The Berne Convention and Protection of Works of Architecture: Why the United States Should Create a New Subject Matter Category for Works of Architecture Under Section 102(a) of the Copyright Act of 1976

At some point each of us has marveled at an architectural structure's beauty. Architecture surrounds us, and becomes the landscape of our cities. Architecture is history, "reflect[ing] the philosophical, intellectual currents, hopes, and aspirations of its time."[1] Although we are moved by an architectural structure's beauty, we rarely consider its utilitarian aspects. Yet, in the United States, works of architecture do not receive copyright protection because the law views architecture with regard to its utilitarian aspects, rather than considering architecture for its beauty as a work of art. Works of architecture should be granted copyright protection commensurate with that of other art forms, such as musical works or literary works. Architecture is a work of art equivalent to these other art forms. Moreover, the Berne Convention, of which the United States is a member, protects works of architecture.[2]

This Note explains why architectural works should receive copyright protection afforded by the Berne Convention. Section I gives a brief history of copyright law — from common law to the Copyright Act of 1976, and ends with the United States's adoption of the Berne Convention in March of 1989. Section II discusses the protection afforded architectural plans and architectural works in the United States today. Section III looks at the Berne Convention and its protection of architectural works. Section IV reviews potential legislative solutions to the protection of works of architecture as suggested by the Copyright Office in its report released on June 19, 1989. Finally, this Note recommends that further legislation be enacted in the United States to protect architectural works regardless of whether the architectural work incorporates separable ornamentation or has a utilitarian function. More specifically, this Note recommends that a new subject matter category under section 102(a) of the Copyright Act of 1976[3] be created for works of architecture.

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1. U.S. COPYRIGHT OFFICE, THE REPORT OF THE REGISTER OF COPYRIGHTS ON WORKS OF ARCHITECTURE 211 (1989) [hereinafter COPYRIGHT OFFICE REPORT].

2. *Id.* at 157. "[P]rotection of architectural works under copyright is fundamentally not about the protection of buildings per se; it is—certainly within many of the states of the Berne Union—about the protection of perceptible personal expression embodied in some, but not all, buildings." *Id.*

3. 17 U.S.C. § 102(a) (1976).

I. An Overview of Copyright Law

Copyright law dates back to the ratification of the United States Constitution. The drafters of the Constitution thought that protection was needed "[t]o promote the Progress of Science and useful Arts . . . [and] [t]o secur[e], for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[4] To secure this protection, the drafters included within the Constitution the Copyright Clause, authorizing Congress to enact copyright legislation. "[T]he public benefits from the creative activities of authors."[5]

Congress has enacted copyright legislation three times.[6] The Acts defining copyright law are the Copyright Act of 1909,[7] the Copyright Act of 1976,[8] and the Berne Convention Implementation Act of 1989.[9]

Although amended by the 1976 Act and the Berne Convention Implementation Act, the 1909 Act still governs those causes of action brought before 1978, the date the 1976 Act became effective.[10] Additionally, the 1909 Act still controls certain rights under the 1976 Act.[11]

The Copyright Act of 1976, effective January 1, 1978, was a comprehensive revision of the 1909 Act.[12] Prior to the 1976 Act, works of authorship were protected either by the 1909 Act or state law. Unpublished works were protected by the common law copyright protection of state law, while the 1909 Act protected published works.[13] The con-

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4. U.S. Const. art. I, § 8, cl. 8.

5. 1 M. Nimmer, Nimmer on Copyright § 1.03[A], at 1-32 (1989).

6. 1 M. Nimmer, *supra* note 5, overview, at OV-1.

7. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 [hereinafter the 1909 Act]. *See* 4 M. Nimmer, *supra* note 5, app. 6 for the text of this Act.

8. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2451 [hereinafter the 1976 Act]. *See* 4 M. Nimmer, *supra* note 5, app. 2 for the text of this Act.

9. Act of Oct. 31, 1988, Pub. L. No. 100-568, 102 Stat. 2853, reprinted in 4 M. Nimmer, Nimmer on Copyright, app. 2A (1989).

10. 1 M. Nimmer, *supra* note 5, overview, at OV-1.

11. *Id.* § 2.08[D], at 2-116 to -117. For instance, the 1976 Act codifies the 1909 Act and does not find infringement in the plans of a structure through the unauthorized construction of a substantially similar building. 17 U.S.C. § 113(b) (1976). Section 113[b] states in pertinent part that

> [t]his title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a state, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

Id.

12. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vand. L. Rev. 1, 1 (1985). *See* 1 M. Nimmer, *supra* note 5, overview, at OV-2; Diamond, *Preemption of State Law*, 25 Bull. Copyright Soc'y 204 (1978).

13. 1 M. Nimmer, *supra* note 5, § 1.01[B], at 1-9.

fusion brought about by the state and federal dichotomy in copyright law prompted Congress to preempt the field of copyright law, ending the dichotomy and providing one federal scheme of protection for works regardless of whether they were published or unpublished.[14]

The sections of the 1976 Act that address federal preemption of state laws are sections 301(a)[15] and (b).[16] Section 301(a) preempts and abolishes any rights under the common law or state statutes that are equivalent to copyright and that extend to works coming within the scope of federal copyright law.[17] Thus, to be preempted by federal law, the rights under state common law must be equivalent to the rights granted under federal law, and the subject matter protected under state common law must be equivalent to the subject matter protected under federal law.[18]

Section 301(b) leaves three areas unaffected by federal preemption.[19] State rights are not preempted when the subject matter of the state right is not found in the 1976 Act,[20] when the cause of action arose under state law before January 1, 1978,[21] or when the state right violated is not equivalent to any rights protected under federal law in the 1976 Act.[22]

A. The Copyright Act of 1976: What Can Be Copyrighted?

Section 102 of the 1976 Act provides that copyright protection is only available for "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 from the medium of expression, whether directly or through the use of a machine or device."[23] Section 102 further provides an illustrative list of various types or categories of copyrightable works. The works protected are: "literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and

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14. 1 M. NIMMER, *supra* note 5, § 1.01[A], at 1-7.
15. 17 U.S.C. § 301(a) (1976).
16. *Id.* § 301(b).
17. *Id.* § 301(a). Section 301(a) states in pertinent part that "all [state] rights that are equivalent to . . . the . . . rights . . . of copyright as specified by section 106 . . . and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by [federal law]." *Id. See* 1 M. NIMMER, *supra* note 5, § 1.01[B][1], at 1-10.
18. H.R. REP. No. 1476, 94th Cong., 2d Sess. 130-31 (1976).
19. 17 U.S.C. § 301(b) (1976).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* § 102(a).

choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; and sound recordings."[24]

If a work falls within one of the various types or categories of "works of authorship," other criteria must be met before copyright protection may be granted.[25] The work must be original, fixed in a tangible medium, an original expression of an idea, and released in the public domain after January 1, 1978.[26]

The work of authorship must be "original."[27] Although the 1909 Act did not expressly require originality, the courts inferred the requirement,[28] resulting in its codification in the 1976 Act.[29] However, the 1976 Act does not fully define the term "original."[30] This makes it necessary to refer to case law under the 1909 Act to find a definition.[31]

Unlike patent law, which requires novelty in order to grant protection, copyright law requires only originality, a lesser standard than novelty. Consequently, it is more difficult for a copyright owner to prove copyright infringement.[32] To prove infringement, a copyright holder must show substantial similarity and copying, although the patent holder need only prove substantial similarity. More specifically, the copyright holder must show that the alleged infringer had the opportunity to view the copyright owner's work and that there is a substantial similarity between the copyright owner's work and the infringer's work.[33]

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24. *Id.* The subject matter of the first copyright act enacted in 1790 included maps and charts. Act of May 31, 1790, ch. 15, 1 Stat. 124. In 1802, an amendment added prints to this list of protectible subject matter. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171. In 1870, another amendment added models or designs intended to be perfected as works of the fine arts. Act of July 8, 1870, ch. 230, 86, 16 Stat. 198, 212. The 1870 amendment also extended to copyright owners the exclusive right to "complete, copy execute, finish, and vend the work." *Id.* The 1909 Act broadened the scope of the 1870 amendment by substituting "works of art" for "fine arts." Act of Mar. 4, 1909, ch. 301, 35 Stat. 1075. The subject matter protected under the 1909 Act was included in §§ 5(g) and 5(i) of the Act. *Id.* Section 5(g) protected "works of art, models, or designs for work of art," and § 5(1) protected "drawings or plastic works of a scientific or technical character." *Id.*

25. 17 U.S.C. § 102(a) (1976).

26. *Id.*

27. *Id. See* 1 M. NIMMER, *supra* note 5, § 2.01, at 2-6.

28. *See, e.g.*, Puddu v. Buonamici Statuary, Inc., 450 F.2d 401 (2d Cir. 1971); DuPuy v. Post Tel. Co., 210 F. 883 (3d Cir. 1914); Edward Thompson Co. v. American Law Book Co., 122 F. 922 (2d Cir. 1903).

29. 1 M. NIMMER, *supra* note 5, § 2.01[A], at 2-6.

30. *Id.*

31. E. Mishan & Sons, Inc. v. Marycana, Inc., 662 F. Supp. 1339, 1340-43 (S.D.N.Y. 1987). *See* 1 M. NIMMER, *supra* note 5, § 2.01[A], at 2-7.

32. 1 M. NIMMER, *supra* note 5, § 2.01[A], at 2-10.

33. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); DeAcosta v. Brown, 146 F.2d 408 (2d Cir. 1944); Smith v. Little, Brown & Co., 245 F. Supp. 451 (S.D.N.Y. 1965),

The second element necessary for copyright protection is that the work of authorship be "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."[34] This requirement, which originates in the Constitution, requires a work to be fixed in tangible form before it is granted copyright protection.[35] The fixation requirement is satisfied if the work is directly perceivable or if it is perceivable with the aid of a machine.[36] However, the work must be fixed in a tangible form "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[37] For example, a live broadcast on television of an athletic event, which itself is not considered a writing, fails to satisfy this requirement unless the broadcast was simultaneously recorded at the time of the live transmission.[38]

Copyright protection only extends to the expression of the work of authorship. It does not cover the idea itself.[39] The landmark Supreme Court decision of *Baker v. Selden*[40] reiterates this requirement.

In *Baker*, the plaintiff brought a copyright infringement action against the defendant, alleging that the defendant's book copied the methods of accounting found in the plaintiff's book.[41] The plaintiff also alleged that forms contained in the defendant's book were very similar to forms

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aff'd, 360 F.2d 928 (2d Cir. 1966). Because it is very difficult to prove by direct evidence the act of copying, plaintiff can prove copying by defendant's access to the plaintiff's work. 3 M. NIMMER, *supra* note 5, § 13.01[B], at 13-7 to -8. But, if there is no evidence of actual viewing, evidence that defendant had the opportunity to view plaintiff's work will be sufficient. *Id.* If access and substantial similarity are proven, the jury still may find no copying when they believe defendant's work is an independent creation unless the evidence of copying is so strong to prevent such a finding. *Id. See* Novelty Textile Mills, Inc. v. Joann Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977).

34. 17 U.S.C. § 102(a) (1976).

35. 1 M. NIMMER, *supra* note 5, § 2.03[B], at 2-28.1. The Constitution expressly provides that a work must be regarded as a writing. U.S. CONST., art. I, § 8, cl. 8.

36. 17 U.S.C. § 102(a) (1976).

37. *Id.* § 101.

38. 1 M. NIMMER, *supra* note 5, § 1.08[C], at 1-50 to -51. However, if the live broadcast is of a writing, such as a play, copyright will be extended to the play, but not to the broadcast. *Id.* Conversely, if the broadcast is not live and is considered a writing, a motion picture for instance, and that which is being filmed is not a writing, an athletic event, the copyright will be extended to the motion picture, but not to the athletic event. Copyright will lie in the manner of filming the athletic event, but not in the event itself. *Id.*

39. 17 U.S.C. § 102(b) (1976). *See also* Mazer v. Stein, 347 U.S. 201 (1954).

40. 101 U.S. 99 (1879).

41. *Id.* at 100.

found in plaintiff's book.[42] The Supreme Court held that defendant's work had not infringed plaintiff's because there was no substantial similarity between the two books.[43] The court stated that although the end results of the two accounting methods were the same, the means used to achieve this end were not substantially similar.[44]

Having found no substantial similarity and thus no copyright infringement, the Court could have ended its opinion.[45] However, the Court further explained in dicta that copyright protection extends only to the expression of an idea, not the idea itself.[46] The defendant had not copied plaintiff's expression of an idea, but only used plaintiff's idea of a book containing an accounting method with worksheets.[47] In short, there was no infringement because the copyright protected only the expression of an accounting method or system, not the accounting method or system itself. Had defendant's book contained the expression of the accounting methods found in plaintiff's book, then plaintiff would have succeeded.

The last element necessary for copyright protection is that the work entered the public domain after January 1, 1978.[48] The Copyright Act of 1976 only extends copyright protection to "works of authorship" issued into the public domain after January 1, 1978.[49] Those works issued in the public domain prior to January 1, 1978, are covered either by the 1909 Act or by applicable state law.[50]

B. The Berne Convention: How Will It Change the Copyright Act of 1976?

On October 31, 1988, President Reagan signed into law the Berne Convention Implementation Act of 1988.[51] This law became effective March 1, 1989, the date the United States became a member of the

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42. *Id.*
43. *Id.*
44. *Id.* at 101.
45. COPYRIGHT OFFICE REPORT, *supra* note 1, at 200.
46. *Baker*, 101 U.S. at 102-03.
47. *Id.*
48. 17 U.S.C. § 301(b) (1976).
49. *Id.* The 1909 Act required that a work be original and fixed in tangible form. The 1976 Act, however, added the requirements that copyright only protects an expression of an idea in a work, and those works released in the public domain after Jan. 1, 1978. *Id.*
50. 1 M. NIMMER, *supra* note 5, § 1.01[B][3], at 1-28. "[S]tate causes of action, like federal causes of action, arising before the effective date of the current Copyright Act, are preserved." *Id.*
51. Berne Convention Implementation Act, *supra* note 9 [hereinafter BCIA]. *See* COPYRIGHT OFFICE REPORT, *supra* note 1, at 140.

Convention for the Protection of Literary and Artistic Works,[52] signed in Berne, Switzerland, on September 9, 1886.[53]

The Berne Convention is a multilateral treaty for international copyright protection.[54] The "cornerstones"[55] of the Berne Convention are that each member nation must accord a foreign work the same copyright protection as it grants domestic works,[56] and each member nation must accord a foreign work a minimum level of protection regardless of what it grants its own nationals.[57] The Berne Treaty[58] has been amended approximately every twenty years since the initial signing of the Treaty.[59] The most current text of the Treaty is the Paris Act of July 24, 1971.[60]

At the initial signing in 1886, ten nations belonged to the Berne Convention.[61] Today, seventy-nine nations belong to the Berne Union.[62] Thus, by becoming a member of the Berne Convention, the United States has truly become "a full-fledged participant in the international copyright community."[63]

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52. Berne Convention (Paris text), July 24, 1971, *reprinted in* 4 M. NIMMER, NIMMER ON COPYRIGHT app. 27 (1989).

53. 3 M. NIMMER, *supra* note 5, § 17.01[B], at 17-6.

54. Smith, *Should the Motion Picture Industry Support or Oppose U.S. Adherence to the Berne Convention?*, 6 ENT. & SPORTS L. 1, 10 (1987).

55. *Id.* at 10.

56. *Id.*

57. *Id.*

58. Hereinafter Berne Treaty or Treaty.

59. International Union for the Protection of Literary and Artistic Works, signed at Berne, Sept. 9, 1886; Additional Act and Declaration signed at Paris, May 4, 1896; revised at Berlin, Nov. 13, 1908; additional protocol signed at Berne, Mar. 20, 1914; revised at Rome, June 2, 1928; revised at Brussels, June 26, 1948; revised at Stockholm, July 14, 1967 (but not ratified by a sufficient number of member states to bring the Stockholm Act into force); revised at Paris, July 24, 1971 (effectively finalizing most of the Stockholm Act). 3 M. NIMMER, *supra* note 5, § 17.01[B], at 17-6 n.12.

60. 3 M. NIMMER, *supra* note 5, § 17.01[B], at 17-6.

61. 3 M. NIMMER, *supra* note 5, § 17.01[B], at 17-6 n.10. "The initial signatories were Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Switzerland, Tunisia, and Liberia. Of those ten signatories, only Liberia failed to ratify the Convention." *Id.*

62. Strauss, *Don't Be Burned By Berne: A Guide to the Changes in the Copyright Laws as a Result of the Berne Convention Implementation Act of 1988*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 374, 374 (1989). All of the major countries of the world belong to the Berne Convention with the exception of the Soviet Union and the People's Republic of China. 3 M. NIMMER, *supra* note 5, § 17.01[B], at 17-6. "[China] is expected to enact its first comprehensive copyright statute in the next several years." *Id.* at n.15. *See also* Baumgarten, *Copyright Relations Between the United States and the People's Republic of China*, 27 BULL. COPYRIGHT SOC'Y 419 (1980).

63. 1 M. NIMMER, *supra* note 5, Highlights of the Berne Convention Implementation Act of 1988, at Comm-1.

Before ratifying the Berne Treaty, Congress stated that the Berne Treaty was not self-executing[64] and would only become the "Supreme Law of the Land" insofar as Congress had expressly legislated.[65] Congress did not want the Berne Treaty, by virtue of the supremacy clause, to become the supreme law of the land.[66] Rather, it wanted the Berne Treaty to be executory, not self-executing. By remaining executory, Congress could implement its own legislation and take a minimalist approach by adopting only those provisions of the Treaty absolutely necessary to join the Berne Convention.[67] The resulting legislation was the Berne Convention Implementation Act of 1988, which, according to Congress, brought United States copyright law into conformity with the standards of the Berne Convention.[68]

The reason for Congress's minimalist approach was that some of the Berne provisions recognized rights not recognized in the United States.[69] For instance, the Berne Convention acknowledges the moral rights doctrine. This doctrine gives an artist the "right to claim authorship of [his] work and to object to any distortion, mutilation or other modification of [his] work, which would be prejudicial to his honor or reputation."[70] This proposition is contrary to United States law which only recognizes an artist's pecuniary interest.[71] Thus, Congress saw the Berne Implementation Act of 1988 as the best way for the United States to join the Berne Union without incorporating those provisions of the Berne Treaty not recognized by United States law.

The central tenet of the Berne Treaty is its prohibition of formalities.[72] The treaty's antipathy for formalities stands in direct contradiction to the United States's affinity for formalities as a condition to copyright

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64. BCIA, *supra* note 9, at 2(1).

65. *Id.* at 2(2).

66. U.S. CONST., art. VI, cl. 2. The supremacy clause states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.*

67. Note, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 481 (1987). *See* 1 M. NIMMER, *supra* note 5, Highlights of the Berne Convention Implementation Act of 1988, at Comm-14.

68. BCIA, *supra* note 9. The BCIA has 13 provisions, and one-third of these provisions state in one way or the other that the Berne Convention is not self-executing. 1 M. NIMMER, *supra* note 5, § 1.12[A], at 1-100.

69. 1 M. NIMMER, *supra* note 5, § 1.12[A], at 1-100 to -101.

70. Berne Convention (Paris text), *supra* note 52, art. 6*bis*, at 27-5 to -6.

71. Kwall, *supra* note 12, at 2.

72. 134 CONG. REC. H3082 (daily ed. May 10, 1988) (statement of Rep. Kastenmeier).

protection.[73] Notice is one formality required in the past from both American claimants and foreign claimants seeking copyright protection in the United States.[74] Failure to include a copyright notice on the article sought to be protected resulted in loss of copyright protection.[75] Notice was even required of the foreign claimant despite the fact that the foreign claimant's own country did not require this formality.[76]

The Berne Treaty does away with formalities as a condition for copyright protection, stating that "the enjoyment and the exercise of [copyright] shall not be subject to any formality" in "countries of the Union other than the country of origin."[77] The Berne Treaty prevents the United States from placing formalities on foreigners as a condition for copyright protection in the United States. However, it does not prevent the United States from requiring formalities from its own nationals[78] because the Berne Treaty only purports to govern the scope of formalities required by a country of a foreigner; it does not purport to govern the scope of formalities required by a country of its own citizens.[79] For example, the United States can discriminate against its own citizens and require the formality of notice as a condition to copyright protection, but it cannot require the same formality from foreigners as a condition to copyright protection in the United States.[80]

The Berne Treaty does, however, permit countries to require formalities as a condition to obtaining certain remedies, licenses, or exemptions, and these formalities apply to both nationals and foreigners.[81] The United States, for instance, could require the copyright formality of notice from both its own nationals and foreigners as a condition to recovering certain remedies, such as payment of attorney fees or obtaining statutory damages.[82]

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73. Strauss, *supra* note 62, at 379. *See* 3 M. NIMMER, *supra* note 5, § 17.01[B], at 17-7.

74. 1 M. NIMMER, *supra* note 5, § 17.01[B], at 17-7.

75. 1 M. NIMMER, *supra* note 5, at Comm-21.

76. 3 M. NIMMER, *supra* note 5, § 17.01[C][2][b], at 17-17.

77. Berne Convention (Paris text), *supra* note 52, art. 5(1), at 27-4.

78. 3 M. NIMMER, *supra* note 5, § 17.01[B][1], at 17-9.

79. *Id.*

80. *Id.*

81. *Id.* Congress has chosen to keep those sections of the Copyright Act requiring notice not as a condition for copyright protection but as a "useful tool for securing procedural advantages to copyright proprietors." *Id.* That is, notice will no longer be a condition for copyright protection for either the American or the foreigner, but it will be a condition necessary for the recovery of certain damages, such as attorney fees. 1 M. NIMMER, *supra* note 5, at Comm-21.

82. *Id.*

II. United States Protection of "Works of Architecture"

A. Copyright Protection for Architectural Plans

Currently, architectural plans and drawings are protected by copyright law.[83] However, the extent and scope of the protection granted to architectural plans and drawings have been widely debated. It is undisputed that "copyright in architectural plans protects against the 'copying' of such plans by another,"[84] and commentators agree that the "making of two-dimensional plans through direct copying of other two-dimensional plans" constitutes copying.[85] However, it is disputed whether the act of using the original plans without authorization to build a substantially similar building constitutes copying.[86]

The court in *Imperial Homes v. Lamont*[87] concluded that constructing a substantially similar building is permissible so long as the imitator does not copy the actual blueprints themselves.[88] However, the court did not determine whether using the actual blueprints of the original building, without duplicating them, to build a substantially similar building constitutes copying.

Thus, the question remains whether copyright in architectural plans protects against the unauthorized use of those plans to build the structure depicted therein. The decisions are varied, and for the most part have relied on *Baker v. Selden*,[89] in which the Supreme Court held that copyright protects only the expression of an idea, not the art, idea, or system explained in the work.[90] However, some courts also have interpreted *Baker* as standing for the proposition that the copying of architectural plans is permissible when the copying is necessary for use rather than for explanation.[91] Essentially, these courts have drawn a distinction between copying for use (acquiring, without authorization, plans to build the depicted structure),[92] and copying for explanation

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83. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). The House Report states that "[a]n architect's plans and drawings would, of course, be protected by copyright . . . ." *Id. See also* Aitken v. Empire Constr. Co., 542 F. Supp. 252 (D. Neb. 1982); Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928 (W.D. Tex. 1982).

84. Note, *Standing on Shaky Ground: Copyright Protection for Works of Architecture*, 6 Art & L. 70, 72 (1981). *See* 1 M. Nimmer, *supra* note 5, § 2.08[D], at 2-115.

85. Note, *supra* note 84, at 72.

86. *Id.*

87. 458 F.2d 895 (5th Cir. 1972).

88. *Id.* at 899.

89. 101 U.S. 99 (1879).

90. *Id.* at 101.

91. Shipley, *Copyright Protection For Architectural Works*, 37 S.C.L. Rev. 393, 406-07 (1986).

92. 1 M. Nimmer, *supra* note 5, § 2.08[D], at 2-118.

(copying, without authorization, plans to explain to a builder how to construct a substantially similar building).[93] Courts prohibit copying for explanation, and disagree whether copying for use should be prohibited.[94]

An architect's plans may be used in two different situations.[95] First, plans may be copied or adapted by a draftsman and used to build a substantially similar structure. Secondly, plans simply may be used directly, without copying, to build a substantially similar building. Early cases held that the unauthorized use of plans in either situation did not constitute copyright infringement.[96] Some decisions following these early cases held that copyright law protects the unauthorized use of plans when the defendant had copied the plans first and then used the plans to construct a substantially similar building.[97]

Thus, the courts have expressly protected a copyright holder from unauthorized copying of plans and the subsequent use of those plans to build a substantially similar building, but they have not protected the holder when the plans were used to build a substantially similar structure, but were never actually copied.[98]

Courts following a broad interpretation of *Baker* rationalize that protecting the architect from the unauthorized use of his plans when they have not been copied gives an architect too much control over the use of his plans.[99] In *Muller v. Triborough Bridge Authority*[100] and *DeSilva Construction Corporation v. Herald*,[101] both courts refused to find infringement when there was unauthorized use of the plans unless it could be proven that the plans had actually been duplicated. In *Muller*, the court held that the defendant could use the plaintiff's copyrighted drawing in designing and constructing the bridge approach because the plaintiff's copyright failed to prevent anyone from using the idea set forth in the plaintiff's plans.[102] Similarly, the court in *DeSilva* held that the prohibited act was the unauthorized copying of the plans, not the unauthorized use of the plans.[103]

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93. *Id.*

94. Shipley, *supra* note 91, at 408-09.

95. 1 M. NIMMER, *supra* note 5, § 2.08[D][2], at 2-106.

96. DeSilva Constr. Corp. v. Herald, 213 F. Supp. 184, 195 (M.D. Fla. 1962); Muller v. Triborough Bridge Auth., 43 F. Supp. 298, 300 (S.D.N.Y. 1942).

97. Donald Frederick Evans & Assoc. v. Continental Homes, Inc., 785 F.2d 897 (11th Cir. 1986); Herman Frankel Org. v. Wolfe, 184 U.S.P.Q. (BNA) 813 (E.D. Mich. 1974); Herman Frankel Org. v. Tegman, 367 F. Supp. 1051 (E.D. Mich. 1973).

98. Shipley, *supra* note 91, at 403.

99. *See, e.g.*, Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 941 (W.D. Tex. 1982).

100. 43 F. Supp. 298 (S.D.N.Y. 1942).

101. 213 F. Supp. 184 (M.D. Fla. 1962).

102. 43 F. Supp. at 300.

103. 213 F. Supp. at 195-96.

A more narrow reading of *Baker* may be found in *Herman Frankel Organization v. Tegman*.[104] The court in this case recognized that copying for use is as harmful as copying for explanation. The court ruled that an architect should be able to prohibit others from copying copyrighted house plans and then using the copied plans to build the house depicted.[105] But the court stated this does not mean that the architect can preclude others from using the ideas taught by the plans to build another similar house.[106] This court seemed to declare the basic principle that, although copyright law protects the architect from another person building a house based on copied plans, it does not protect the ideas disclosed in those plans.[107]

In *Donald Frederick Evans & Associates v. Continental Homes, Inc.*,[108] the Court of Appeals for the Eleventh Circuit similarly stated that a defendant who copies floor plans set forth in a promotional booklet and then uses the copies to build the structure depicted in the plans is liable for copyright infringement.[109]

One may distill from this line of cases that all courts agree that copyright infringement in the plans of a structure occurs when the plans themselves are copied for explanation (that is, for purposes of explaining to a builder how to construct a substantially similar building). Additionally, the courts have held that copyright infringement occurs when the plans are copied and then used without authorization to build a substantially similar structure.

However, the courts do not agree that copyright infringement also occurs when the plans, although not copied, are used without authorization to build the structure depicted therein. An architect should be protected in this instance because the interest divested here is the same as the interest divested when the plans are copied and then used to build a substantially similar building.[110] Admittedly, this situation would be rare because it would be almost impossible for someone to acquire copyrighted plans and use them without copying them, especially considering the number of contractors and subcontractors needed to build a structure. Nonetheless, it is possible, and the architect's interest should be protected.

Despite the similarity between the two situations, many commentators have argued that the situation in which the plans are used without

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104. 367 F. Supp. 1051 (E.D. Mich. 1973).
105. *Id.* at 1053.
106. *Id.*
107. *Id. See* Shipley, *supra* note 91, at 411 n.88.
108. 785 F.2d 897 (11th Cir. 1986).
109. *Id.* at 904-05
110. *Id.*

copying does not constitute infringement.[111] First, they state that no infringement occurs because a structure is not a "copy" of the plans. That is, a structure built from the unauthorized use of the plans is a result of the plans, not a copy of the plans, and is not the equivalent of an actual duplication into another set of plans.[112] Second, they contend no infringement occurs when the architect's plans are used without his consent because copyright does not include the right of an architect to control the use of his plans.[113]

Neither of these reasons for denying copyright protection is adequate. Copying can occur in any medium.[114] The mere fact that the medium in this situation is a three-dimensional structure rather than two-dimensional plans is irrelevant,[115] because "one possible method of 'fixing' a plan in 'tangible form' from which the work can be perceived would be to build the building described by the plans."[116] Additionally, giving an architect the right of control over the unauthorized use of his plans would still leave the well-established doctrine of *Baker* intact.[117]

Baker should be interpreted as standing for the proposition that an architect simply has no exclusive right to ideas, methods of construction, or processes of work depicted in his plans. It should not be interpreted as holding that an architect has no control over the unauthorized use of his plans.[118] Liability should not turn on whether the copying was done for use or for explanation, as both instances equally divest the architect of ideas and economic and creative interest in his work.[119] Melville Nimmer was correct in saying that

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111. *Id. See, e.g.*, Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 941 (W.D. Tex. 1982); DeSilva Constr. Corp. v. Herald, 213 F. Supp. 184, 195 (M.D. Fla. 1962); Muller v. Triborough Bridge Auth., 43 F. Supp. 298, 300 (S.D.N.Y. 1942).

112. *DeSilva Constr. Corp.*, 213 F. Supp. at 196. "The court also found that buildings were not 'copies' of the plans and could not 'publish' them." COPYRIGHT OFFICE REPORT, *supra* note 1, at 37 n.39.

113. *DeSilva Constr. Corp.*, 213 F. Supp. at 195. The court stated that "it appears to be the unanimous view of respected text writers that, under the current copyright laws of the United States, the architect does not have the exclusive right to build structures embodied in his technical writings." *Id. See also* Imperial Homes v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972) (where the court stated that copyrighted drawings do not "clothe their author with the exclusive right to reproduce the dwelling pictured"); Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 941 (W.D. Tex. 1982); Muller v. Triborough Bridge Auth., 43 F. Supp. 298, 300 (S.D.N.Y. 1942).

114. 1 M. NIMMER, *supra* note 5, § 2.08[D], at 2-119 n.176.; 2 M. NIMMER, *supra* note 5, § 8.01[B].

115. 2 M. NIMMER, *supra* note 5, § 8.01 [B], at 8-15. *See also* Shipley, *supra* note 91, at 415-16.

116. Hellmuth, *Obsolescence Ab Initio: The New Act and Architectural Copyright*, 22 BULL. COPYRIGHT SOC'Y 169, 178 (1975).

117. Shipley, *supra* note 91, at 414.

118. *Id.* at 413.

119. *Id.* at 414.

> [t]he copyright in plans should very definitely protect against the unauthorized use of such plans in the building of a structure. A copyright in architectural plans which does not include the exclusive right to erect structures based upon such plans makes no more sense than copyright in musical or dramatic compositions without the exclusive right of public performance. In order to be meaningful the copyright must include rights which give the work economic value.[120]

In summary, an architect should be able to control the use of his plans because the architect is not seeking to protect ideas as they appear individually in the plans, but is seeking to protect his economic interest in the compilation of ideas which, when depicted in the plans, form the architect's own original expression.

An architect should also be protected from attempts to build a substantially similar structure from either photographs of the original building or measured drawings of the original building.[121] However, the courts are hesitant to provide protection in this instance because they view it as equivalent to providing protection to the original structure itself.[122]

In response to this rationale, the Frank Lloyd Wright Foundation has stated that "the legal system [provides] an anomalous result which everyone senses is wrong, but for which an equitable solution is believed to be particularly elusive."[123] Simply put, an architect's interests are no less divested when a substantially similar building is built based on measured drawings or a photograph than when the building is built from the unauthorized use of copied plans or the unauthorized use of uncopied plans.[124]

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120. M. Nimmer, *Comments and Views Submitted To the Copyright Office on Copyright in Architectural Works*, COPYRIGHT L. REVISION 85 (1959).

121. G. Quatman & M. Brown, Response to Copyright Office Notice of Inquiry on Architectural Work Protections (Sept. 16, 1988), *reprinted in* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comment 5, at 8. The AIA defines measured drawing as a drawing "made by careful observation or surveying of an existing building's exterior and or interior and then creating new graphic works from the observation and surveying." Proskauer Rose Goetz & Mendelsohn on behalf of the American Institute of Architects, Response to Copyright Notice of Inquiry on Architectural Work Protections (Sept. 16, 1988), *reprinted in* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comment 6, at 4, n.2 [hereinafter Proskauer].

122. Donald Frederick Evans & Assoc. v. Continental Homes, Inc., 785 F.2d 897, 901 n.7 (11th Cir. 1986). *See* Proskauer, *supra* note 121, at 6.

123. Frank Lloyd Wright Found., Response to Copyright Office Notice of Inquiry on Architectural Work Protections, *reprinted in* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comments of the Frank Lloyd Wright Found., at 9.

124. *Id.*

However, because the law does not protect the architect when measured drawings are used to build a substantially similar building because the effect would be to protect the structure itself, the issue arises as to what copyright protection, if any, is afforded to architectural structures.

B. Copyright Protection of Architectural Structures

Architectural structures are protected in only two instances in the United States.[125] They are protected first when the structure is purely nonfunctional or monumental[126] (for example, the Washington Monument), and second, when the functional structure incorporates design features that are conceptually separable from the utilitarian aspect of the structure.[127] Even in this instance, however, only the design feature is protected,[128] not the structure.[129] For example, separable ornamentation such as a gargoyle on the side of a building would be protected, but the building itself would not be protected.[130]

The courts' reluctance to extend copyright protection to works of architecture is based on sections 102(a)(5)[131] and 101[132] of the 1976 Act. Although section 102(a)(5) protects pictorial, graphic, and sculptural works, the definition of these types of works in section 101 raises a barrier to the inclusion of architectural works in this category of protectible subject matter.[133] First, the definition raises a barrier to the

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125. H.R. REP. No. 1476, 94th Cong., 2d Sess. 55 (1976).

126. *Id. See* Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729 (M.D. Pa. 1936).

127. H.R. REP. No. 1476, 94th Cong., 2d Sess. 55 (1976).

128. *Id.*

129. *Id. See also* Donald Frederick Evans & Assoc. v. Continental Homes, Inc., 785 F.2d 897, 901 n.7 (11th Cir. 1986).

130. H.R. REP. No. 1476, 94th Cong., 2d Sess. 55 (1976). *See* COPYRIGHT OFFICE REPORT, *supra* note 1, at 220.

131. 17 U.S.C. § 102(a)(5). This section provides that "[c]opyright protection subsists, in accordance with this title, 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. Works of authorship include . . . pictorial, graphic, and sculptural works." *Id.*

132. *Id.* § 101. This section states that

> [p]ictorial, graphic, and sculptural works include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. 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.

133. Note, *supra* note 84, at 70.

protection of a functional structure itself because it provides that the mechanical or utilitarian aspects of pictorial, graphic, and sculptural works are not protected.[134] Second, section 101 serves as a barrier to the protection of a functional structure because it provides that a useful article's separate ornamentation or embellishments will be considered a pictorial, graphic, and sculptural work if the ornamentation is separable from and capable of existing independently of the utilitarian aspects of the useful article.[135]

Taken together, these two provisions would preclude all structures, aside from those structures that are purely monumental, from being protected because most structures have a utilitarian aspect because they provide shelter as a home or a place of business. The scope of protection for useful articles as codified in section 101 originates from *Mazer v. Stein*,[136] in which the Supreme Court held that "[i]ndependent works of art may be copyrighted even if they are incorporated into useful articles, but that protection in such cases . . . extend[s] only to that aspect of the article . . . [that is] independent of the useful article."[137] This requirement is referred to today as conceptual separability.

Conceptual separability is the key criterion that a useful article must meet if any aspects of that article are to be protected.[138] The House Report accompanying the 1976 Act states the intention that the overall design of a useful article, although aesthetically pleasing, is not copyrightable subject matter. The Report states that only those elements that are physically or conceptually identifiable from the utilitarian aspects of the useful article are protected.[139] For example, the House Report explains

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134. 17 U.S.C. § 101. The pertinent part of the section provides that "[pictorial, graphic, and sculptural works] shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned." *Id.*

135. Note, *supra* note 84, at 70.

> 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.

17 U.S.C. § 101.

136. 347 U.S. 201 (1954).

137. *Id.*

138. Note, *supra* note 84, at 70.

139. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976).

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of . . . an industrial product contains some element that, physically or conceptually can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.

Id.

that a carving on the back of a chair would be protected, but that the overall design of the chair would not.[140] With regard to architectural works, the House Report provides that protectible subject matter includes only the separable ornamentation and not the overall design of the structure.[141] In summary, both section 102(a)(5) and *Mazer v. Stein*, as codified in section 101, provide a rationale for the generally accepted rule that monumental structures are protectable subject matter as are a building's separable ornamentation or embellishments.

Section 102(b)[142] and *Baker v. Selden*[143] also serve as reasons for the courts' reluctance to grant protection to works of architecture.[144] Section 102(b) codifies the *Baker* rule that copyright protection does not extend to an idea, but only to the expression of an idea.[145] Section 102(b) also states that copyright protection does not extend to procedures, processes, systems, and methods of construction.[146] This rule certainly applies to architects and works of architecture, but it should not preclude works of architecture from being protected. Experts also agree that neither *Baker* nor section 102(b) precludes works of architecture from being protected.[147]

The Copyright Office published a Notice of Inquiry in the Federal Register on June 8, 1988,[148] asking interested persons to comment on a number of issues regarding works of architecture and works related to architecture.[149] Responses to the Notice of Inquiry agreed that neither

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140. *Id.*

141. *Id.*

142. 17 U.S.C. § 102(b)(1976). "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." *Id.*

143. 101 U.S. 99 (1879).

144. COPYRIGHT OFFICE REPORT, *supra* note 1, at 200.

145. *Id.*

146. 17 U.S.C. § 102(b).

147. COPYRIGHT OFFICE REPORT, *supra* note 1, at 202. *See* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comment 3 at 2, comment 5 at 11-12, comment 6 at 5, comment 11 at 2-3. Professor Nimmer has also written: "It is noteworthy that in *Mazer v. Stein*, 347 U.S. 201 (1954), the Supreme Court interpreted *Baker v. Selden*, 101 U.S. 99 (1879), as merely holding that the copying of an idea without copying the expression of the idea . . . does not constitute infringement." 1 M. NIMMER, *supra* note 5, § 2.18[D].

148. Notice of Inquiry: Works of Architecture, 53 Fed. Reg. 21,536 (June 8, 1989).

149. *Id.* The Inquiry touches on three broad areas: (1) the type of copyright and other forms of protection currently accorded works of architecture and works related to architecture; (2) the need, if any, for protection beyond that now available including whether perceived deficiencies are capable of resolution through private consensual arrangements; and 3) the laws and actual practices of foreign countries in protecting works of architecture and works related to architecture. *Id.*

section 102(b) nor *Baker* prohibits works of architecture from being protected.[150] The Frank Lloyd Wright Foundation stated:

> We do not view *Baker v. Selden* or 102(b) of the Act as having any effect on the protection of copyrightable elements of a building or structure under copyright, just as neither affects protection of any other copyrightable work. The design of a building or structure is not 102(b) subject matter. [We] concur with . . . Professor Nimmer that "the rationale for the doctrine of *Baker v. Selden* in no event justified the denial of copyrightability to any work."[151]

Thus, a proper reading of section 102(b) and *Baker* would provide that an architect cannot claim a copyright in the ideas, processes, and methods of construction of a work of architecture.[152] But an architect should be able to claim a copyright in and protect his own manner of expressing those ideas because those ideas, when taken together, form the architect's original expression as exemplified in a completed structure.[153]

Of the nine responses received by the copyright office, seven favored protection for architectural works.[154] The commentators noted that protection in other areas of the law is inadequate.[155] These areas include design patents, trademark, contract, misappropriation, conversion, unfair competition, and unjust enrichment.[156]

Design patents protect the ornamental appearance of a new, original, and nonobvious design.[157] This form of protection is inadequate because,

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150. COPYRIGHT OFFICE REPORT, *supra* note 1, at 202. "The Notice of Inquiry asked for comment on the effect, if any, of *Baker v. Selden* on protection of works of architecture. Four commentators responded to this question. All agreed that *Baker v. Selden* in no way restricted protection for these works as a class." *Id.* The five commentators who responded to this question are: Professor David E. Shipley, University of South Carolina; the American Institute of Architects; the Frank Lloyd Wright Foundation; G. William Quatman, Esq., AIA, and Mark E. Brown, an attorney with a degree in architecture. *Id.* The other commentators include Frank X. Arvan, an architect; Michael E. Minns, an attorney; Mark G. Gilligan, a structural engineer; Thompson, Hine & Flory, a law firm representing architects, contractors, and owners; IBM; and David K. Perdue, on behalf of the American Institute of Architects as Associate General Counsel. *Id.* at app. C.

151. Frank Lloyd Wright Found., *supra* note 123, at 3.

152. Shipley, *supra* note 91, at 412.

153. *Id.* at 417.

154. COPYRIGHT OFFICE REPORT, *supra* note 1, at 195.

155. *Id.* at 63-69.

156. *Id.*

157. 35 U.S.C. § 171 (1952).

first, the term of protection granted for a design patent, 14 years,[158] is much shorter than the term of protection granted for copyright, which extends for the life of the author and for an additional 50 years after the author's death.[159] Secondly, the requirements of novelty, originality, and nonobviousness required by design patent law present a formidable hurdle that would deny protection to most, if not all, works of architecture.[160] Lastly, although design patents have protected the architectural components of some architectural works, the cases granting such protection[161] are old and rarely followed.[162]

Trademark law has offered limited protection to the unique design of commercial businesses.[163] But this protection extends to the owner of the commercial business, not to the architect, because the public associates the unique design of the structure with the owner's product or services rather than with those of the architect.[164] Thus, it is evident that trademark law does not adequately protect the architect. The commentators further noted that contract protection is often inadequate because the plans are usually revealed prior to the contract, and because a contract does not offer the architect much protection against third parties who duplicate a structure that is constructed pursuant to a contract.[165]

Finally, recovery under causes of action for misappropriation, conversion, unfair competition, or unjust enrichment appears equally unlikely, because allowing recovery may create a conflict with the principle of federal preemption embodied in section 301 of the 1976 Act.[166] Section 301 provides that the 1976 Act preempts any state causes of action that grant legal or equitable rights that are the equivalent of or come within the general scope of copyright, in works that come within the subject matter of copyright.[167] The Copyright Office noted that it is not the application of a state cause of action such as conversion or misappropriation to a claim that renders the claim preempted; rather, it is the nature of the claim pleaded by the plaintiff and the elements needed to prove that claim which determine whether federal law preempts.[168] A general rule is that if the activity pleaded amounts to a claim of copyright

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158. *Id.*
159. 17 U.S.C. § 301(a)(1976).
160. Frank Lloyd Wright Found, *supra* note 123, at 14-15.
161. Ritter - Conley Mfg. Co. v. Aiken, 203 F. Supp. 669 (3d Cir. 1913).
162. G. Quatman & M. Brown, *supra* note 121, at 7.
163. *See, e.g.*, Fotomat Corp. v. Cochran, 437 F. Supp. 1231 (D. Kan. 1977).
164. G. Quatman & M. Brown, *supra* note 121, at 7.
165. *Id.* at 8.
166. 17 U.S.C. § 301(a) (1976).
167. *Id.*
168. COPYRIGHT OFFICE REPORT, *supra* note 1, at 68.

infringement, federal law preempts the state action pleaded.[169] Thus, although some state actions will survive federal law preemption, others will not because they do not differ qualitatively from copyright infringement.[170] It is for this reason alone that other forms of protection for works of architecture are needed.

The reasons given for granting protection to works of architecture include that protection would encourage creativity benefiting both the architect and the public.[171] That is, the public would benefit from the dissemination of unexecuted plans, as architects would be able to publicize plans without the fear that others will use the plans to construct the depicted structure.[172] The commentators also noted that architecture is a traditional fine art that should be granted the protection other art forms enjoy, especially because the Berne Convention, of which the United States is a member, protects works of architecture.[173]

The 1976 Act, however, only grants limited protection to works of architecture.[174] As mentioned earlier, only the separable ornamentation or artistic sculpture added to the functional structure is protected.[175]

The test of whether a functional structure's design features can be identified separate from, and can exist independent of, the utilitarian aspects of the functional structure is referred to as the conceptual separability test.[176] However, there is disagreement concerning the appropriate standard for conceptual separability and what should be protected under the test.[177]

C. The Evolution of Conceptual Separability

According to the Copyright Office, conceptual separability requires that the design features, although physically inseparable from the useful article, clearly be recognizable from the useful article in order that they may be protected.[178] The design features and the "useful article [must

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169. *Id.*
170. *Id.*
171. *Id.* at 198.
172. *Id.*
173. *Id.*
174. *See* 17 U.S.C. § 102(a)(5) (1976); *id.* § 101.
175. *See supra* text accompanying notes 124-29.
176. COPYRIGHT OFFICE REPORT, *supra* note 1, at 204. *See supra* text accompanying notes 137-40.
177. *E.g.*, Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 5 U.S.P.Q. 2d (BNA) 1089 (2d Cir. 1987); Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985); Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980); Esquire Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).
178. COPYRIGHT OFFICE, COPENDIUM II COPYRIGHT OFFICE PRACTICES, para. 505.03 (1984).

be able to] exist side by side and be perceived as fully realized, separate works — one an artistic work, and the other a useful article."[179]

This test suggested by the Copyright Office is overbroad because it ultimately denies protection to many works that should be given copyright protection. It would not, for instance, prevent someone from copying the attractiveness of a building's overall shape. Under this test, an architect is protected only if an imitator uses or copies a structure's separable ornamentation and embellishments, incorporating them into a second structure. This test also discriminates in favor of styles of architecture that incorporate separable ornamentation. The separable ornamentation representative of the Victorian style would be protected, although the sleek and simple lines of the Miesian style would not be protected.[180] Lastly and perhaps most importantly, this test fails to recognize that a work of architecture is as much a work of art as subject matter, such as literature or music, currently protected by section 102(a) of the 1976 Act.

Many jurists have applied different tests for conceptual separability other than the one suggested by the Copyright Office. One such test is the temporal displacement test.[181] Under this test, conceptual separability exists "whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously."[182] Conceptual separability exists when the beholder temporarily displaces the utilitarian functions of the article and instead recognizes the design features of the article.[183]

In *Carol Barnhart, Inc. v. Economy Cover Corp.*,[184] Judge Newman dissented and applied the temporal displacement test to an artistically designed chair, stating that the requisite separateness exists if the ordinary beholder can temporarily displace the utilitarian function of the chair and entertain separably the artistic aspects of the chair.[185] Separateness would not exist if the ordinary beholder recognized the artistic aspects of the chair simultaneously with the utilitarian aspects of the chair.[186] According to Judge Newman, the issue of conceptual separability should be determined by the jury.[187] Additionally, he stated that when deter-

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179. *Id.*

180. Shipley, *supra* note 91, at 427.

181. Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411, 422 (2d Cir. 1985).

182. *Id.* That is, the "article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function." *Id.*

183. *Id.*

184. 773 F.2d 411 (2d Cir. 1985).

185. *Id.* at 423 (Newman, J., dissenting).

186. *Id.*

187. *Id.*

mining whether the two concepts are entertained simultaneously or separately, the trier of fact should be able to consider whatever evidence it deems necessary.[188] For instance, factors such as how the item is displayed (as a work of art apart from its utilitarian function), expert opinion, and survey evidence should all be received.[189]

Requiring the jury to determine whether the two concepts, that of a work of art and that of a utilitarian article, are entertained simultaneously is a tedious task that inevitably would lead to incongruous results. Moreover, the requirement of this test, whether two concepts are entertained simultaneously, is a fiction that should not govern the granting or denial of copyright protection to a work of architecture.

Unlike the test suggested by the Copyright Office, the temporal displacement test arguably may extend protection to the overall shape of a structure when that shape as a work of art is not entertained simultaneously with the structure's utilitarian function. However, this test is inappropriate because it only offers protection to a limited and ephemeral class of architectural structures; that is, those that have demonstrably separable artistic aspects and utilitarian functions.

Another test offered by the Frank Lloyd Wright Foundation suggests that conceptual separability should turn on whether the "ordinary observer understands the work as having a conceptually dual function — that of a work of art and that of a useful article."[190] Of the tests suggested by various jurists, this test seems to be the best; first, because it arguably extends protection to works of architecture under existing law, eliminating the need for further legislation,[191] and second, because the test is already used in trademark law.[192]

In its comments to the Copyright Office, the Frank Lloyd Wright Foundation concluded that existing copyright protection should be applied to cover architectural works.[193]

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188. *Id.*

189. *Id.*

190. Frank Lloyd Wright Found., *supra* note 123, at 23. "Factors which could tend to show functioning as art work would include, without limitation: a materially higher price paid for the work because of the artwork component; any display or attempted display of the work in museums; publicity of the work as a work of art; the awarding of artistic prizes and or the entering of the work in artistic competitions; inclusion in art publications; direct evidence of consumer perception of the work as a work of art (by affidavit or survey evidence); demonstrations of the importance of artistic concerns in creating the plans or drawings, expert testimony; and the number of copies made or intended to be made." *Id.*

191. *Id.* at 20.

192. *Id.* at 22.

193. *Id.* at 20.

> We believe that existing copyright law should be interpreted to cover the pictorial, graphic or sculptural features of a design of an architectural work to the extent such features are understood to "exist independently" of the utilitarian aspects of the useful article. These pictorial, graphic or sculptural features of the design could, under this approach, inhere in the entire architectural work, or in portions of the work.[194]

The dual function test has been applied in trademark law to determine whether a useful article is worthy of trademark protection.[195] If the useful article is perceived as having a nonfunctional trademark purpose in addition to its utilitarian purpose, then conceptual separability exists and trademark protection is granted.[196] For instance, the Court of Custom and Patent Appeals granted trademark protection to a cleaning product container despite the container's utilitarian function because it was shown that the design of the container was understood as a "symbol of origin" (that is, a trademark).[197] The Frank Lloyd Wright Foundation argues that the same test could be applied in copyright law to determine whether a useful article is perceived also as a work of art.[198]

Unlike the temporal displacement test, the dual function test does not require the tedious task of knowing whether the beholder can temporarily displace the utilitarian function of the article.[199] Nor does this test require that the articles exist "side by side and be perceived as fully realized, separate works,"[200] one artistic and the other useful. Perhaps most importantly, this test recognizes that an architectural structure's overall shape is the product of an architect's work and is no less a form of art than other subject matter currently protected by section 102(a) of the 1976 Act. "Just as the arrangement of individually uncopyrightable words results in the production of a copyrightable literary work,"[201] so too should the arrangement of individually uncopyrightable components of architecture result in the production of a copyrightable architectural work.

The Copyright Office has suggested another test for conceptual separability that also arguably supports protection for works of architecture under existing law.[202] Similar to the dual-capacity test suggested

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194. *Id.*
195. *Id.* at 22.
196. *Id.*
197. *Id.*
198. *Id.*
199. COPYRIGHT OFFICE REPORT, *supra* note 1, at 208.
200. *Id.*
201. Proskauer, *supra* note 121, at 5.
202. COPYRIGHT OFFICE REPORT, *supra* note 1, at 208-10. This test was suggested in the Copyright Office Report released June 19, 1989. *See supra* note 1.

by the Frank Lloyd Wright Foundation, this test provides that conceptual separability should evolve to accord protection not only to the artistic sculpture or separable ornamentation of a structure, but also to the overall shape of the structure.[203] More specifically, the test suggests that design features will vary according to the structure and that some structures will include design features, such as separable ornamentation or artistic sculpture, although others will not.[204] The test further provides that buildings that do not contain separable ornamentation or artistic sculpture may have an overall shape that itself could be considered a protected design feature.[205] In short, the test concludes that the scope of protectible design features should include not only separable ornamentation and artistic sculpture, but also the overall shape of a building. For instance, "it could be reasoned that the Guggenheim is a building; that as a building it has an overall shape; that the artistic features of the Guggenheim are its overall shape"[206] and that, therefore, the overall shape should be protected.

Like the dual function test suggested by the Frank Lloyd Wright Foundation, this test applies existing copyright law to protect architectural works. It recognizes that a building's design or overall shape can be set apart from its utilitarian function and recognized as protectible subject matter. The weakness, however, that sets this test apart from the dual function test is that it would deny protection to the overall shape of an architectural work when the overall shape facilitates the utilitarian aspects of the building.

D. Has Conceptual Separability Evolved to the Extent That It Provides Adequate Protection to Works of Architecture?

The conceptual separability test currently in use by the Copyright Office should be abandoned to the extent that it does not recognize or protect the overall shape of a structure. Furthermore, although conceptual separability arguably has evolved to accord protection to the overall shape of a building as discussed in the aforementioned tests, this form of protection is insufficient in the face of article 2(1) of the Berne Convention which expressly provides that works of architecture are protected.[207]

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203. COPYRIGHT OFFICE REPORT, *supra* note 1.

204. *Id.*

205. *Id.*

206. *Id.* A more definitive analysis is as follows: Can the ordinary observer recognize the presence of artistic features in the overall shape of the building? If so, are those features dictated by the utilitarian aspects of the structure (*i.e.*, is the overall shape of the building designed to facilitate the utilitarian aspects of the building)? If not, then the artistic features are conceptually separable (protectible). *Id.*

207. Berne Convention (Paris text), *supra* note 52, art. 2(1), at 27-1 to -2.

Other members of the Berne Union recognize that works of architecture are works of authorship and have drafted legislation granting works of architecture protection equal to that of other art forms.[208] It behooves Congress to grant protection to works of architecture equal to that afforded in other countries.

III. The Berne Convention Protects Works of Architecture

Article 2(1) of the Berne Convention provides that the expression "literary and artistic works" shall include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."[209] Among the works protected by article 2(1) are works of architecture, illustrations and plans relative to architecture, and three-dimensional works relative to architecture.[210] The copyright law adequately protects illustrations and plans relative to architecture[211] and three-dimensional works relative to architecture.

However, the issue remains whether the current composite of United States Copyright Law protecting works of architecture is sufficient to adhere to the Berne Convention, especially when considering the protection other member nations afford works of architecture. The scope of this Note precludes in-depth discussion of the protection other member nations grant to works of architecture. Nonetheless, broad generalizations may be considered. First, other nations either include works of architecture as a subclass of "artistic works" or they create a separate category for architectural works as protected subject matter.[212] All nations regard architectural works, if original, as artistic creations.[213] The concept of originality, however, can mean different things depending on the country.[214] Originality can require that the author of the work claim that he created the work without copying a substantially similar building, or it can require that the work of architecture "convey a personal intellectual, artistic, or other creative character."[215] Most often, however, works of architecture are protected even though they have no artistic merit.[216]

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208. Copyright Office Report, *supra* note 1, at 223. "The copyright law of virtually every Berne member country makes express reference to protection for buildings and structures." *Id.*

209. Berne Convention (Paris text), *supra* note 52, art. 2(1), at 27-1 to -2.

210. *Id.*

211. Recall that the architect is not adequately protected when his plans, although not copied, are used to build a substantially similar structure. *See supra* text accompanying notes 110-19 (where it is argued that the architect should be protected in this situation).

212. Copyright Office Report, *supra* note 1, at 162.

213. *Id.* at 162-63.

214. *Id.*

215. *Id.*

216. *Id.* at 223.

Additionally, all nations protect works of architecture without regard to whether the work has a utilitarian function by providing that the utilitarian aspects of a work are not protectible subject matter.[217] The remedies afforded architectural works are often the same as those for other works, except that when the structure is substantially completed, destruction is not available.[218]

When deciding what changes were necessary in the area of protection for works of architecture, Congress was confused and uncertain. Although it initially heard testimony that the current composite of the law protecting such works was inadequate,[219] Congress later chose not to make any changes to the 1976 Act once it heard testimony that current United States law satisfies article 2(1)'s requirements for architectural protection.[220] To alleviate much of the confusion, Congress asked the Copyright Office to conduct a study. Specifically, Congress asked the Copyright Office to address the issue of architectural protection — deciding what structures should be protected and how this should be done.[221]

The Copyright Office released its report on June 19, 1989, and asked Congress to consider amending the law concerning works of architecture.[222] Additionally, the report offered four possible ways in which United States law could be brought into conformity with the requirements of the Berne Convention.[223] Ironically, however, the report

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217. *Id.* at 163.

218. *Id.*

219. *U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 1st & 2d Sess. (1985) (statement of Irwin Karp, Chairman of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention). See COPYRIGHT OFFICE REPORT, *supra* note 1, at 103-06.

220. *The Berne Convention: Hearings on S.1301 and S.1971 Before the Subcomm. on Patents, Copyrights, & Trademarks, Senate Judiciary Comm.*, 100th Cong., 2d Sess. 182 (1988) (statements of Professor Paul Goldstein and former Register of Copyrights Barbara Ringer).

> The essence of this testimony is that present law, including the requirement of conceptual separability, is sufficient to provide protection for architectural works (and features of such works) based upon their demonstrable artistic character. The belief that [U.S. law] was compatible with the Berne Convention rested upon the fact that many Berne Union countries did not generally protect buildings *per se*, but only those containing clear artistic features or character. In short, that absent a more detailed examination, the requirements of artistic content (but not quality) present in Berne legislation might tend to produce similar results when variant U.S. tests of copyrightability were applied to the same subject matter.

COPYRIGHT OFFICE REPORT, *supra* note 1, at 216.

221. COPYRIGHT OFFICE REPORT, *supra* note 1.

222. COPYRIGHT OFFICE REPORT, *supra* note 1, preface, at vi.

223. COPYRIGHT OFFICE REPORT, *supra* note 1, at 223-26.

did not issue an opinion as to which solution was the best or what types of structures should be protected.[224]

The four possibilities mentioned in the report are: (1) do nothing and allow the courts to develop new legal theories of protection under existing statutory and case law, as they attempt to come to grips with the United States's adherence to the Berne Convention;[225] (2) amend the 1976 Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans;[226] (3) amend the definition of "useful article" in the 1976 Act to exclude unique architectural structures;[227] and (4) create a new subject matter category for works of architecture in the 1976 Act and legislate appropriate limitations.[228]

IV. Analysis of the Alternatives Mentioned by the Copyright Office for Protection of Works of Architecture

A. Do Nothing and Allow the Courts to Develop New Legal Theories of Protection Under Existing Statutory and Case Law

The first option, that Congress do nothing and allow the courts to develop new legal theories of protection under existing statutory[229] and case law,[230] appears attractive because further legislation is not needed to protect works of architecture. Furthermore, this alternative appears equitable because the courts would be deciding, on an ad hoc basis, which works of architecture to protect. Arguably, only the most deserving architectural works would receive protection.

However, legislative abdication is not the best alternative because it leaves the courts with the insurmountable task of developing new legal theories from inadequate statutory law and case law that purports to protect works of architecture. Other member nations have passed legislation that provides for protection of works of architecture, and these nations have done so in an equitable manner by providing that works must be original in order to receive copyright protection.[231] In short, because case law, statutory law, and the conceptual separability test currently used by the Copyright Office protect only the separable or-

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224. *Id.* at 226.
225. *Id.* at 225-26.
226. *Id.* at 224.
227. *Id.* at 225.
228. *Id.* at 223-24.
229. *See supra* text accompanying notes 130-34.
230. *See supra* text accompanying notes 135-45.
231. *See supra* text accompanying notes 211-15.

namentation of a building, it is evident that Congress must legislate to protect works of architecture to put the United States on par with other member nations.

B. Amend the 1976 Act to Give the Copyright Owner of Architectural Plans the Right to Prohibit Unauthorized Construction of Substantially Similar Buildings Based on Those Plans

This alternative was proposed by the American Institute of Architects [AIA]. It prohibits the situation in which an architectural work is copied by the unauthorized use of the copyrighted plans to construct an identical, second structure.[232] However, this alternative is inadequate. Absent the use of copyrighted plans to build a substantially similar structure, copyright infringement would not exist. If a substantially similar building was built from either measured drawings or a photograph of the original structure, and not from the structure's copyrighted plans, there would be no infringement.[233] The AIA rationalizes that because the plans are copyrightable material, they are infringed upon when someone uses them without authorization to build a substantially similar structure.[234] The AIA further argues, however, that because a structure is not copyrightable subject matter, it cannot be infringed upon when a person's own measured drawings of the structure are used to build a substantially similar structure.[235] According to this rationale, protection is only afforded to the plans of a structure, but not the structure itself because the offending act is not the construction of a substantially similar building, but the use of copyrighted plans to build that building.[236] This argument is unreasonable because it merely amounts to saying that "[i]t's okay to copy the appearance of that house identically but don't you dare use the underlying plans to achieve the same result."[237]

This alternative is inadequate because it only protects the architect in the limited situation in which a person "obtain[s] a set of blueprints and, while not engaging in any unauthorized copying, . . . use[s] the blueprints to construct a duplicate structure without authorization."[238] It does not sufficiently protect the architect in the situation in which

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232. Proskauer, *supra* note 121, at 4. *See supra* text accompanying notes 110-19.

233. *Id.* "Time-honored practices of making 'measured drawings' from others' buildings and borrowing design elements (except conceptually severable copyrighted works) would be unaffected; competitors would only be barred from constructing a new building from others' copyrighted plans." *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Frank Lloyd Wright Found., *supra* note 123.

238. G. Quatman & M. Brown, *supra* note 121.

sketches are made of a structure's exterior or interior through careful observation and then are used as measured drawings to build a substantially similar building.[239] However, both situations equally divest the architect's interest in protecting his work.[240] An architect should be protected from the imitator who uses measured drawings to construct a substantially similar building because the imitator is doing nothing more than using another person's original expression of an idea for his own benefit.

This is not to say that an imitator cannot use ideas as they appear individually in a work of architecture. Such a proposition would be violative of the principle found in *Baker v. Selden* and section 102(b) that an architect does not have exclusive rights to the design ideas, concepts, and methods of construction disclosed in his copyrighted plans.[241] This proposition merely suggests that an imitator should not be able to take from a building the architect's original expression or compilation of ideas, and use them to build a substantially similar building.

The concern that prohibiting the use of measured drawings and thereby protecting works of architecture would constitute protecting the utilitarian aspects of the architectural work is misleading. Granting protection to the compilation of design ideas that comprise the architectural work would not constitute protection of the utilitarian aspects of the architectural work because most, if not all, design ideas bear no connection to the functional needs of a structure.[242] In fact, the absence of most design ideas from a structure or building would have no effect on the function of these structures or buildings.[243] Additionally, recall that experts in copyright law agree that neither *Baker v. Selden* nor section 102(b), which prohibits copyright protection of ideas, procedures, processes, systems, and methods of operations, precludes the design of a structure from being protected.[244] In effect, these experts conclude that the design of a building or structure is not section 102(b) subject matter and is, therefore, protected by copyright law.[245] Thus, the compilation of design ideas that comprise a work of architecture should be subject to copyright protection apart from those utilitarian aspects of the struc-

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239. *See supra* text accompanying notes 120-23.

240. *Id.*

241. *See supra* text accompanying notes 117-18.

242. COPYRIGHT OFFICE REPORT, *supra* note 1, at 211. "The relative importance of function in architecture is vastly overemphasized, (footnote omitted) perhaps as a result of unfamiliarity with the discipline. (footnote omitted) Very few architectural design elements are actually required by functional needs. There are hundreds, if not thousands, of non-functional design options in many architectural structures." *Id.*

243. *Id.*

244. *See supra* text accompanying notes 149-52.

245. *Id.*

ture, such as methods of construction, that are denied such protection.[246]

Allowing the architect to recover when measured drawings are used to build a substantially similar building would not open the floodgates of litigation because it would be harder to prove infringement. Copyright infringement will be more difficult to prove in this situation because the plaintiff will not be able to show copying or use of his plans.[247] Thus, the architect must prove that the imitator had access to or viewed the structure, and that the second structure's exterior and interior are substantially similar to the original structure.[248] In summary, protecting the architect when his plans are used to build a substantially similar building is inadequate because it only extends copyright protection to the architect's plans and not to the work of architecture itself.

C. Amend the Definition of "Useful Article" in the 1976 Act to Exclude Unique Architectural Works

Congress could amend the definition of "useful article" in section 101 of the 1976 Act to exclude unique architectural structures.[249] Consequently, the conceptual separability test found in the definition of pictorial, graphic, and sculptural works would no longer apply to unique architectural structures.[250] Recall that the design of a useful article will be considered a pictorial, graphic, or sculptural work when the design incorporates features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.[251] Thus, by excluding "unique architectural structures" from the definition of "useful articles," such structures would be considered "pictorial, graphic, or sculptural works," not useful articles subject to the conceptual separability test. Therefore, protection would not be limited to the separable ornamentation of the architectural work. It would extend to the work itself.

This alternative is narrow in scope protecting only unique works of architecture rather than a broad class of architecture, such as single-

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246. *Id.*

247. D. Shipley, Response to the Copyright Office Notice of Inquiry on Architectural Work Protections (Sept. 10, 1988), *reprinted in* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comment 3, at 3.

248. Shipley, *supra* note 91, at 446-47.

249. COPYRIGHT OFFICE REPORT, *supra* note 1, at 225. Therefore the new definition would be [*insertion*]: "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article'. *A 'unique architectural structure' does not constitute a 'useful article'.*" 17 U.S.C. § 101 (1976).

250. *Id.*

251. *Id. See supra* text accompanying note 134.

family housing. The Copyright Office Report states, however, that despite its narrow scope, this alternative should be considered because the impact of the change in the law affecting works of architecture would be minimized, the most deserving architectural structures would be protected, and the conceptual separability analysis would no longer apply.[252]

As the Copyright Office suggested, this alternative is worthy of consideration, especially because, unlike any of the other legislative solutions previously discussed, it extends copyright protection to architectural works. However, although this alternative seems to be ideal, the Copyright Office has neglected to define the term "unique architectural work." By not providing a definition of this term, Congress left for the courts the almost insurmountable task of deciding which architectural works are unique and worthy of protection. That is, because the term "unique architectural work . . . eludes precise definition"[253] there will be great uncertainty among the courts when determining which structures to protect.

In addition, the uniqueness requirement treats architectural works differently than other protectible subject matter, such as music or literature. For instance, the 1976 Act does not require that only unique musical works be protected; rather section 102(a) of the 1976 Act provides that "[c]opyright protection subsists . . . in original works of authorship." Because architecture is a form of art equivalent to music and literature, it should not be held to a higher standard, such as uniqueness, to receive copyright protection. In short, an architectural structure should be protected when it is original.

Limiting protection only to unique architectural structures is conservative when compared to the majority of the countries belonging to Berne, which protect works of architecture without expressly imposing a higher level of originality, such as artistic merit.[254] Melville Nimmer argued that the controlling principle for copyright protection for works of architecture should be the same as it is for all works of authorship:[255] the work must be of an original nature to be protected.[256] "[A]rchitectural structures in themselves should . . . be the subject of copyright protection, and [it] is undesirable to make any arbitrary distinction as to 'artistic'

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252. COPYRIGHT OFFICE REPORT, *supra* note 1, at 225.

253. Copyright Office Study No. 27, in Strauss, *Copyright in Architectural Works* (1959), *reprinted in* SENATE COMMITTEE PRINT, 86TH CONG., 2D SESS., 1966 COPYRIGHT L. REVISION STUDY 77.

254. COPYRIGHT OFFICE REPORT, *supra* note 1, at 159.

255. M. Nimmer, *Comments and Views Submitted to the Copyright Office on Copyright in Architectural Works* (1959), *reprinted in* SENATE COMMITTEE PRINT, *supra* note 253, at 86.

256. *Id.*

structures. If the form of the structure may be said to be original, this should be sufficient."[257]

D. Create a New Subject Matter Category Under Section 102(a) of the Copyright Act of 1976 for Works of Architecture

Congress could protect works of architecture by creating a new subject matter category.[258] Recall that section 102(a) of the 1976 Act provides an illustrative list of copyrightable works.[259] Those areas currently protected are literature; music; pantomime and choreography; pictorial, graphic, and sculptural works; motion pictures and audiovisual works; and sound recordings.[260] This list, however, is illustrative, not limiting.[261] Although Congress did not intend every writing to be copyrightable, it still left section 102(a) undefined because it did not want to "freeze the scope of copyrightable subject matter at the present stage of communications technology or . . . allow unlimited expansion into areas completely outside the present Congressional intent."[262]

Congress could expand copyright protection beyond that accorded in section 102(a) in two instances: first, when a new form of creative expression is made possible by a scientific discovery or technological development; and, second, when an existing form of expression is recognized as creative and worthy of protection.[263]

Architecture is not a new form of creative expression, but it is an existing form that arguably should be recognized as creative and worthy of protection. Music, drama, and works of art were not accorded protection under the first Copyright Statute of 1790, but they were later recognized as worthy of protection and included within section 102(a).[264] Thus, because music, drama, and works of art are no more creative than architecture, it necessarily follows that architecture should be worthy of the same protection by creating a new subject matter category for works of architecture under section 102(a) of the 1976 Act. Opponents to this alternative characterize the granting of protection to works of architecture as opening a "can of worms."[265] They argue that although

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257. *Id.*
258. COPYRIGHT OFFICE REPORT, *supra* note 1, at 223-24.
259. 17 U.S.C. § 102(a) (1976).
260. *Id.*
261. H.R. REP. No. 1476, 94th Cong., 2d Sess. 53 (1976).
262. *Id.* at 51.
263. *Id.*
264. *Id.* at 51-52.
265. *Berne Convention Implementation Act of 1987, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives*, H.R. 1623, 100th Cong., 1st & 2d Sess. 679-80 (June 17 & 23, Sept. 16 & 30, 1987, Feb. 9 & 10, 1988). *See* COPYRIGHT OFFICE REPORT, *supra* note 1, at 132.

other countries protect works of architecture, and article 2(1) of the Berne Treaty specifically provides protection for architectural works, such protection nonetheless will cause great uncertainty and confusion in the law.[266] For example, because the Berne Convention vests in the architect the right to control subsequent construction of his work, opponents assert that questions surrounding zoning laws or the tearing down of homes for eminent domain purposes would be confused.[267] However, such confusion would be alleviated by thoughtful congressional consideration of these uncertainties and by carefully drafted legislation. A few uncertainties should not preclude the United States from protecting works of architecture, especially when other countries adhering to Berne have overcome these uncertainties or found them to be minimal, and instead have chosen to recognize architecture as a protected art form.

Additionally, opponents argue that protecting works of architecture would not be in the architect's best interests because it would "stifle the creativity of architects,"[268] and add the undue burden of originality verification.[269] Protecting works of architecture would not stifle the creativity of architects because the only protectible aspect of a structure would be the compilation of design ideas which form the architect's own original expression.[270] Copyright protection would not protect individual design ideas that are "staple, commonplace, or familiar in the industry."[271] Such protection would create monopolization of ideas in violation of the principles enunciated in *Baker v. Selden* and codified in section 102(b). Therefore, because design elements that have been

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266. *Berne Convention Implementation Act of 1987, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives*, H.R. 1623, 100th Cong., 1st & 2d Sess. 679-80 (June 17 & 23, Sept. 16 & 30, 1987, Feb. 9 & 10, 1988). *See* COPYRIGHT OFFICE REPORT, *supra* note 1, at 132.

267. *Id.*

268. F. Arvan, Response to Copyright Office Notice of Inquiry on Architectural Work Protections (Aug. 16, 1988), *reprinted in* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comment 1. *See* G. Quatman & M. Brown, *supra* note 121, at 4.

269. F. Arvan, Response to Copyright Office Notice of Inquiry on Architectural Work Protections (Aug. 16, 1988), *reprinted in* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comment 1. *See* G. Quatman & M. Brown, *supra* note 121, at 4.

270. Shipley, *supra* note 91, at 445.

271. Frank Lloyd Wright Found., *supra* note 123, at 4. "There can be originality, and protectibility, for . . . [architectural] works, regardless of whether they include elements of the staple, the commonplace or the familiar." *Id. See also* J.W. Henderson on behalf of IBM, Response to Copyright Office Notice of Inquiry on Architectural Work Protections (Sept. 16, 1988), *reprinted in* COPYRIGHT OFFICE REPORT, *supra* note 1, app. C, comment 7, at 2-3. "Architectural works or any other category [should not] be discriminated against merely because they might include elements which are 'staple, commonplace, or familiar in the industry.'" *Id.*

duplicated throughout history would not be protected under copyright law, architects could continue to "borro[w] ideas and concepts, or imitat[e] the general styles of their contemporaries and predecessors"[272] without the fear that they would be infringing the rights of others and be, therefore, subject to liability.

Architects would not be burdened with the worry of originality verification — that their structure would violate another copyrighted structure — because they would only be subject to liability when there has been an affirmative act to duplicate an already existing copyrighted structure. Architects will only be subject to liability when they use or copy copyrighted plans to build a substantially similar building.[273]

Furthermore, a strong presumption of copyright infringement will attach when the architect's building is substantially similar to the copyright owner's building, and the copyright owner proves that the architect had access to the copyrighted building.[274] It must be noted, however, that this is a heavy burden for the copyright owner. "Access" does not mean that simply because the building is in the public domain, the architect had access to it. Rather, access connotes the affirmative act of walking through the building, taking pictures of the building, or making measured drawings from observations of the building.[275] Therefore, an architect would not be subject to liability when the architect does not affirmatively attempt to duplicate the original structure, but does so anyway by mere coincidence.

Opponents also argue that architecture is not worthy of copyright protection commensurate to that of other works of authorship, such as literary works or musical works, because "an architectural structure is usually composed of standard elements capable of being synthesized by craftsmen and therefore the individualized artistic flair is often less apparent than in the work of the writer, painter, or sculptor."[276] This view that architecture is less deserving of copyright protection than are other works of authorship is disheartening. Perhaps a reason for this view is that we are often too familiar with works of architecture to

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272. Shipley, *supra* note 91, at 445.

273. *Id.* at 446. *See* D. Shipley, *supra* note 247, at 2-3. "With some simple structures the substantial similarity of protected expression test would not be satisfied unless the copying amounted to almost verbatim reproduction of the entire structure. . . . [C]ourts should not hesitate to find infringement when copying is established and the plaintiff shows that the internal plans of the two structures are substantially similar." *Id.*

274. *Id.*

275. D. Shipley, *supra* note 247.

276. J. Cahn, *Comments and Views Submitted to the Copyright Office on Copyright in Architectural Works* (1959), *reprinted in* SENATE COMMITTEE PRINT, 86TH CONG., 2D SESS., 1966 COPYRIGHT L. REVISION STUDY 86.

consider them an art form.[277] We know so many of the particulars about a work of architecture, such as its location, its insurance rates, its mortgage payments, and its occupants that our perception of it as an art form is often obscured.[278]

Additionally, works of architecture are often emphasized for their utilitarian aspects or function.[279] However, as mentioned earlier, most, if not all, design ideas bear no connection to the functional needs of a structure.[280] In fact, the absence of most design ideas from a structure or building would have no effect on the function of these structures or buildings.[281] It is for this reason that the compilation of design ideas that comprise a work of architecture should be regarded for their artistic aspects rather than their utilitarian aspects.

Indeed, the compilation of design elements chosen by an architect when designing a building is no different than the "sequence and arrangement of notes"[282] chosen by a musician when composing a song or the "choice and arrangement of colors [and] lines"[283] selected by an artist when painting a portrait. "Like composers, painters, and poets, an architect's choices reflect subjective, aesthetic judgment that constitutes the essence of creativity, the encouragement of which forms the foundation of copyright."[284]

If Congress should take this route and include works of architecture within the subject matter of section 102(a), other issues must be considered.[285] These issues are the exact nature of the buildings covered by the new subject matter, the nature of the limitations on the exclusive rights, and the nature of the remedies. [286] These issues were originally discussed in House Resolution 1623.[287]

House Resolution 1623 was introduced in early 1987 when the United States was deliberating Berne adherence.[288] It would have provided protection for architectural works by including in section 101 of the 1976 Act a definition of architectural works,[289] and amending the definition

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277. COPYRIGHT OFFICE REPORT, *supra* note 1, at 211 n.36.
278. S. AMBERCROMBIE, ARCHITECTURE AS ART 7 (1983).
279. COPYRIGHT OFFICE REPORT, *supra* note 1, at 211.
280. *Id. See supra* text accompanying notes 241-42.
281. COPYRIGHT OFFICE REPORT, *supra* note 1, at 211.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 223-24.
286. *Id.*
287. H.R. 1623, 100th Cong., 1st Sess. 1 (1987).
288. *Id. See* COPYRIGHT OFFICE REPORT, *supra* note 1, at 123.
289. H.R. 1623, 100th Cong., 1st Sess. 3, § 4(a) (1987). "Section 101 is amended by inserting after the definition of 'anonymous work' the following: 'Architectural works'

of pictorial, graphic, and sculptural works to exclude architectural works.[290] The legislation also amended section 102(a) by including architectural works as protectible subject matter.[291] The scope of protection afforded architectural works was limited to the work's artistic character and artistic design.[292] It did not include protection for the methods of construction or processes of the work.[293] The legislation also provided that a copyright owner would not be entitled to injunctive relief when the structure was substantially begun.[294] In particular, equitable remedies such as stopping construction, seizure, or demolition would not be available because such remedies would result in economic waste.[295] Finally, the owner of the work of architecture was granted the permission to modify the structure without fear of infringing the architect's rights in the structure provided that the modifications were minor or necessary for the use of the structure.[296]

In July of 1987, however, House Resolution 1623 was amended and introduced as House Resolution 2962.[297] The two bills were very similar except that House Resolution 2962 did not include within the definition of an architectural work that the work must be of an "original artistic

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are buildings and other three-dimensional structures of an original artistic character, and works relative to architecture, such as building plans, blueprints, designs, and models." *Id.*

290. *Id.* "Section 101 is amended in the definition of 'Pictorial, graphic, and sculptural works' by inserting before the period at the end of the first sentence ', other than architectural works'." *Id.*

291. *Id.* at 5, § 5. "Section 102(a) is amended — (1) by redesignating paragraphs (6) and (7) as paragraphs (7) and (8), respectively; and (2) by inserting after paragraph (5) the following: '(6) architectural works;'." *Id.*

292. *Id.* at 10, § 9(a). "Processes or Methods of Construction Not Protected. The exclusive rights of a copyright owner in an architectural work shall apply only to the work's artistic character and artistic design and shall not extend to processes or methods of construction." *Id.*

293. *Id.*

294. *Id.* at 12, § 9(c).

> Limitations Regarding Construction. The owner of the copyright in an architectural work (1) shall not be entitled to obtain an injunction under section 502 of this title restraining the construction or use of an infringing building, if construction has substantially begun; and (2) may not, under any circumstances, obtain a court order under chapter 5 of this title requiring that an infringing building be demolished or seized.

Id.

295. *Id.*

296. *Id.* at 12, § 9(d). "Alterations to Buildings. The owners of a building embodying an architectural work may, without the consent of the author or copyright owner, make or authorize the making of minor alterations to such building, or other alterations to such building in order to enhance the utility of the building." *Id.*

297. H.R. 2962, 100th Cong., 1st Sess. (1987). *See* COPYRIGHT OFFICE REPORT, *supra* note 1, at 126.

character."[298] Instead, House Resolution 2962 defined an architectural work as "a work such as a building or other three-dimensional structure and related works such as plans, blueprints, sketches, drawings, diagrams, and models relating to such building or structure."[299] Further, House Resolution 2962 differed in that it prohibited copyright in the utilitarian features of an architectural work, and it gave the owner of the building additional control over the reconstruction of the building once it was completed.[300] Nonetheless, despite the minor differences between House Resolution 1623 and House Resolution 2962, the central precept of the two bills, creating a new subject matter category for works of architecture, is the most appropriate alternative because it recognizes architecture for what it is — a work of authorship worthy of copyright protection equal to that enjoyed by other art forms.

Congress should create a new subject matter category for works of architecture under section 102(a).[301] However, this protection should not be unlimited. First, to protect only the most deserving architectural structures, section 101 should include within the definition of architectural works a requirement that the architectural work must be of an original character to be worthy of protection.[302] Including within the definition

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298. COPYRIGHT OFFICE REPORT, *supra* note 1, at 126.

299. *Id.*

300. *Id.*

301. G. Quatman & M. Brown, *supra* note 121, at 17. The proposed amendment is as follows:

17 U.S.C. § 102 (1976). Subject matter of copyright:

In general

(a) Copyright protection subsists, in accordance with this title, 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. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings[]; *and*

(8) architectural works.

Id. (emphasis added).

302. *Id.* Section 101 would be amended to include the following definition of "architectural works" (*insertion*):

§ 101. Definitions. *"Architectural works" include buildings and other three-dimensional structures of an original character, and works relative to architecture, such as building plans, elevations, designs, sketches, drawings, blueprints and models.*

Id. (emphasis added).

of architectural works the additional requirement that an architectural work must be of an "original artistic character" in order to enjoy copyright protection would present the courts with the almost impossible task of determining what structures are artistic in nature. Although some countries adhering to the Berne Convention require that works of architecture possess an artistic character or design, commentators argue that "this reference is, in practice, only the general standard of originality."[303] Because works of architecture are art forms equivalent to other works of authorship currently protected by section 102(a), they should be held to the same standard: "originality without more."[304]

Further, to prevent the monopolization of ideas, the new legislation also should clearly provide that the scope of exclusive rights in architectural works does not include processes or methods of construction or purely utilitarian features of such works.[305] Moreover, to prevent economic waste, the legislation should state that remedies do not include injunctions to restrain the construction or use of an infringing building once construction has substantially begun, and that remedies do not include demolition or seizure of the infringing building.[306] Rather, the legislation should provide that remedies are limited to monetary awards based on the plaintiff's damages or based on the defendant's profits.

Finally, to protect the use of a structure, the legislation should provide that the owner of the building may make alterations to it without infringing the copyright in the building if the alterations are necessary for the building's maximum utility.[307]

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303. *Id.* at 159 n.5. *See* W. COPINGER AND S. JAMES, ON COPYRIGHT 718, at 299 (11th ed. 1971).

304. Proskauer, *supra* note 121, at 5.

305. G. Quatman & M. Brown, *supra* note 121, at 17. Section 119 would be amended to define the scope of exclusive rights in architectural works as follows (*insertion*):

§ *119. Scope of exclusive rights in architectural works.*

(a) The exclusive rights of a copyright owner in an architectural work are limited to those rights specified in clauses (1), (2), (3), (5), and (6) of Section 106, and shall not extend to processes or methods of construction or purely utilitarian features of such works.

Id.

306. *Id.* Section 119 should further include the following (*insertion*):

(c) The owner of a copyright in an architectural work —

(1) shall not be entitled to obtain an injunction under section 502 of this title to restrain the construction or use of an infringing building, if construction has substantially begun; and

(2) may not obtain a court order, under chapter 5 of this title, requiring that an infringing building be demolished or seized.

Id.

307. *Id.* at 18. Section 119 should finally include the following (*insertion*):

(d) It is not an infringement of copyright in an architectural work for the

V. Conclusion

Most countries grant copyright protection to architectural works and architectural plans. The United States, however, grants architectural works and architectural plans second class protection. The Copyright Act of 1976 affords copyright protection only to monumental structures and the separable ornamentation of functional structures. Although copyright law protects architects from those who duplicate their plans into another set of plans, it does not prohibit imitators from the unauthorized use of those plans in building the structure the plans depict. Furthermore, copyright law does not protect against those who attempt to build a substantially similar structure from photographs or measured drawings of the original building.

If the United States hopes to become a country on par with other countries in the copyright community, it must provide copyright protection to works of architecture, which other countries adhering to the Berne Convention recognize and which the Berne Treaty itself dictates. The United States must also grant architects copyright protection against the unauthorized use of their plans and the use of measured drawings to build a substantially similar building. Creating a new subject matter category for works of architecture under section 102(a) of the Copyright Act of 1976 would afford architectural works and plans the protection they deserve, and prove to the world that the United States is a full-fledged member of the Berne Convention.

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owner of a building embodying such architectural work, without the consent of the author or copyright owner, to make or authorize the making of alterations to such building, in order to enhance the utility of the building.

Id.

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