Sess. 55 (1976).

figures.[132] The controversy stemmed from the fact that the statuettes were copyrighted as works of art, but were intended to be used as bases for table lamps with the electrical wiring and shade attached.[133] The inherent dichotomy of the statuettes between copyrightable art and unprotectable useful article required the application of a separability analysis. In ultimately granting protection for the statuettes, the court proposed that copyright protection extend to "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned."[134] This doctrine was eventually codified by the Copyright Act of 1976 as the useful article restriction regarding pictorial, graphic and sculptural works.[135]

In *Harper House, Inc. v. Thomas Nelson, Inc.*,[136] the plaintiff sought to copyright the nontextual utilitarian features of organizer booklets developed to assist people in planning their activities.[137] Applying the separability test, the court held that several features including special hinges, pockets to hold keys, coins, a calculator, and other similar utilitarian nontextual aspects of the organizer were not subject to copyright protection.[138] The court reasoned that the useful article doctrine prohibited copyright protection for those components of the organizer which were inherently useful.[139]

The court in *Brandir Intern., Inc. v. Cascade Pacific Lumber Co.*[140] reached a similar conclusion in considering the copyrightability of a bike rack which possessed a highly sculptural quality.[141] The *Brandir* court held that even though the sculptures which inspired the bicycle rack may have been copyrightable, the rack itself was not copyrightable as its form was significantly influenced by utilitarian concerns.[142] This utilitarian influence prevented the rack's aesthetic elements from being conceptually separable from its utilitarian elements,[143] thus precluding protection.

Similarly, the court in *Carol Barnhart Inc. v. Economy Cover Corp.*[144] applied a separability analysis considered the copyrightability of mannequins of

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132. Mazer v. Stein, 347 U.S. at 202.
133. *Id.*
134. *Id.* at 212. *See also* Esquire, Inc. v. Ringer, 414 F. Supp. 939 (D.C. Cir. 1976), *rev'd*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), *and reh'g denied*, 441 U.S. 917 (1979) (design of a lighting fixture intended for use as outside lighting for parking lots qualified as a work of art eligible for copyright protection, despite its obvious utilitarian purpose and despite concern of Register of Copyrights that grant of copyright would open floodgates to copyrighting of intrinsically useful articles); Stein v. Expert Lamp Co., 96 F. Supp. 97 (N.D. Ill. 1951), *aff'd*, 188 F.2d 611 (7th Cir. 1951), *and cert. denied*, 342 U.S. 829 (1951) (copyrights for the figures of male and female Balinese dancers held invalid because of the article's intended practical use as a lamp); Stein v. Rosenthal, 103 F. Supp. 227 (S.D. Cal. 1952) (Egyptian dancing figures used and sold as lamp bases. The court held the mere functional use of an artistic work does not derogate its status as a work of art); Stein v. Benaderet, 109 F. Supp. 364 (E.D. Mich. 1952) (in denying copyright, court held that it is the "intent and purpose" of the designer which determines whether an object is copyrightable as a work of art).
135. H.R. Rep. No. 101-735, *supra* note 4 at 11 (citing H.R. No. 94-1476, 94th Cong., 2d Sess. 55 (1976)).
136. Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197 (9th Cir. 1989).
137. *Id.* at 198.
138. *Id.*
139. *Id.*
140. Brandir Intern., Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987).
141. *Id.* at 1143.
142. *Id.* at 1146-47.
143. *Id.* at 1147.
144. Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985).

partial human torsos used to display articles of clothing.[145] In denying copyright protection, the court held the mannequins were utilitarian articles which did not possess artistic or aesthetic features that were physically or conceptually separable from their utilitarian characteristics and therefore were not copyrightable.[146]

Courts have occasionally applied the useful article doctrine to buildings as well. In *Evans & Assocs. v. Continental Homes, Inc.*,[147] for example, an architect brought an action against a homebuilder alleging copyright infringement under the copyright Act of 1976.[148] The defendant homebuilder had used the architect's copyrighted floor plan which had been portrayed in a promotional flyer. [149] In assessing whether the construction of the home from the infringing plans constituted a violation in and of itself, the court indicated that the nature of the home as an intrinsically utilitarian article prevented its copyrightability.[150]

The court in *Robert R. Jones Assoc., Inc. v. Nino Homes,*[151] also considered the issue of whether a building constructed from infringing plans constituted an infringement in and of itself.[152] In discussing the limitations imposed on the protection afforded architectural plans by the useful article doctrine, the court stated that "any building or house undoubtedly falls within the [useful article] definition..."[153]

One final case, *Richmond Homes Management, Inc. v. Raintree, Inc.*[154] made specific reference to the Act and indirectly alluded to its affect on the useful article doctrine. The case involved competing developers, Richmond and Raintree. Richmond held copyrights in both the structure and plans for a particular residential design. Raintree allegedly constructed a substantially similar design, thus infringing on Richmond's copyrights. In acknowledging the validity of Richmond's copyright in the structure itself, the court explained that:

> [b]y extending copyright protection to architectural structures...the Architectural Works Copyright Protection Act brought architectural structures within the confines of existing copyright standards for creative works. Thus, architectural works need no longer serve primarily nonfunctional, creative purposes, akin to sculptures, but protection extends to the most mundane, functional products of modern commercial architecture so long as the minimal originality requirement of copyright law is met...Now structures, as well as plans, are subject to the same copyright protection. Moreover, structures and plans...may be protected

145. *Id.* at 412.
146. *Id.*
147. 785 F.2d 897 (11th Cir. 1986).
148. *Id.* at 900.
149. *Id.*
150. In a footnote the court specifically stated: "The building itself has 'an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information,' 17 U.S.C. § 101, and as such is an useful article not susceptible to copyright." *Id.* at 901 n.7 (citing Baker v. Selden, 101 U.S. 99 (1880) and 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.08[D], at 2–108.2 (1985)).
151. Robert R. Jones Assoc. v. Nino Homes, 858 F.2d 274, 277–78 (6th Cir. 1988).
152. *Id.* at 277.
153. *Id.* at 278 (more specifically, the court was analyzing the limitations imposed by 17 U.S.C. 113(b), prohibiting the copyright of a useful article).
154. Richmond Homes Management v. Raintree, Inc., 862 F. Supp. 1517 (W.D. Va. 1994).

irrespective of their functional purpose.[155]

The court used this reasoning to reject the defendant's argument that elements of the plaintiff's allegedly infringed upon design were not covered because they served a utilitarian purpose.[156] Although this pronouncement was largely dicta, it is valuable in illustrating the effect the Act has in abrogating the useful article doctrine.

Other cases have similarly considered the useful article doctrine, and affirmed the proposition that articles which possess predominantly utilitarian characteristics are generally not copyrightable.[157] Under the presumption of these holdings and the statutory language predating the Act that intrinsically utilitarian articles should be denied copyright protection, the classification of a building as a useful article becomes an important determination.

C. Is a Building a Useful Article?

As discussed in the previous section, if a building is classified as primarily utilitarian it will not be granted copyright protection under traditional limitations imposed by the useful article doctrine.[158] Despite these traditional limitations, Congress afforded the opportunity for copyright protection for buildings by creating a new category in architectural works.[159]

1. Common perceptions of buildings as useful articles

In the process of implementing the Act of 1990, Congress recognized the unique character of architecture by virtue of its cultural and societal influence.[160] In passing the Act, Congress concluded that the design of a work

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155. *Id.* at 1525.

156. *Id.* (citations omitted).

157. *See, e.g.*, Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970 (6th Cir. 1983) (holding that toy manufacturer's selection of certain features or manufacturer's selection of certain features for economical reasons has nothing to do with whether article is, to the consumer, a "useful article" which is not copyrightable under copyright law).

158. *See supra* section III(B).

159. *See supra* note 71 and accompanying text.

160. Congress explained the significance of architecture as follows:

> Architecture plays a central role in our daily lives not only as a form of shelter or as an investment, but also as a work of art. It is an art form that performs a very public, social purpose. As Winston Churchill is reputed to have once remarked: 'We shape our buildings and our buildings shape us.' We rarely appreciate works of architecture alone, but instead typically view them in conjunction with other structures and the environment at large, where, at their best, they serve to express the goals and aspirations of the entire community. Frank Lloyd Wright aptly observed: 'Buildings will always remain the most valuable aspect in a people's environment, the one most capable of cultural reaction.'
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> The truth of this observation is borne out every day in the Capitol, which serves as a strong symbol of our country's dedication to democracy. The sheer number of visitors to the Capitol speaks eloquently to the success of that symbol. Indeed, the important relationship between democracy and architecture was well understood by our Founding Fathers. The design of the Capitol was strongly influenced by Thomas Jefferson, whose love of architecture is well known and visible today in his own works of architecture at Monticello and the University of Virginia.
>
> Architecture is not unlike poetry, a point made by renowned critic Ada Louise Huxtable, who wrote that architects can make 'poetry out of visual devices, as a writer uses literary or aural devices. As words become symbols, so do objects; the architectural world is an endless source of symbols with unique

of architecture is a "writing" under the language of the Constitution and deserves full copyright protection.[161] The classification was justified by categorizing architecture as art serving a societal purpose, equating it to "poetry composed of visual devices".[162] Congress summarized its position by suggesting that protection for works of architecture should have the net effect of stimulating design excellence, thus enriching our public environment consistent with constitutional objectives.[163] Obviously, the classification of a design and resultant building as a "writing" is a tenuous interpretation. Unfortunately, the classification leaves unanswered the issue of the functional role architecture serves, leaving intact the unresolved conflict between affording copyright protection to the special category of architectural works and the traditional limits imposed by the useful article doctrine.

As expressed by a prominent architectural scholar, an architect creates a "functional art [which] solves practical problems. [Architecture] creates tools or implements for human beings and utility plays a decisive role in judging it."[164] This characterization exemplifies the problem with copyright in buildings by illustrating the dual role of buildings as both functional edifices and as works of art. Architecture is a form of expression that combines aesthetic and functional elements which require an amalgamation of imagination, metaphor, and style to produce effective results.[165]

As previously discussed,[166] a useful article is defined as an article which has an "intrinsically utilitarian function."[167] In the architectural context, "function" is traditionally understood as the "utility", "fitness of purpose", and "task" a building is meant to fulfill.[168] The importance of function in architecture was recognized nearly 2000 years ago by the ancient Roman architect and theorist Vitruvius, who described function as one of the three inseparable dimensions of a work of architecture.[169]

To better understand the interplay of architecture and the copyright law, an historical analysis of the perceived role of function and utility in architecture provides insight. The American system of copyright has undergone the most pronounced evolution of its protection for architectural works during the twentieth century.[170] The following discussions of the historical role of function

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ramifications in time and space.'
H.R. Rep. No. 101–735, 101st Cong., 2d Sess. (1990).

161. *Id.* at 12.

162. *Id. at* 12–13, (quoting critic Ada Louise Huxtable).

163. *Id.*

164. STEEN E. RASMUSSEN, EXPERIENCING ARCHITECTURE 9. (1959).

165. Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since Contu?*, 106 Harv. L. Rev. 977, 988 (1993) (citing ANTHONY L. CLAPES, SOFTWARE, COPYRIGHT AND COMPETITION: THE "LOOK AND FEEL" OF THE LAW 43–44 (1989)).

166. *See supra* section III.

167. 17 U.S.C. § 101; *See also supra* notes 114–24 and accompanying text.

168. LARRY L. LIGO, THE CONCEPT OF FUNCTION IN TWENTIETH CENTURY ARCHITECTURAL CRITICISM 1 (1984).

169. Vitruvius described the three fundamentals of architecture as "commodity", "firmness" and "delight". "Function" and "commodity" are synonymous. DAVID A. HANSER & CHERYL E. MORGAN, FIRMITAS, UTILITAS, VENUSTAS, ARCHITECTURE AND SOCIETY 2–3 (1984).

170. *See supra* notes 100–13 and accompanying text for an overview of the history of architecture in American copyright during the twentieth century.

in architecture will thus be limited to this time frame.

The turn of the century marked the origin of the modern movement in architecture.[171] The dogma of the modern movement was functionalism.[172] The proclaimed credo of the movement was that "form follows function",[173] illustrating the commonly held belief that function plays an indispensable role in the creation of architecture. Frank Lloyd Wright,[174] Louis Sullivan,[175] Mies Van Der Rohe,[176] Le Corbusier,[177] Walter Gropius,[178] and many other highly influential contemporary architects were students of the modern movement and they professed their dedication to the principle of functionalism.[179]

Internationally, since World War I, architecture has emphasized the primacy of function in architecture. Technology has been a driving and inspirational influence in modern architecture[180] which has simultaneously increased architecture's functional and aesthetic possibilities.[181] The international style movement,[182] the organic architecture of Wright,[183] the "brutalist" movement,[184] and even the post modern movement[185] in twentieth

171. *See* REYNER BANHAM, AGE OF THE MASTERS 10 (1975).
172. *See* PETER BLAKE, FORM FOLLOWS FIASCO 16 (1977); LIGO, *supra* note 168, at 1.
173. BLAKE, *supra* note 172, at 16.
174. In a paper originally appearing in the Architectural Record, March, 1908, Wright described the interplay between architecture and function by emphasizing that "[a] knowledge of the relations of form and function lies at the root of [an architect's] practice..." FRANK LLOYD WRIGHT, FRANK LLOYD WRIGHT ON ARCHITECTURE 31 (Fredrick Gutheim ed., 1941). In a later article appearing in the Architects Journal, August, 1936, Wright professed that "'[f]orm follows function' is mere dogma until you realize the higher truth that form and function are one." *Id.* at 181.
175. In his autobiography, Sullivan explained the architectural philosophy he aspired to follow in largely functionalist terms. In describing his new found ability to pursue this philosophy he stated that "[he] could now, undisturbed, start on the course of practical experimentation he long had in mind, which was to make an architecture that fitted its functions—a realistic architecture based on well defined utilitarian needs—that all practical demands of utility should be paramount as the basis of planning and design..." LOUIS H. SULLIVAN, THE AUTOBIOGRAPHY OF AN IDEA 257 (1956).
176. Mies expressed the integral nature of function to the design process in a lecture to his students, stating "[we] shall examine one by one every function of a building and use it as a basis for form." DAVID A. SPAETH, MIES VAN DER ROHE 114 (1985).
177. Le Corbusier coined the phrase "machine for living" in describing his design philosophy behind creating a residence. This was arguably the epitome of functionalism. *See, e.g.*, HORST DE LA CROIX & RICHARD G. TASNEY, GARDNER'S ART THROUGH THE AGES 931–32 (8th ed. 1986).
178. Gropius, the founder of the Bauhaus architectural tradition, stated "we want...architecture whose function is clearly recognizable in the relation of its forms." Ligo, *supra* note 168 (citing *The First Proclamation of the Weimer Bauhaus, in* BAUHAUS 1919–1928, 27 (Herbert Bayer et al eds., 1952)).
179. Ligo, *supra* note 168, at 9.
180. DE LA CROIX & TASNEY *supra* note 177, at 927.
181. *Id.*
182. The "International Style" of the 1920's was coined by historian Henry Russell Hitchcock in observing the great international similarity of modern architecture. THE WORLD ATLAS OF ARCHITECTURE 376 (Michael Beazley Int. eds., 1984). One of the principal doctrines of the international school was functionalism, where the function of the building is considered first and determined the architectures form. DE LA CROIX & TASNEY *supra* note 177, at 931.
183. BLAKE, *supra* note 172, at 16.
184. The brutalist movement of the 1950's was characterized by massive structures usually constructed in concrete as a criticism to the modernist movement. THE WORLD ATLAS OF ARCHITECTURE, *supra* note 182, at 380.
185. The post modern movement illustrates a desire to break from the modern movement

century architecture all considered function as central to their architectural philosophy.

2. Perceptions of architecture in the promulgation of the Act

During the hearings preceding passage of the Act,[186] Michael Graves,[187] a well respected figure in the international architectural community, presented a statement to the Subcommittee on Courts, Intellectual Property, and the Administration of Justice advocating the proposed copyright protection for architectural works.[188] In considering the proposed legislation,[189] he expressed his concern that the legislation was intended to provide separate treatment for function and artistic expression.[190] He explained that such separation was troublesome because "architecture inherently serves both pragmatic and aesthetic functions."[191] Thus Graves stressed the ingrained role that function and utility play in the composition of every architectural structure.

The public's perception of architecture further provides insight as to the relative importance of function in architecture. In a survey of 600 large commercial architectural clients who were asked why they chose to hire a particular architecture firm, the ability to make a building functional was ranked second in importance.[192] In contrast, aesthetic or artistic quality ranked tenth.[193] This empirical data elucidates the prominence of functional concerns in the view of those who are paying for architectural services. Although the survey was limited to commercial clients who had a specific purpose in employing an architect, it does suggest that public perception of architecture is less artistic than functional.

The other side of the argument views architecture as art, thus justifying copyright protection as such. It is the exception rather than the rule that some architecture is purely art and entirely devoid of function. Few, if any architectural structures have been conceived and commissioned without some functional purpose in mind even if they are clad in artistic overtones.

Having demonstrated the generally accepted notion of the inseparability of form and function in architecture, and considering the nature of architecture, the inherent utilitarian function of buildings becomes apparent. Obviously not all buildings are created in accordance with a particular architecture style or movement, nor can all buildings be considered

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and the constraints of functionalism. It is more whimsical than previous architectural traditions combining elements of historical and cultural sources resulting in a new eclecticism. THE WORLD ATLAS OF ARCHITECTURE, *supra* note 182, at 390.

186. *See Hearings, supra* note 33.

187. Michael Graves is one of the most well–known living American architects. He is a fellow of the American Institute of Architects and serves as principal of his own large architecture firm. His work includes prominent libraries, hotels, museums, educational facilities, custom residences and restaurants. *Hearings, supra* note 33 at 11-12 (statement of Michael Graves).

188. *Hearings, supra* note 33.

189. *Supra* notes 51–52.

190. *Hearings, supra* note 33 at 21.

191. *Hearings, supra* note 33 at 21. Graves illustrates this notion considering the function of the Washington Monument in that although " [it] may serve no particular utilitarian purpose, it functions as a marker of urban space; its many antecedents often contained commemorative inscriptions thereby serving a narrative function for society." *Hearings, supra* note 33 at 21.

192. DANA CUFF, ARCHITECTURE: THE STORY OF PRACTICE 55 (1991).

193. *Id.*

"architecture" in the traditional sense. Similarly, not all buildings can be classified as possessing the same amount of utility. Nonetheless, it is apparent that all serve a functional purpose to a measurable degree. Irrespective of the artistic and aesthetic merit of any particular architectural design, at the very core of any work of architecture is a quantum of functionality. Hence buildings are aptly categorized as useful articles.

3. Conflict created with patent laws in granting buildings copyright protection

By granting copyright protection for a useful article, the copyright law creates a right for a subject matter which is traditionally covered by patent laws. In the current patent scheme architectural designs and the buildings constructed from them fall under the category of protectable subject matter of design patents.[194] To qualify for a design patent, the design must have utility,[195] novelty,[196] originality[197] and be non–obvious to a person skilled in the art.[198] The requirements for a design patent are thus more stringent than the requirements for a copyright.[199] By allowing a liberal interpretation of the 1990 Act, intrinsically utilitarian buildings which do not qualify for design patent protection may be afforded copyright protection.[200] Granting copyright

194. There are three types of patents issued under the United States regime: utility, design and plant. A design patent is intended to provide protection for the aesthetic of physical appearance of an invention. RAMON D. FOLTZ & THOMAS A. PENN, UNDERSTANDING PATENTS AND OTHER INTELLECTUAL PROPERTY 9–10 (1990). The design patent law is codified in 35 U.S.C.A. § § 171–173 (West 1984).

195. The "utility" standard is arguably the easiest patentability condition to meet. It merely requires the invention be useful. FOLTZ & PENN, *supra* note 194, at 17.

196. In order to be qualify as "novel" for patent protection, the invention or discovery must not have been "known or used by others in this country, or patented or described in a printed publication in this or a foreign country." The invention must also not have been "in public use or sale in this country more than one year prior to the date of the application for patent..." 35 U.S.C.A. § 102 (West 1984).

197. The originality requirement is referred to in the Patent Act which states "[t]he applicant shall make oath that he believes himself to be the *original* and first inventor of the process, machine, manufacture, or composition of matter, or improvement thereof, for which he solicits a patent..." 35 U.S.C.A. § 115 (West 1984) (emphasis provided).

198. The "non–obvious" qualification requires that the technology claimed in the patent application not be included in, or be obvious from the relevant prior art. The relative obviousness is determined from the viewpoint of a person having ordinary skill and knowledge in the technology of the invention. *See* Ramon D. Foltz and Thomas A. Penn, *supra* note 175, at 17. The Patent Act codification of the non–obvious mandate states that "[a] patent may not be obtained...if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains." 35 U.S.C.A. § 103 (West 1984).

199. The subject of the copyright must only be original and fall within one of the statutorily defined subject matter categories. According to the code, copyright subsists in "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a). The level of originality required for copyright protection is not as high as "[a]ll that is needed to satisfy [the originality requirement under] both the Constitution and the statute is that the author contributed something more than a merely trivial variation, something recognizably his own. Originality in this context means little more than a prohibition of actual copying." Richmond Homes Management v. Raintree, Inc. 862 F. Supp. 1517 (W.D. Va. 1994) (citing M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 438 (4th Cir. 1986) (quoting Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102-03 (2d Cir. 1951)).

200. The dangers are explained by one commentator as follows:

protection to such inherently useful articles as buildings has the effect of circumventing the patent system. The net result is that the copyright laws will grant greater protection for a utilitarian article (a building) than that which would be available under the patent laws.[201]

D. Idea/Expression Dichotomy

A second doctrine of copyright threatened by the extension of protection to buildings is that commonly known as the idea/expression dichotomy.[202] The principle behind this dichotomy is rooted in the fundamental copyright maxim that protection is intended to cover only expressions of ideas rather than the idea itself.[203] The doctrine is abrogated when an architectural design is itself afforded protection. If copyright protection extends to a building, by implication, this protection extends to cover the design of the building as well.

The case and statutory law have affirmed this tenet in allowing the borrowing of ideas[204] while affording copyright protection for the "expression of such ideas."[205] In considering architectural works, the courts have generally held that while architectural plans are protectable as expressions of ideas,[206] the building designs depicted in them are not.[207] For example, in *Robert R. Jones*

> Regardless of how the article is perceived or originally created, if the aesthetic elements of a useful article are intertwined with the utilitarian elements, it is impossible to protect the aesthetic elements without protecting the article as a whole, which is a practice prohibited by the utility rule. If an exception is made for architectural works, a "slippery slope" situation occurs. That is, by making such an exception, it will likely be more difficult to stop future attempts to protect other useful, but artistic, articles. In this way, copyright law will be transformed into a "catch-all" protection provision for useful articles not satisfying the minimum requirements of patent law. Such a result clearly is not contemplated by U.S. copyright law.

James Bingham Bucher, *Reinforcing the Foundation: the Case Against Copyright Protection for Works of Architecture,* 39 EMORY L.J. 1261, 1282 (1990).

201. The term for a design patent is limited to fourteen years from the time the patent is filed. 17 U.S.C.A. § 173 (West 1977). A copyright term generally lasts for the life of the author, except in the case of dual authors in which case it endures for the life of the last surviving author. 17 U.S.C. § 106(d).

202. *See* 17 U.S.C. § 102(b) (1988) "In no case does copyright protection for an original work of authorship extend to any *idea*, procedure, process,...or discovery regardless of the form in which it is...embodied in such work." *Id.* (emphasis provided).

203. Granting a property right in a mere idea would effectively remove that idea from the public domain thereby reducing the avenues of thought available for contemplation and development. As such, protection of ideas would essentially contradict the basic purpose of the copyright laws by hindering the "progress of science and the useful arts". 3 NIMMER, NIMMER ON COPYRIGHT § 13.03 (B)(2)(a), at 13–68 (1993). *See also* Beacker v. Loew's, Inc., 133 F.2d 889, 891 (7th Cir. 1943); Burtis v. Universal Pictures Co., 256 P.2d 933, 939 (Cal. 1953).

204. For cases supporting the proposition that ideas in and of themselves are not protectable by copyright, *see, e.g.,* Dellar v. Samuel Goldwyn Inc., 150 F.2d 612, 612 (2d Cir. 1945); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930); Desny v. Wilder 299 P.2d 257, 266 (Cal. 1956).

205. *See* Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 208 (9th Cir. 1988) (similar ideas in two video games).

206. *Supra* note 9 (discussing traditional copyrightability of architectural plans).

207. *See* Robert R. Jones Associates v. Nino Homes, 858 F.2d 274, 277–78 (6th Cir. 1988) (holding design of building not protectable under copyright law); Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 500 (2d Cir. 1982) (holding that only the expression of an idea rather than the idea itself was protectable); Demetriades v. Kaufman, 680 F. Supp 658, 664 (S.D.N.Y. 1988) (holding that while ideas expressed by architectural plans were protectable, the building designs as depicted in the plans represent the idea itself and hence were not protectable).

Associates v. Nino Homes,[208] a custom home builder sued a second builder for copyright infringement when the second builder allegedly constructed a home from copyrighted plans owned by the first.[209] In considering whether damages for the copyright owner should include lost profits for homes which would have been sold had the infringement not occurred, the court reasoned that only the plans and not the building design were protected by the copyright law.[210] The court's reasoning was grounded in the "fundamental maxim" that a copyright protects the particular expression of an idea rather than the idea itself.[211] It further explained that the protection of ideas was the province of patent rather than copyright law.[212]

An additional consideration intrinsically linked to the idea/expression dichotomy is the distinction which courts have drawn between the copying of the expression of an idea and the actual use of that idea. The issue was initially discussed in the landmark United States Supreme Court case *Baker v. Seldon*.[213] In *Baker*, the plaintiff sought copyright protection for bookkeeping forms contained in a book which explained a new system of bookkeeping.[214] In rejecting the plaintiff's claim, the Court held that copyright protection extends only to the particular expression of a work, and does not protect use of the work described by the copyrighted publication.[215] In the terms of the idea/expression dichotomy, preventing the *use* of a copyrighted work is synonymous with protecting the idea embodied by the work.[216]

The Register of Copyrights noted that "the protection of architectural works under copyright is fundamentally not about the protection of buildings *per se*; it is—certainly within many states of the Berne Union—about the protection of perceptible personal expression embodied in some, but not all, buildings."[217] The Register thus recognized the practical limits imposed by the idea/expression dichotomy.

If architectural designs were afforded copyright protection, the copyright would be protecting more than just artistic expression, it would be protecting the idea expressed. Such protection for design ideas would be inappropriate for exactly the same reasons that protection of expression in a literary work is precluded under the merger doctrine. This doctrine provides that when the idea has "merged" with the underlying idea comprising the work, the work itself is not protectable.[218] Affording protection to building designs is thus the theoretical analog to the merger doctrine in literary works, which provides that an expression must be more than a de minimis representation of

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See also Scott W. Pink, *The Expanding Scope of Copyright Protection of Architectural Works*, THE CONSTRUCTION LAWYER, Nov. 1992, at 42.

208. 858 F.2d 274.
209. *Id.* at 275.
210. *Id.* at 277.
211. *Id.*
212. *Id.* at 278.
213. 101 U.S. 99 (1879).
214. *Id.* at 100.
215. *Id.* at 104–05.
216. *Id.* at 107.
217. *Report of the Register of Copyrights*, *supra* note 8, at 157.
218. Raymond M. Polakovic, *Should the Bauhaus Be in the Copyright Doghouse? Rethinking Conceptual Separability*, 64 U. COLO. L. REV. 871, 888 (1993).

the underlying uncopyrightable idea that results in the literary expression.[219] This twisting of rights is exactly what the present copyright structure intends to avoid by not allowing protection and the subsequent monopolization[220] of mere ideas and useful articles.

IV. PROPOSED RULE

Rather than leave the ultimate interpretation of the Act to the courts, as will be necessary under the current legislation, new laws should be drafted to better comply with traditional notions of the United States copyright regime. More specifically, any new law should deny protection for useful articles and mere ideas. The goal of complying with the requirements of the Berne convention can better be achieved through alternative legislation which provides effective protection to architects while still adhering to the basic tenets of American copyright law.

Note that when the Berne Implementation Act was passed, the World Intellectual Property Organization (WIPO)[221] accepted the United States' proposal of compliance without objection to the level of protection afforded to buildings under the Unites States regime. The WIPO's accession to the American copyright law implies that the United States was in compliance with Article 2(1)[222] of the Convention. The WIPO apparently approved of the application of the separability test as prescribed by the 1976 Copyright Act as the limit for protection of architectural works. As one commentator stated: "If the test was adequate for purposes of adherence, why should the test be any less adequate now that the U.S. has joined the Convention?"[223]

The signatory nations to the Berne Convention have taken widely disparate approaches to complying with the guidelines imposed by the treaty.[224] Not surprisingly, uniformity has never been achieved regarding the copyrightability of architecture among the Berne Union members.[225] Despite the disparity, there are some general commonalties among the individual Union members regarding the issue.[226] First, all Berne member countries make reference to the fundamental difference between architectural buildings and architectural works.[227] Secondly, architectural works are regarded as artistic creations whose copyrightability depends upon their "originality," the definition of which varies from country to country.[228] Third, the fact that the architectural work embodies some utilitarian aspect does not preclude

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219. *Id.*
220. If granted a copyright for mere ideas, the copyright holder would have the legal right to prevent anybody else from copying that idea, hence the monopolization. Allowing such a monopoly would stifle rather encourage creativity. This would contravene the spirit of the copyright laws. With this in mind it is clear that the Act does not achieve this purpose of fostering creativity originally behind copyright law.
221. The WIPO is responsible for the administration and enforcement of the Berne Convention.
222. Article (2)(1) is the provision pertaining to architectural works. *See supra* note 16.
223. Bucher, *supra* note 200, at 1285.
224. *See Report of the Register of Copyrights*, *supra* note 8.
225. *See Report of the Register of Copyrights*, *supra* note 8.
226. *See infra* notes 227–31 and accompanying text.
227. *Report of the Register of Copyrights*, *supra* note 8, at 158-59.
228. *Report of the Register of Copyrights*, *supra* note 8, at 162–63.

protection of the particular artistic characteristics of the work.[229] Fourth, architectural works are generally accorded the same rights as other copyrightable subject matter within any particular national regime.[230] Finally, most Union members include provisions creating exceptions to reproduction rights and moral rights in an attempt to balance the potentially countervailing interests of the architect, the owner, and the general public with regards to any particular work of architecture.[231] In drafting appropriate United States legislation the general principles followed by other Berne members should be considered.

In the wake of the United States becoming a signatory to Berne, the American Institute of Architects (AIA) proposed an interesting solution to the quandary of copyright in architectural works.[232] The AIA suggested that Congress amend the Copyright Act to provide the copyright owner of the plans and specifications the exclusive right to execute those plans and drawings in a structure.[233] The right would not, however, prohibit construction of a substantially similar building derived from "measured drawings."[234] In the context of intellectual property law, measured drawings can be characterized as a form of reverse engineering, which is recognized as a legally acceptable method of acquiring a technology.[235] Plans derived from measured drawings should be viewed analogously as a legitimate and legal means to obtain the design of a constructed building.

The Register of Copyright's report suggested four alternatives which would allegedly bring the United States within compliance with Berne.[236] In congruence with the AIA suggestions, the Register proposed alternative number two,[237] which suggested amending the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those copyrighted plans.[238] Of the four alternatives, this proposal best complies with both Berne guidelines and traditional notions of copyright under the United States copyright system.

Drawing from the suggestions of both the Register of Copyrights and the AIA, the most equitable rule pertaining to architectural works is to give the copyright owner of the architectural plans the right to prevent unauthorized construction of buildings based on those plans. This can be accomplished by merely amending the definition of pictorial, graphic and sculptural works found in §101 of the Copyright Act of 1976 in such a way as to extend the protection afforded architectural plans to include the right to prevent

229. *Report of the Register of Copyrights, supra* note 8, at 163.
230. *Report of the Register of Copyrights, supra* note 8, at 163.
231. *Report of the Register of Copyrights, supra* note 8, at 163.
232. *Report of the Register of Copyrights, supra* note 8, at 197 (AIA response to Copyright Office Notice of Inquiry).
233. *Report of the Register of Copyrights, supra* note 8, at 197 (AIA response to Copyright Office Notice of Inquiry).
234. A "measured drawing" is a document created by observing or physically measuring the interior and exterior dimensions of a constructed building.
235. In the area of intellectual property known as trade secrets, the propriety of reverse engineering is settled law. *See, e.g.*, Brunswick Corp. v. Outboard Marine Corp., 404 N.E.2d 205, 207 (1980) (in discussing remedies for trade secret infringement of marine craft engine technology court held reverse engineering of technology as legal means of acquiring such).
236. *Report of the Register of Copyrights, supra* note 8, at 223–26.
237. *See supra* note 54 and accompanying text.
238. *See supra* note 54 and accompanying text.

unauthorized construction of the building(s) depicted in the plans. Further, the changes to Title 17 included in the Act should be repealed with the exception of the addition of 17 U.S.C. §120, which addresses the concern of limiting moral rights.[239]

This solution will surely meet the prerequisites for compliance to the Berne Convention. Further, the proposed rule is in accord with the principles guiding architectural works protection provided by other Berne Union members.[240] More specifically, the new rule differentiates between buildings and architectural works in that buildings are not afforded protection but rather are treated as extensions of the protection covering the architectural plans. The originality consideration[241] is met in that in order for the plans to be copyrighted, they still must meet the originality requirements applicable to all copyright candidates. The particular artistic characteristics of the building will still be protectable[242] under the pictorial, graphic and sculptural works provision subject to the traditional separability test. Arguably, the rights conferred by the proposed rule will accord the same rights as other copyrightable subject matter[243] in disallowing unauthorized reproductions, contingent only on the registration of the plans which depict the building. Finally, by retaining 17 U.S.C. §120,[244] the moral rights exceptions endorsed by many Berne Union members will by followed in American copyright law. Although not dispositive in terms of compliance with Berne,[245] the fact that the proposed rule embodies all the general principles common to most Berne members' architectural protection provisions creates a strong implication of compliance. As discussed previously,[246] the WIPO approved of the protection afforded architectural works prior to the Act, thus it logically follows they would approve of the increased protection offered by this proposal.

The proposed rule would also cure the violations of the useful article doctrine and the idea/expression dichotomy created by the Act of 1990. In regard to the useful article doctrine, the new rule no longer protects the building per se, but rather imparts the copyright owner with the affirmative right to prevent unauthorized construction based on copyrighted plans. Thus any unauthorized construction will constitute an infringement of the copyright plans rather than an infringement of the building. This change in law

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239. Moral rights are separate, non-transferable rights which enable the author or creator of the work to invoke the aids of the court in order to protect the integrity of the work, including protection against alteration, mutilation or destruction after the copyright has been transferred to others. KITCH & PEARLMAN, *supra* note 15, at 775–76. Section 106A of the Copyright Act provides moral rights for authors of works of visual art. 17 U.S.C. § 106A.

240. *See supra* notes 227–31 and accompanying text.

241. *Supra* note 227 and accompanying text.

242. *Supra* note 229 and accompanying text.

243. *Supra* note 230 and accompanying text.

244. *Supra* note 72.

245. It is important to consider that the Berne Convention only proscribes standards rather than absolute rules which Union members are required to follow. In considering compliance with the Convention, one commentator observed:

> The fact that Berne consists of standards, and that these standards are sufficiently flexible to accommodate the often disparate laws and practices of its member states, means that the Convention leaves ample room for preserving the American copyright tradition of balancing the incentives needed for authors and publishers against the interests of consumers in access to copyrighted works.

Hearing, supra note 31, at 667 (Testimony of Professor Paul Goldstein).

246. *See supra* notes 221–23 and accompanying text.

effectively eliminates the anomalous results of affording protection to the useful article itself.

Unfortunately, extending the copyright privilege for architectural plans to include the right to prohibit unauthorized construction does not as easily dispel the concerns of violating the idea/expression dichotomy. Several jurisdictions have explicitly held that copyright in architectural plans does not impliedly grant the copyright holder the affirmative right to prevent the construction of a structure based on those plans.[247] These cases based their reasoning on the idea/expression dichotomy first enunciated in *Baker v. Selden*,[248] and subsequently recognized by Congress in §102(b) of the Copyright Act.[249] The holder of the copyright in the plans was considered to hold a copyright only in the expression (the plans) of the idea (the concept behind the design), and did not have any copyright in the idea alone.[250]

The proposed new rule merely provides for the protection of the expression of an idea in the form of plans and allows for the prohibition of the copying of the expression of that idea in the form of constructed buildings. Along this line of reasoning, several courts have considered the unauthorized construction of a building from copyrighted plans a potential infringement of the plans.[251] In *Scholz Homes, Inc. v. Maddox*,[252] the court considered an infringement claim stemming from the construction of a home substantially similar to one depicted in the plaintiff's copyrighted plans.[253] Although the court declined to find infringement,[254] it did provide an interesting analysis of the idea/expression dichotomy as outlined in *Baker*[255] as follows:

> It is far less obvious that architectural plans are prepared for the purpose of instructing the general public as to how the depicted structure might be built. Rather, they are often prepared so that they may be used in the building of unique structures limited in number. If the Copyright Statute protected merely against the vending of plans instead of against their unauthorized use, it would therefore fail to afford a form of protection architects might strongly desire. This protection would most effectively be provided by holding the unauthorized construction of a copyrighted plan to be an infringement...[256]

The court in *Robert R. Jones Associates, Inc. v. Nino Homes*,[257] citing the

247. Swantz v. American Inst. of Architects, 842 F.2d 1292 (4th Cir. 1988); Demetriades v. Kaufmann, 680 F. Supp. 658, 664 n. 8 (S.D.N.Y.1988); Acorn Structures, Inc. v. Swantz, 657 F. Supp. 70, 75 (W.D. Va. 1987) (a building is an "idea" under the Copyright Act of 1976, and is thus unprotectable; construction of a building from unauthorized plans does not constitute copyright infringement); Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 941 (W.D. Tex. 1982); DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184, 195-96 (M.D. Fla. 1962); Muller v. Triborough Bridge Auth., 43 F. Supp. 298, 299 (S.D.N.Y. 1942).

248. 101 U.S. 99 (1879). *See also supra* section III(D).

249. 17 U.S.C. § 102(b).

250. *Id.*

251. *See, e.g.*, Robert R. Jones Assoc. v. Nino Homes, 858 F.2d 274 (6th Cir. 1988); Scholz Homes, Inc. v. Maddox, 379 F.2d 84 (6th Cir. 1967); Herman Frankel Org. v. Tegman, 367 F. Supp. 1051 (E.D. Mich. 1973).

252. 379 F.2d 84 (6th Cir. 1967).

253. *Id.*

254. *Id.* at 87. The infringement claim was dismissed based on the defendant's testimony that he never saw the plaintiff's plans. *Id.*

255. 101 U.S. 99 (1879).

256. 379 F.2d at 86.

257. Robert R. Jones Assoc. v. Nino Homes, 858 F.2d 274 (6th Cir. 1988).

Scholz case, formulated a rule prohibiting the construction of a home from the infringing use of copied plans.[258] Finally, in *The Herman Frankel Organization v. Tegman*,[259] a case involving the infringement of architectural plans embodied in a brochure, the court found a valid copyright in the plans and subsequent infringement.[260] The court held that "[a] person should...be able to prevent another from copying copyrighted house plans and using them to build the house."[261] Although these cases appear to be in the minority, they do provide evidence that the proposed rule would not violate the idea/expression dichotomy.

A less significant but nonetheless beneficial result of abandoning the current law would be elimination of the requirement of dual registration.[262] By extending the copyright protection of architectural plans to include the right to prohibit the construction of a building, a single registration of the plans would cover all resultant infringement. This would decrease the paper trail and save the resources of designers, the copyright office and, ultimately, the courts. Considering these practical benefits in addition to the aforementioned doctrinal benefits, the proposed rule is more in congruence with the legislative initiative to follow a minimalist approach in the pursuit of Berne compliance.

Protection of buildings is not limited to copyright. Theories of misappropriation[263] and unfair competition[264] can also be applied in the case of unauthorized reproduction of original drawings. Although merely stealing architectural plans would not create a cause of action under copyright, the designer could still bring suit against the thief under the applicable state conversion laws.[265] Further, contractual alternatives are always readily available to protect the architect. He can specify that no copies of his original design may be made. Such protection already exists under copyright laws. AIA documents, used by a large portion of the architectural profession can further be altered to include copyright specifics as a given part of any architect/owner agreement.[266] Additionally, design patent protection may be available for some buildings.[267] Arguably any of these alternatives taken individually may not

258. In formulating the rule, the court in Jones stated that "one may construct a house which is identical to a house depicted in copyrighted architectural plans, but one may not directly copy those plans and then use the infringing copy to construct the house." 858 F.2d 274, 280. The court went on to explain that "[t]he same result would not necessarily obtain if the alleged infringer merely made houses which were substantially similar to the house depicted in the copyrighted plans." *Id.* at 280, n.5.

259. 367 F. Supp 1051 (E.D. Mich. 1973).

260. *Id.*

261. *Id.* at 1053.

262. According to the Code of Federal Regulations, under the Act, architectural plans and the actual architectural structure must be registered separately as follows:

> (4) Separate registration for plans. Where dual copyright claims exist in technical drawings and the architectural work depicted in the drawings, any claims with respect to the technical drawings and architectural work must be registered separately.

37 C.F.R. § 202.11(c) (4).

263. *See supra* note 43.

264. *See supra* note 43.

265. *See supra* note 43.

266. THE AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT B141 STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (14th ed. 1987) grants the exclusive rights to use, copy, and reproduce the work of the architect.

267. Considering the stringent requirements regulating the assignment of design patents, however, the practical applicability of patent protection may not be sufficient to afford adequate

provide adequate protection for the architect but in the aggregate the potential protection is quite great, especially if applied in conjunction with the proposed rule.[268]

V. CONCLUSION

The societal benefit realized in not introducing a new protectable class of architectural works far outweighs the minimal increase in rights for the design professional. The potential for creating an architectural monopoly for intrinsically utilitarian articles undermines the very essence of copyright law of protecting the personal expressions rather than the useful qualities embodied in the work of the author. As recognized by the AIA, architecture is a profession in which imitation is integral.[269] Architect's borrow from historical traditions in developing their contemporary designs and are formally educated to recognize the value of the history of architecture. If architects are not allowed to learn and employ their colleague's design ideas, as forbidden by the Act, the profession will only suffer as the number of available design options are limited by copyright monopolies granted under the cloak of Berne compliance.

protection to buildings. *See supra* notes 171–80 and accompanying text.

268. *See generally, Report of the Register of Copyrights, supra* note 8, at 63–69 (for a general discussion of alternative forms of protection available to architects and designers).

269. *See supra* note 8 and accompanying text.