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NOTES

BUILDING UPON THE ARCHITECTURAL WORKS PROTECTION COPYRIGHT ACT OF 1990

VANESSA N. SCAGLIONE

INTRODUCTION

The Architectural Works Protection Copyright Act of 1990¹ ("Architectural Copyright Act" or "Act") grants copyright protection to designs embodied in actual works of architecture.² In essence, the Act creates a new category of protectible subject matter for architectural works,³ allowing an architect to sue for infringement when a subsequent building is copied from his or her copyrighted building.⁴

Congress passed the Architectural Copyright Act to comply with the Berne Convention for the Protection of Literary and Artistic Works⁵ ("Berne Convention") with respect to works of architecture.⁶ The United States' adherence to the Berne Convention signified its alignment "with other developed and developing nations in subscribing to the world's oldest and most extensive [copyright] treaty."⁷ The Berne Convention includes works of architecture as protected subject matter under a broad category of literary and artistic works.⁸ Thus, for the United States to comply with the Berne Convention, it was necessary to forego United States tradition and grant architectural works outright copy-

1. Pub. L. No. 101-650, 104 Stat. 5133 (1990) (codified in scattered sections of 17 U.S.C.).

2. The Act protects the design of the building rather than the building itself. See *infra* note 21 and accompanying text. As the United States Copyright Office has stated, "[T]he protection of architectural works under copyright is fundamentally not about the protection of buildings *per se*; it is . . . about the protection of perceptible personal expression embodied in some, but not all, buildings." United States Copyright Office, A Report of the Register of Copyrights: Copyright in Works of Architecture 157 (1989) [hereinafter Copyright Report].

3. See 17 U.S.C. § 102 (Supp. II 1990). Protection for the constructed building is distinct from protection for plans, models, and specific sculptural features of a building. See *infra* notes 9-12 and accompanying text (detailing copyright in architecture).

4. The Act applies equally to all persons designing architectural works and not just to architects. See H.R. Rep. No. 735, 101st Cong., 2d Sess. 18 n.36 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6949 n.36 [hereinafter H.R. 735]. For the sake of simplicity, this Note uses the term "architect" to encompass all designers of architectural works.

5. Sept. 9, 1886, revised in Paris on July 24, 1971, 828 U.N.T.S. 221.

6. See H.R. 735, *supra* note 4, at 4, reprinted in 1990 U.S.C.C.A.N. at 6935. For a description of the Berne Convention, see World Intellectual Property Org., Guide to the Berne Convention for the Protection of Literary and Artistic Works (1978); Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 Colum.-VLA J.L. & Arts 1, 8-24 (1988).

7. Ginsburg & Kernochan, *supra* note 6, at 1.

8. See Berne Convention, *supra* note 5, art. 2.1.

right.⁹ Prior to the Architectural Copyright Act, American copyright law did not protect architecture *per se*,¹⁰ although monumental architecture¹¹ and certain works related to architecture were protected.¹²

9. See Copyright Report, *supra* note 2, at 221; see generally Laura E. Steinfeld, *The Berne Convention and Protection of Works of Architecture: Why the United States Should Create a New Subject Matter Category for Works of Architecture Under Section 102(a) of the Copyright Act of 1976*, 24 Ind. L. Rev. 459 (1991) (arguing that protection of architectural works was necessary under Berne); Natalie Wargo, *Copyright Protection for Architecture and the Berne Convention*, 65 N.Y.U. L. Rev. 403 (1990) (same).

Throughout the various acts of Congress, architectural works never received outright copyright protection. Thus, because architectural works did not constitute their own category of protected subject matter, the only recourse for an architect was to seek protection for his work under the category of "pictorial, graphic, or sculptural" works. See Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Acts and the Architectural Works Copyright Protection Act of 1990*, 14 Colum.-VLA J.L. & Arts 477, 490 (1990). A building's overall shape, however, was specifically denied protection under this category. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5668 [hereinafter H.R. 1476]; see also Copyright Report, *supra* note 2, at 202-04, 218-19 (explaining this lack of protection).

Moreover, the 1976 Copyright Act did not protect useful articles. See Pub. L. No. 94-553, 90 Stat. 2541 (1976) (as codified at 17 U.S.C. § 101) (defining "pictorial, graphic, and sculptural" works). Section 101 of the Copyright Act defines a "useful article" as an article "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101 (1988); see also 1 Melville Nimmer, *Nimmer on Copyright* § 2.18[A]-[D], at 2-195 to 2-207 (1978) (explaining rationale for denying protection to useful articles). Because most structures provide shelter, they are technically utilitarian and were not eligible for copyright protection under the 1976 Copyright Act. Thus, buildings were only protected under the category of "pictorial, graphic, and sculptural" works to the extent that they included features that were separable from the building's utility. See 17 U.S.C. §§ 101, 113 (1988); Ginsburg, *supra*, at 490-91; see also *infra* notes 52-54 and accompanying text (discussing protection of monumental works).

10. See Nimmer, *supra* note 9, at OV-1 to OV-7 (giving a brief history of copyright law and the present acts of Congress that legislate copyright).

11. Monumental architecture has been defined as "works which society at large regards as artistic statements, [and] with such a self-evident, unmistakable stamp of artistic individuality that the useful features of the structure are fundamentally tertiary to the real nature of the work." Copyright Report, *supra* note 2, at iv.

12. Works "related to" architecture—including architectural plans, drawings, and sketches—were protected under the 1976 Copyright Act. See Pub. L. No. 100-568, § 4(a)(1)(A), 102 Stat. 2853, 2854 (1988) (codified at 17 U.S.C. § 101) (technical drawings, which also include architectural drawings, are included under the protected category of "pictorial, graphic, and sculptural works"); see also *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 897-98 (5th Cir. 1972) (recognizing plans as protected works); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 260-61 (D. Neb. 1982) (same); David E. Shipley, *Copyright Protection for Architectural Works*, 37 S.C. L. Rev. 393, 394-417 (1986) (detailing history on copyright law relating to architecture prior to the Act). Moreover, when a structure incorporated decorative ornamentation separable from its utilitarian aspects, these elements were also protected as pictorial or sculptural works. See H.R. 1476, *supra* note 9, at 14, reprinted in 1976 U.S.C.A.N. at 5627; see also Nimmer, *supra* note 9, at OV-1 to OV-7 (for a brief history of copyright law and the present acts of Congress that legislate copyright). An example of a separate artistic work on a building is a gargoyle on a cornice or a mural on a ceiling.

Following the statutory history, courts had historically agreed that building a subsequent, identical building was not copyright infringement if based on visual inspection of

Prior to the Architectural Copyright Act, Congress attempted to comply with the Berne Convention via the Berne Implementation Act of 1988.¹³ While this legislation expressly provided protection for architectural plans and models as "pictorial, graphic, and sculptural works," it nevertheless omitted protection for completed architectural structures.¹⁴ To compensate for this lack of protection, Congress commissioned the Copyright Office to review the current scope of copyright protection for architectural works.¹⁵ The Copyright Office determined that "U.S. law may well prove inadequate to fulfill the requirements of the Berne Convention," and suggested alternatives to comply with the Berne Convention.¹⁶ Based on these recommendations, Congress enacted the Architectural Copyright Act.

Despite the Act's good intentions, it provides inadequate guidance for determining exactly which architectural works should be protected. While the legislative history might have provided some basis for filling in this gap, it in fact created further confusion.¹⁷ Three major problems

another building, rather than on copyrighted drawings. See *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 280 (6th Cir. 1988); *Demetriades v. Kaufmann*, 680 F. Supp. 658, 666 (S.D.N.Y. 1988); *DeSilva Constr. Corp. v. Herrald*, 213 F. Supp. 184, 196 (M.D. Fla. 1962); cf. *Associated Hosts, Inc. v. Moss*, 207 U.S.P.Q. (BNA) 973, 975-76 (W.D.N.C. 1979) (enjoining defendant from copying plaintiff's drawings although there was no evidence that defendant had access to the drawings). Courts had also agreed that copying copyrighted drawings did constitute infringement. See *Demetriades*, 680 F. Supp. at 666; *Ga-On Homes, Inc. v. Spitzer Homes, Inc.*, 178 U.S.P.Q. (BNA) 183, 186 (M.D. Fla. 1973), *aff'd*, 181 U.S.P.Q. (BNA) 685 (5th Cir. 1974). An architect, therefore, was protected from the unauthorized use or duplication of her copyrighted drawings but not from the building of a subsequent, identical building based on a visual inspection of her structure. This inconsistency, although rare, did not make any sense considering that an architect is harmed more by the construction of another building identical to her own than by the simple copying of her plans. See *Shipley, supra*, at 401-02.

13. Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.); see generally Ginsburg & Kernochan, *supra* note 6, at 8-24 (describing the impact of the Berne Implementation Act on American copyright law).

14. See Berne Implementation Act § 4(a), 102 Stat. at 2855.

15. See Letter from Robert W. Kastenmeier, Chairman of Subcommittee of Courts, Civil Liberties and the Administration of Justice, to Ralph Oman, Register of Copyrights (Apr. 27, 1988), in Copyright Report, *supra* note 2, app. A.

16. Copyright Report, *supra* note 2, at 223-26. The four alternatives prepared by the Copyright Office were that Congress could (1) create a new subject matter category for architectural works; (2) amend the 1976 Copyright Act to provide the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans; (3) amend the definition of "useful article" under the 1976 Copyright Act to exclude "unique" (i.e. single copy) architectural structures; and (4) allow the courts to develop new legal theories of protection for architectural works. See *id.*

17. The Subcommittee on Courts, Intellectual Property, and the Administration of Justice methodically explains each provision of the Act. See H.R. 735, *supra* note 4, at 17-25, reprinted in 1990 U.S.C.C.A.N. at 6948-56. One example of the confusion is whether the Act is meant solely to comply with Berne. Compare *id.* at 12, reprinted in 1990 U.S.C.C.A.N. at 6943 ("The importance of H.R. 3990 [the bill on which the Act is based] . . . should not be measured solely by the purpose of placing the United States unequivocally in compliance with its Berne Convention obligations.") with *id.* at 20, reprinted in 1990 U.S.C.C.A.N. at 6951 ("The sole purpose of legislating at this time is to

exist with the Act and its legislative history. First, the legislative history's definition of what is protected under the Act is too restrictive and may exclude works deserving architectural protection. Second, the legislative history's equivocal wording leads to confusion as to whether architectural works can receive dual protection as both sculptural and architectural works. Finally, the Act's legislative history proposes a "functionality test" to determine what aspects of a constructed architectural work are protected. Under this test, if design elements are determined by functional considerations, they are not copyrightable.¹⁸ Hence, the functionality test could exclude most architectural works from protection if it is interpreted narrowly or restrictively.

The Architectural Copyright Act should be construed by courts to ensure full copyright protection for architectural works. By interpreting the Act broadly, courts will carry out the dual constitutional goals of protecting the works of an author and "promot[ing] the Progress of Science,"¹⁹ and the congressional goal of "stimulat[ing] excellence in design, thereby enriching [the] public environment."²⁰ This Note attempts to provide the clarification of the Act necessary to protect all architectural works deserving protection.

Part I of this Note examines the Architectural Copyright Act's definition of "architectural works," focusing particularly on what this category includes and arguing that a broad interpretation of architectural works will most effectively carry out copyright goals. Part II addresses the issue of dual protection for works that fall under the categories of both sculpture and architectural works. This Part concludes that, in appropriate circumstances, architectural works need to be protected as both sculptural and architectural works. Part III outlines the application of the "functionality test" developed by the Act's corresponding legislative history and examines in detail the problems inherent in applying this test to architecture. Part III also asserts that in order to grant effective copyright protection to architecture, the functionality test should be replaced with a more lenient standard to determine a building's copyrightability. This Note offers the following standard for determining when an architectural work and its features should be protected: (1) when the work meets or exceeds a minimal level of creativity; (2) when the work to be protected does not implement a method or process of construction; and (3) when, even if the work does implement a method or process, other

place the United States unequivocally in compliance with its Berne Convention obligations.").

18. See *id.* at 20-21, reprinted in 1990 U.S.C.C.A.N. at 6951-52; see also *infra* notes 71-74 and accompanying text (discussing functionality).

19. U.S. Const. art I, § 8, cl. 8.

20. H.R. 735, *supra* note 4, at 13, reprinted in 1990 U.S.C.C.A.N. at 6944. Other forms of intellectual property do not adequately protect architectural works, and their possible applications to architecture are beyond the scope of this Note. See Copyright Report, *supra* note 2, at 63-69 (discussing other forms of legal protection for architectural works and their inadequacies).

reasonable alternatives could have been used. Finally, this Note concludes that a broad interpretation of the Architectural Copyright Act is essential to ensure copyright protection for architectural works.

I. WHAT IS PROTECTED UNDER THE ARCHITECTURAL COPYRIGHT ACT

A. Defining "Building"

The Architectural Copyright Act and its legislative history suggest starting points for determining exactly what works are included as architectural works. Under the Act, an architectural work is defined as the "design of a *building* as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features."²¹

Recognizing the difficulty in using the term "building," the legislative history attempts to refine the definition of architectural works.²² It states that "[o]bviously, the term [building] encompass[es] habitable structures such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions."²³ Thus, according to legislative history, if the structure is meant to be inhabited by a human being, even temporarily, as in the case of a gazebo, it is a building and therefore qualifies as a copyrightable architectural work.

The legislative history, however, does not resolve all ambiguities.²⁴ Specifically, the history restricts the definition of "building" to exclude "bridges and related nonhabitable three-dimensional structures" from protection.²⁵ This exclusion raises two major questions: (1) is this distinction necessary; and (2) if so, how can an architect know whether his or her work will be categorized as a protected architectural work or as a nonprotected "nonhabitable three-dimensional structure"?

B. Protecting Nonhabitable Structures

Excluding "nonhabitable three-dimensional structures" from the Act poses problems for architectural works that blur the line between archi-

21. Architectural Works Copyright Protection Act § 702(a), 17 U.S.C. § 101 (Supp. II 1990) (emphasis added). The Act, therefore, seeks to protect an architect's design as it is embodied in a built structure. See H.R. 735, *supra* note 4, at 18, *reprinted in* 1990 U.S.C.C.A.N. at 6949 ("The protected work in [sic] the design of the building.").

22. See H.R. 735, *supra* note 4, at 20, *reprinted in* 1990 U.S.C.C.A.N. at 6951 (raising the question of "what is meant by the term 'building'").

23. *Id.*

24. See *id.* at 19-20, *reprinted in* 1990 U.S.C.C.A.N. at 6950-51.

25. *Id.* at 20, *reprinted in* 1990 U.S.C.C.A.N. at 6951. Because the Berne Convention does not require the protection of these structures, Congress deferred the question of their copyrightability to "another day." See *id.*

ecture and nonhabitable three-dimensional structures. For example, the bridge-like sculpture mimicking the Statue of Liberty's crown in Battery Park City in Manhattan,²⁶ fits both definitions. It is habitable like a pergola or gazebo and therefore is a building under the Act's legislative history; at the same time, it is a lookout and therefore probably qualifies as a nonhabitable three-dimensional structure that would not receive protection under the legislative history.²⁷

The follies²⁸ in the Parc de la Villette in Paris provide additional examples of structures that blur the line between architecture and nonhabitable three-dimensional works. Although some of the follies are easily defined as buildings because of the functions that they house—for example, a restaurant and a visitors' center—others, such as the belvedere folly,²⁹ serve no utilitarian function. Under the legislative history's guidelines, it is impossible to determine whether this latter structure would qualify as architecture, sculpture, or nonhabitable structure.³⁰

Finally, many bridges are monumental and deserve as much protection

26. The steel sculpture is essentially a semi-circular staircase with a lookout. A trellis above echoes the Statue of Liberty's crown. For a more detailed description and photograph of the lookout, see Nancy Princenthal, *In the Waterfront*, Village Voice, June 7, 1988, at 99.

27. *See id.* (describing the work as part of a collaboration between an artist, an architect, and a landscape architect to include public art in Battery Park City).

28. A folly is an "extravagant picturesque building erected to suit a fanciful taste." Webster's New Collegiate Dictionary 480 (9th ed. 1990).

29. *See* Ziva Freiman, *A Non-Unified Field Theory*, Progressive Architecture, Nov. 1989, at 65-73 (including a photograph of the belvedere folly and descriptions of most of the other follies).

30. The problem of distinguishing architecture from nonhabitable three-dimensional structures is analogous to distinguishing sculpture from utilitarian articles. This problem was raised in a Ninth Circuit case, *Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984). In *Poe*, an artist sought damages for copyright infringement of an article that looked like a swimsuit, but that he called an "artwork." *See* 745 F.2d at 1239. The court held that there was a disputed issue of material fact as to whether the article was a work of art which is protected, or a utilitarian article of clothing which is not protected. *See id.* at 1243. Under the rationale of this case, a designer might escape the prohibition of protecting nonhabitable three-dimensional structures by calling his work "architecture" or "sculpture." *See* Shipley, *supra* note 12, at 424-25 (applying this argument to utilitarian artwork). This argument, however, would be successful only in cases where no evidence existed that the work had a utilitarian function. *See id.* This, in turn, could lead to subjective determinations of what classifies as utilitarian. For example, if the defendant in *Poe* had shown that the plaintiff's work could be worn, the plaintiff may have lost his case even though he clearly intended to create a work of art rather than a swimsuit. A different judge, however, may not have been persuaded that use as a bathing suit was an intrinsic function of the artwork.

The problems with this type of analysis were also raised in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987). In this case, a bicycle rack designer sought damages for copyright infringement. The court held for the defendant, stating that the rack was not entitled to copyright protection because its form was influenced by functional concerns. *See id.* at 1147. The artist's subjective intent in his design thus became relevant. As in *Poe*, an architect citing *Brandir* could simply state that he intended to design an architectural work rather than an excluded three-dimensional structure. Such a result is untenable because, as one judge stated in *Brandir's* dissent, the "focus on the process or sequence followed by the particular designer makes copyright

as buildings. For example, architects recognize the Golden Gate Bridge and the Bay Bridge in California as valuable works of architectural design.³¹ The legislative history, however, specifically precludes the protection of bridges under the Architectural Copyright Act.³² This result defies both logic and the legitimate expectations of architects. Put simply, these works should be given copyright protection under the Act because the legislative history creates an inappropriate distinction between architectural works and nonhabitable, three-dimensional structures.³³

C. *Expanding the Definition of "Building"*

Unlike the legislative history, the Architectural Copyright Act does not automatically exclude nonhabitable three-dimensional structures from protection because it never defines the term "building" in the statute itself.³⁴ Thus, courts should grant protection to these works and place less emphasis on the legislative history.

In passing the Act, Congress had originally sought to protect "architectural works embodied in innovative structures that defy easy classification."³⁵ Congress was concerned, however, that the phrase would also encompass, among other things, cloverleaves, dams, and interstate highway bridges,³⁶ and the legislative history seems to reflect this concern in its restrictive language. This concern, however, is largely unfounded. First, most cloverleaves, dams, and highway bridges are owned by the government and therefore are automatically excluded from copyright protection.³⁷ Second, many works that are not governmentally-owned also are excluded because protection only extends to works involving creativity. Architects will still be able to copy those structures that are purely functional. Finally, the difficulty of proving infringement will circumscribe an architect's ability to effectively protect purely functional structures.

protection depend upon largely fortuitous circumstances concerning the creation of the design in issue." *Id.* at 1151 (Winter, J., dissenting).

31. Both the Golden Gate Bridge and the Bay Bridge had consulting architects involved in their designs. They have been praised for their design excellence in architecture journals. See Michael J. Crosbie, *The Background of the Bridges*, *Architecture*, Mar. 1985, at 150.

32. See H.R. 735, *supra* note 4, at 20, reprinted in 1990 U.S.C.C.A.N. at 6951. A complete discussion of the copyrightability of structures such as bridges is beyond the scope of this Note and is part of the larger question of the copyrightability of industrial design. See generally Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 *Minn. L. Rev.* 707 (1983) (discussing copyright protection for industrial designs). This Note only points out the deficiencies in the Act and the possible unfairness in its application.

33. See *infra* note 72 and accompanying text.

34. See *supra* note 21 and accompanying text.

35. H.R. 735, *supra* note 4, at 19-20, reprinted in 1990 U.S.C.C.A.N. at 6950-51.

36. See *id.* at 20, reprinted in 1990 U.S.C.C.A.N. at 6951.

37. See 17 U.S.C. § 105 (1988) (copyright protection unavailable for works of the United States Government). Although many of these works may be state-owned, they can also be excluded from protection for other reasons. See *infra* notes 38-48 and accompanying text.

As one commentator has noted, "In those rare cases where function alone is determinative, a monopoly would be avoided by the inherent difficulty in proving that the claimant's design had been copied rather than independently conceived."³⁸ Therefore, structures such as bridges and dams will not be protected unless they embody highly unique and exceptional designs.

The difficulty of proving infringement would prevent copyright monopolies on shapes dictated by consumer preference,³⁹ thereby omitting mundane structures, such as typical highway overpasses, from copyright protection. Furthermore, "the risk of granting a monopoly on basic designs by extending copyright protection to architectural works is circumvented in [other] countries by the fact that 'it is naturally more difficult to prove infringement of copyright in a plain building than in one showing marked originality.'"⁴⁰ The issue of infringement may also be completely avoided: Basic shapes are part of the public domain and therefore ineligible for copyright protection in the first place.⁴¹

Infringement also requires a finding of *substantial* similarity between the works. As one court has stated, "A general impression of similarity in design is not enough to make out an infringement case."⁴² The fact that a structure is copyrighted does not mean that a similar structure will be found to be an infringement. In addition, courts should allow "substantial latitude . . . [to subsequent architects] so that they can modify and perhaps improve upon unprotectible architectural styles, ideas, and concepts."⁴³ Therefore, an expansive definition of "building" will not permit the original architect to have a monopoly on a universal design or diminish the creativity of other architects.

Courts are fully able to distinguish between protecting expression and protecting ideas, processes, or methods, and can apply this to architecture. For example, in one case, a plaintiff sought damages from defendants who allegedly copied the plaintiff's design of a structure built for the World's Fair.⁴⁴ In dictum, the court stated that the plaintiff could not copyright his *idea* of a tower with a spherical building on the top of it.⁴⁵ The court, recognizing that the use of towers was not unique and that the

38. Erika White, *Standing on Shaky Ground: Copyright Protection for Works of Architecture*, 6 *Art & the Law* 70, 71 (1981) (suggesting that using the separability test to discriminate against modern, streamlined works is unnecessary to achieve copyright's goals).

39. *See id.*

40. *Id.* (quoting F.E. Skone James, *Copinger on the Law of Copyright* 256 (9th ed. 1958)).

41. *See id.*

42. *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 555 F. Supp. 154, 155 (E.D. Tenn. 1983), *aff'd*, 739 F.2d 1094 (6th Cir. 1984).

43. *Shiplee*, *supra* note 12, at 447.

44. *See Wickham*, 555 F. Supp. at 154.

45. *See id.* at 156; *see also Shiplee*, *supra* note 12, at 446 ("[S]imilarities resulting from the fact that both structures are based on the same general concept . . . will not provide the basis for a successful [infringement] claim.").

form of the defendant's structure was completely dictated by functional requirements,⁴⁶ implied that this too would prevent the success of plaintiff's infringement claim. Yet the design of a structure like the Golden Gate Bridge transcends the functional requirements of a bridge and deserves to be copyrighted.

Another example of how courts protect designs rather than ideas in architectural works involved a plaintiff who alleged that the defendant had infringed on his copyrighted bridge approach.⁴⁷ The court held that, because the second bridge was independently conceived, the infringement claim could not be sustained.⁴⁸ Moreover, the court stated in dictum that, even if the defendant had copied the plaintiff's plans, the plaintiff would have no cause of action because he could not copyright his system of traffic control.⁴⁹ Copyrighting a structure such as the Bay Bridge would extend only to its creative aspects and not to a new construction method.

Along these lines, someone trying to protect a highway bridge, canal, or dam is unlikely to win an infringement case because it would be difficult for the plaintiff to prove that the defendant did not conceive the design on his own. Additionally, the design may be considered to be a system. Either way, proving infringement is difficult in structures with little creativity, and courts should allow a broad definition of "building." Such a broad definition would protect most architectural works, and would therefore carry out the constitutional and congressional goals of encouraging creativity, enhancing the environment, and benefitting the public.⁵⁰ Moreover, a broad definition of building would not hinder other architects' creative expressions by creating a monopoly over commonplace architectural ideas.⁵¹

II. DUAL IDENTITY:

WORKS THAT ARE BOTH SCULPTURE AND ARCHITECTURE

Prior to the Act, three-dimensional models and nonfunctional monumental works of architecture were protected as sculptural works.⁵² This is because these works served as artistic statements rather than as shelters.⁵³ The Washington Monument, for example, is a nonfunctional, monumental, architectural work that could have been protected as a

46. See *Wickham*, 555 F. Supp. at 156.

47. See *Muller v. Triborough Bridge Auth.*, 43 F. Supp. 298 (S.D.N.Y. 1942).

48. See *id.* at 299.

49. See *id.* at 299-300.

50. See *supra* notes 19-20 and accompanying text.

51. See H.R. 735, *supra* note 4, at 18, reprinted in 1990 U.S.C.C.A.N. at 6949; see also Denicola, *supra* note 32, at 718-23 (explaining the rationale behind limiting copyright protection in useful articles).

52. See *Jones Bros. Co. v. Underkoffler*, 16 F. Supp. 729, 731-32 (M.D. Pa. 1936); Copyright Report, *supra* note 2, at 220; see also *supra* note 12 and accompanying text (ornamentation on a building could also be protected as a separate sculptural work).

53. See Copyright Report, *supra* note 2, at iv.

sculptural work,⁵⁴ while the United States Capitol Building would not have been protected because of its function as an office building. One could also argue that the Washington Monument is functional as a lookout. However, its aesthetic qualities are conceptually, and perhaps physically, separable and therefore copyrightable. Even under this view, the Capitol Building would remain unprotected because its function is not conceptually separable from its aesthetic qualities.

Under the Architectural Copyright Act, however, both of these structures receive copyright protection as architectural works. The Act does not state, however, whether monumental works, such as the Washington Monument, are exclusively protected as architectural works, or whether such structures can also receive protection as sculptural works. This question is important because sculptural works receive more protection than architectural works in several respects. First, sculptural works are protected from the making of two-dimensional copies.⁵⁵ Thus, an unlicensed commercial photograph of a sculpture qualifies as infringement while a commercial photograph of a building does not.⁵⁶ In addition, sculptural works fall under the Visual Artists Rights Act of 1990,⁵⁷ which protects, among other things, the "moral" rights of the artist.⁵⁸

The legislative history seems to suggest that nonfunctional, architectural works should receive dual protection.⁵⁹ Nevertheless, the history's wording is confusing and at least one commentator has interpreted it as denying dual protection to a work as both architecture and sculpture.⁶⁰ Resolution of this issue is essential to ensure uniform protection to artists and architects.

A. *Architecture as Sculpture*

The Architectural Copyright Act itself does not explicitly prohibit artists from seeking protection for their works under the categories of both architectural works⁶¹ and sculptural works.⁶² In fact, although the wording in the history is confusing, Congress seems to have intended sculptural architectural works to be protected under both categories. The history states: "Monumental, nonfunctional works of architecture are currently protected under section 102(a)(5) of title 17 as sculptural

54. See Shipley, *supra* note 12, at 425; White, *supra* note 38, at 71.

55. See 17 U.S.C. § 113 (1988).

56. See Ginsburg, *supra* note 9, at 494-95.

57. Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C.); see also Ginsburg, *supra* note 9, at 477-90 (discussing the Visual Artists Rights Act).

58. Moral rights are the artist's personal, noneconomic rights that include claiming authorship and preventing destruction or alteration of his work. See Ginsburg, *supra* note 9, at 478.

59. See *infra* notes 61-64 and accompanying text.

60. See *infra* note 66 and accompanying text.

61. See 17 U.S.C. § 102(a)(8) (Supp. II 1990).

62. See 17 U.S.C. § 102(a) (1988).

works. These works are, nevertheless, architectural works, and as such, *will not be protected exclusively under section 102(a)(8).*"⁶³

By analogy, the Act's legislative history allows architectural plans and drawings to be protected both as architectural works and as pictorial works, stating that "[a]n individual creating an architectural work by depicting that work in plans or drawing [sic] will have two separate copyrights, one in the architectural work . . . the other in the plans or drawings."⁶⁴ Congress was thus not averse to allowing an architect to have this dual protection for his work, and logically this permissiveness can be carried over to allow an architect to protect a work as both sculpture and architecture. Moreover, even if this reading of the legislative history is rejected, it is important to note that the statute itself does not prohibit dual protection. Thus, as some scholars, including Justice Scalia, have argued, the legislative history need not even be considered, and the plain meaning of the statute should be followed.⁶⁵

In opposition, Ginsburg suggests that Congress did not intend to grant dual protection to architectural works. Thus, she writes that the legislative history's footnote states that, "[t]hese works are, nevertheless, architectural works, and, as such will *no[w]* be protected exclusively under section 102(a)(8)."⁶⁶ This is significant, of course, because pictorial, graphic, and sculptural works receive more protection than architectural works,⁶⁷ and Ginsburg's interpretation would deny this additional protection.

As Ginsburg herself states, this reading is "problematic" because "[i]t fails to elucidate what constitutes a 'nonfunctional work of architecture,' as opposed to a 'sculptural work.'"⁶⁸ Furthermore, characterizing certain structures as "buildings," and therefore architecture, would discriminate against certain artists. For example, Alice Aycock and Ned Smyth create room-size pieces that include architectural elements such as stairs and columns.⁶⁹ Human beings can inhabit their pieces as one might in-

63. H.R. 735, *supra* note 4, at 20 n.43, *reprinted in* 1990 U.S.C.C.A.N. at 6951 n.43 (emphasis added). Congress was aware that certain architectural works could be considered sculptural works. Thus, in the Act's legislative history, Congress denied election of protection only in instances where the designer of a sculptural work embodied in an architectural work is different from the architect. *See id.* at 19, *reprinted in* 1990 U.S.C.C.A.N. at 6950.

64. *Id.*

65. *See, e.g.,* *Begier v. IRS*, 496 U.S. 53, 69 (1990) (Scalia, J., concurring) (criticizing the majority's reliance on the Congressional Record and referring to the majority's debate on whether to adopt the Committee Reports as "demeaning and unproductive"); *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) (criticizing the use of subsequent legislative history).

66. Ginsburg, *supra* note 9, at 495 n.72 (quoting H.R. 735, *supra* note 4, at 20 n.43, *reprinted in* 1990 U.S.C.C.A.N. at 6951 n.43 (emphasis added)).

67. *See supra* note 56 and accompanying text (discussing higher degree of protection for sculptural works).

68. Ginsburg, *supra* note 9, at 495 n.72.

69. *See* Phil Patton, *New Wood Sculpture*, *Horizon*, Jan. 1980, at 51-53 (photograph and description of Aycock's "The Central Machine"); Nancy Princenthal, *On the Water-*

habit a pergola. Anyone initially viewing Aycock's and Smyth's work would likely consider them to be sculptures rather than architecture. Yet, under the legislative history's definition of architecture, the work could qualify as architecture and, under Ginsburg's formulation, would receive less copyright protection than that of other artists.

Ginsburg's interpretation undoubtedly poses problems for artists and architects who would want their works classified as sculptural works, rather than as architectural works, in order to receive a higher degree of copyright protection. Hoping to create works that are more likely to be considered "art," artists are less likely to incorporate architectural elements into their works. In addition, infringers are less likely to seek an artist's permission for using his work if they think that the work will be classified as architecture rather than as sculpture. In short, Ginsburg's interpretation of the Act as denying dual protection will tend to compromise an artist's work or encourage infringement.

B. *Granting Dual Protection to Sculptural Architecture*

To ensure the full amount of protection for all artists, an artist who creates a sculptural work of architecture should receive protection as both an architectural work and as a sculptural work.

Allowing an artist dual protection avoids many difficulties inherent in exclusive protection. A court will not have to make the difficult distinction between nonfunctional architecture and sculpture. Instead, an artist who claims his work is sculpture will be treated as all other sculptors are now: (1) the court will have to analyze whether his work qualifies as a sculpture or as a utilitarian article; (2) if it is a utilitarian article, the court will apply the separability test⁷⁰ usually applied to useful articles under the Copyright Act of 1976; and (3) if the court decides that the work is utilitarian with no separable aesthetic elements, then the artist can resort to the lesser protection of architectural works.

III. MOVING BEYOND THE FLAWED FUNCTIONALITY TEST

To determine the scope of an architectural work's copyrightability, the Architectural Copyright Act's legislative history suggests a two-part test:

First, an architectural work should be examined to determine whether there are original design elements present, including overall shape and interior architecture. If such design elements are present, a second step is reached to examine whether the design elements are functionally required. If the design elements are not functionally required, the work is protectible without regard to physical or conceptual separability.⁷¹

front, Art in America, Apr. 1987, at 211 (photograph and description of Smyth's "The Upper Room" in Battery Park City).

70. A separability test determines what aspects of the article are nonutilitarian and therefore copyrightable. See *infra* note 74.

71. H.R. 735, *supra* note 4, at 20-21, reprinted in 1990 U.S.C.C.A.N. at 6951-52.

In formulating this test, the legislature sought to avoid the use of the "separability test," historically employed to determine the scope of copyrightability of useful articles under the category of "pictorial, graphic, or sculptural" work, because many commentators disagreed as to whether and how such a test should apply to architecture.⁷² Generally, a separability test has been used to decide which articles, especially utilitarian articles, are copyrightable.⁷³ If an article's intrinsic function is its utility, then it is not protectible. If, however, an article incorporates features that can be identified separately from its utility, these features are protectible.⁷⁴

A. *Flaws in Functionality*

The "functionality test" is ineffective and inappropriate. It does not accomplish the Act's goal of avoiding the problems previously encountered in applying a separability test to architecture because functionality is hardly distinguishable from separability.⁷⁵ Furthermore, functionality discriminates against certain styles of architecture, contrary to well-established copyright goals.⁷⁶

1. Functionality Equals Separability

Although the legislative history implies that functionality is not the same as separability, in essence, applying either test to architecture produces the same result. Under functionality, "[i]f [a] design element [is] not functionally required, [it] is protectible without regard to . . . separability."⁷⁷ Similarly, the separability test protects only those elements that are not intertwined with the utility of an article.⁷⁸ Because design elements that are not functionally required would also be conceptually or

72. See *id.* at 20, reprinted in 1990 U.S.C.C.A.N. at 6951 (considerable scholarly and judicial disagreement over how to apply the separability test to architecture).

73. See 17 U.S.C. § 101 (1988).

74. See *id.*; see also H.R. Rep. No. 1476, *supra* note 9, at 55, reprinted in 1976 U.S.C.C.A.N. at 5668 (explaining separability test); Denicola, *supra* note 32, at 711-17 (describing development of separability test regarding utilitarian objects).

Separability has been interpreted differently by many courts. Essentially, if a useful article has elements that are either conceptually separable or physically separable from its utility, then those elements are protected. See Alan Latman et al., *Copyright for the Nineties* 197-221 (3d ed. 1989). Difficulties have arisen in the application of conceptual separability. Compare *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993-94 (2d Cir. 1980) (belt buckle design separable because of aesthetic aspect) with *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1148 (2d Cir. 1987) (shape of bicycle rack may not be protectible if the artist's design was influenced by rack's use).

75. See H.R. 735, *supra* note 4, at 20, reprinted in 1990 U.S.C.C.A.N. at 6951; *supra* note 74.

76. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

77. H.R. 735, *supra* note 4, at 21, reprinted in 1990 U.S.C.C.A.N. at 6952.

78. See *id.*; see also *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985) ("[S]ince the aesthetic and artistic features of the [objects] are inseparable from the [objects'] use as utilitarian articles the [objects] are not copyrightable.")

physically separable from the utilitarian aspects of the building,⁷⁹ and because the functionality test denies protection to functionally determined elements,⁸⁰ the two tests are indistinguishable. In fact, many commentators writing on the application of the separability test to architecture have couched the test in terms of the building's function.⁸¹ Thus, the functionality test is simply a separability test with another name. Its application, therefore, will result in many of the same problems that arise in applying a separability test to architecture.

Since the functionality test is really a separability test, analyzing separability in architecture will expose many of the problems inherent in the Architectural Copyright Act. As one commentator has explained, "Courts have experienced difficulty in determining whether particular works of authorship are useful articles and in applying the [Copyright] Act's separability and independence test to ascertain whether a useful article contains any features that are copyrightable."⁸² By analogy, determining copyrightable features in functionality will be equally difficult.

2. Discrimination Against Architectural Styles

As with any separability test, the functionality test discriminates against modern architecture.⁸³ Indeed, as one commentator has stated, the separability approach "to determin[e] the copyrightability of works of applied art favors traditional art forms and denies protection to some less conventional styles, such as modern abstract utilitarian design."⁸⁴ Even the Copyright Office has recognized the difficulties with this distinction, stating that

[t]he unexpressed notion appears to be that if a considerable portion of the cost of the building has been for decoration, it may be considered a work of art, whereas, if form has followed function, the building is not a work of art. This is a dangerous notion and one which could plunge us into the midst of a bitter artistic controversy.⁸⁵

79. For example, decoration on a building is not functionally required and is physically separable. See also *infra* notes 145-46 and accompanying text (discussing Ginsburg's example of the Pompidou Center that also illustrates this point).

80. See H.R. 735, *supra* note 4, at 21, reprinted in 1990 U.S.C.C.A.N. at 6952.

81. See Shipley, *supra* note 12, at 419 ("[I]f a building is functional, there may be only a few aspects of it that are protectible."). Applying the separability test to buildings further evinces the similarity between the two tests. See, e.g., *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (if functional concerns influence the building's appearance, the sculptural features would be deemed *inseparable*); *Carol Barnhart Inc.*, 773 F.2d at 418 (if "artistic features of the [buildings] are *inseparable* from the [buildings'] use as utilitarian articles the [buildings] are not copyrightable") (emphasis added).

82. Shipley, *supra* note 12, at 422-23 (citing as examples *Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984); *Carol Barnhart, Inc. v. Economy Cover Corp.*, 594 F. Supp. 364 (E.D.N.Y. 1984), *aff'd* 773 F.2d 411 (2d Cir. 1985)).

83. See Ginsburg & Kernochan, *supra* note 6, at 25.

84. Shipley, *supra* note 12, at 442.

85. Copyright Report, *supra* note 2, at 91.

One example of a style that would probably qualify for protection under the Architectural Copyright Act of architecture is Robert A.M. Stern's neo-shingle style. The houses he designed in Long Island, New York,⁸⁶ incorporate turrets and other fanciful embellishments. Many of these design elements are nonfunctional and would easily qualify as copyrightable under the Act. On the other hand, the Lever House office building in New York City is an example of a building style that would not be protected. Since the entire building was influenced by functional concerns—its overall shape was dictated by zoning laws and the need to accommodate business machines; its glass skin was a new method of construction; and its glass color was one of the few hues made to absorb heat⁸⁷—it would not be copyrightable under the functionality test.

Today, more than ever, the use of a separability test will have a discriminating effect on architecture. As one commentator has noted:

Much architecture today strives for a unity of function and design. The useful aspects of the building and its underlying structural components are often emphasized in a modern architectural work, if not utilized as the main motif of its design. A strict application of [separability] would deny copyright protection to the majority of contemporary architectural structures and result in a discrimination against modern abstract architecture.⁸⁸

Discriminating against certain styles of architecture is inconsistent with established copyright principles.⁸⁹ The Architectural Copyright Act should protect all artistic styles. Although Shipley does suggest that certain styles of architecture may deserve less copyright protection than others,⁹⁰ many of the world's most valued and respected works of architecture are modern in style—such as the John Hancock Building in Boston⁹¹ and the TWA Terminal at Kennedy Airport in New York.⁹² It seems senseless that these works should go unprotected while other structures are protected because they incorporate more nonfunctional embellishments. Put simply, to avoid discriminating against certain styles of architecture, the functionality test needs to be re-interpreted or

86. See Leland M. Roth, *A Concise History of American Architecture* 349 (1979) (describing these houses).

87. See Carol H. Krinsky, *Gordon Bunshaft of Skidmore, Owings & Merrill* 17-21 (1988) (describing the Lever House).

88. White, *supra* note 38, at 71.

89. These principles state that "if a work might arguably be regarded as a work of art by any meaningful segment of the population, be they high-brow, low-brow, hippy, avant-garde, middle class-bourgeois, adult or juvenile, then the work must be considered a work of art for copyright purposes." Nimmer, *supra* note 9, § 2.08[B][1], at 2-85; see also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Justice Holmes admonished courts not to weigh artistic merit to avoid discriminating against particular styles); Shipley, *supra* note 12, at 442 (applying this warning to architecture).

90. See Shipley, *supra* note 12, at 427.

91. See Roth, *supra* note 86, at 335-36 (describing the Hancock Building).

92. See *id.* at 295-297 (photograph and description of the TWA Terminal).

replaced.⁹³

3. Distinguishing Between Function and Aesthetics

Even if discrimination between architectural styles could be resolved, distinguishing between the functional and the aesthetic aspects of an architectural work poses severe difficulties. This is due to the mutualism of creative and practical concerns in a building.⁹⁴

In fact, because architecture embodies both art and construction, its "ambivalent nature" has always been a reason for its lack of copyright protection.⁹⁵ A few examples illustrate this point. It would be difficult, for instance, to distinguish artistic features from functional features in such modern buildings as the Wang Building in New York City or the Johnson Wax Building in Racine, Wisconsin, by Frank Lloyd Wright. The main decorative motif on the Wang Building's facade is its structural cross-beams,⁹⁶ while the interior of the Johnson Wax Building is famous for its mushroom-like columns that hold up the roof.⁹⁷

Shipley comments that courts should be able to distinguish between the functional and the design features in a building as they have done in the applied arts.⁹⁸ Without guidelines, however, courts could struggle for years to define architectural copyrightability as, in fact, they struggled to define separability in utilitarian articles.⁹⁹

93. See *infra* notes 157-73 and accompanying text (proposing a revision of the functionality test).

94. In a 1989 Report to Congress, the Copyright Office itself recognized this difficulty when it stated, "[i]n the case of architecture particularly, it would often be difficult to differentiate between the functional and the 'artistic' features of a design." Copyright Report, *supra* note 2, at 93-94. Moreover, as early as 1961, the Register of Copyrights "recommended against extending protection to the design of functional architectural structures because of the difficulty in distinguishing between the functional and artistic features of a design." Shipley, *supra* note 12, at 418, 437 (emphasis added) (citations omitted).

95. See Michel Huet, *Architecture and Copyright*, 19 UNESCO Copyright Bull., No. 4, at 14, 15 (1985).

96. See Elliot Willensky & Norval White, *AIA Guide to New York City* 262 (3d ed. 1988) (describing the Wang Building).

97. For a description of the Johnson Wax Building, see Roth, *supra* note 86, at 255, 261-62.

98. See Shipley, *supra* note 12, at 439.

99. See Latman, *supra* note 7, at 197-224. The Second Circuit alone shows to what extent courts can derive their own standards for separability. See, e.g., *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (if the disputed design element was dictated by functional considerations, then it is not copyrightable); *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985) ("[S]ince the aesthetic and artistic features of the [mannequin] forms are inseparable from the forms' use as utilitarian articles the forms are not copyrightable."); *Kieselstein-Cord v. Accessories by Pearl, Inc.* 632 F.2d 989, 993 (2d Cir. 1980) (belt buckle had aesthetic features that were separable from the belt's function); *Jane Ginsburg et al., Subject Matter of Trademark Protection* 157 (1991) (discussing these cases and other circuit court tests).

a. *When Functional Elements Should Be Protected*

As indicated above,¹⁰⁰ the functionality test may not protect designs and aesthetic judgments that are based on functional elements because the Act excludes functionally determined designs from protection.¹⁰¹ In addition, it is unclear to what extent function can play a role in a design before that design is denied protection. Because the majority of elements in a building are to some degree functionally determined¹⁰²—unless they are applied decoration—the functionality test may deny protection to many aspects of a building's design.

This result is ludicrous. Simply because some elements of architecture are functional should not mean that the designs incorporating them are not protectible.¹⁰³ Recognizing the importance of incorporating function into a building will more effectively protect architectural works. A court that understands the role of function in architecture is less likely to deny protection to deserving works.

The Copyright Office underestimates the influence of functional requirements in a building's design. For example, it has stated, "The relative importance of function in architecture is vastly overemphasized, perhaps as a result of unfamiliarity with the discipline. 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."¹⁰⁴

Although only a small portion of a building's design may reflect purely functional needs, certainly much of its design is influenced by these considerations. Moreover, many architects believe that function is a very important element in their work. Le Corbusier, for instance, owes his freedom of expression in his Dom-ino Houses to their underlying structure, a functional requirement.¹⁰⁵ Similarly, Ludwig Mies van der Rohe, in a speech to students, has stated that "We shall examine one by one every function of a building and use it as a basis for form."¹⁰⁶ Finally, many architects, such as Louis Sullivan, subscribe to and design by the credo "form follows function."¹⁰⁷

Still other reasons exist in support of the idea that buildings should not

100. See *supra* notes 83-93 and accompanying text.

101. See H.R. 735, *supra* note 4, at 21, reprinted in 1990 U.S.C.C.A.N. at 6952.

102. Windows and skylights are added to buildings to meet lighting and air requirements. The shape and size of a room are dictated by the client's demands as well as the relationship of other rooms. In other words, almost every part of a building is influenced by functional considerations.

103. See Copyright Report, *supra* note 2, at 209-10, 214; Shipley, *supra* note 12, at 439.

104. Copyright Report, *supra* note 2, at 211 (footnotes omitted).

105. Dom-ino Houses consist of columns supporting concrete slab floors that are completely independent of such other functions in the house as its partition walls. See Maurice Besset, *Le Corbusier: To Live with the Light* 67-73 (1987). This structure allowed Le Corbusier freedom to organize interior spaces as he wanted, to make the walls out of any material, and to place windows without regard to walls. See *id.* at 67-71.

106. David Spaeth, *Mies van der Rohe* 114 (1985).

107. See H.W. Janson, *History of Art* 749 (3d ed. 1986).

be denied protection under the Act simply because they incorporate function into their designs.¹⁰⁸ For instance, copyright protection is accorded in other fields although functional concerns, by necessity, modify an author's creative choices.¹⁰⁹ Architectural plans are copyrightable,¹¹⁰ even though they reflect limitations imposed by such functional considerations as building codes and client needs. Similarly, computer programs are functional, yet courts have consistently held that they are copyrightable as literary works.¹¹¹

The copyrightability of architectural works is analogous to the copyrightability of other products. Regarding musical works, Shipley recognized that

[b]y analogy, a musical composer's creative options are limited by the thirteen tones, their octaves, and their variations. Other constraints are imposed by the limitations on a performer's range and on our ability to hear. Although the average composer of popular music works under these physical limitations, the copyrightability of musical works is not questioned.¹¹²

By comparison, an architect's "creative options" are limited by structural requirements, building codes, and technology, and should be protected.¹¹³

Even the Copyright Office has recognized that, while the difficult question is in determining what constitutes a protectible architectural structure, this problem is simply a variation of the "familiar and troublesome question of what constitutes a 'work of art' in other areas of three-dimensional objects that may be utilitarian or aesthetic or both in combination." ¹¹⁴ Under existing law, abstract works of art—such as those by Ellsworth Kelly—can be copyrighted. Some of Kelly's sculptures are

108. For example, foreign laws on architectural copyright grant protection to designs incorporating functional elements. See *infra* notes 126-29 and accompanying text (discussing foreign law protection for designs incorporating functional elements). Indeed, as the Copyright Report has noted with regard to foreign copyright laws, "the fact that a building embodying an architectural work has utilitarian or technologically dictated characteristics does not, in and of itself, deprive the work of a potentially protectible artistic character or aspect." Copyright Report, *supra* note 2, at 163. Nevertheless, "many [foreign] statutes expressly exclude from copyright protection functional or engineering or utilitarian aspects that exist in architectural works." *Id.*

109. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 218 (1954) (lamp base copyrightable although modified to allow for wiring); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980) (belt buckle copyrightable).

110. See 17 U.S.C. § 102 (1988); Shipley, *supra* note 12, at 399.

111. See *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247-49 (3d Cir. 1983); see also Ginsburg, *supra* note 9, at 491 (noting that the functionality limitation on protecting architectural works is similar to distinguishing a computer program code that is required to accomplish a task from a code that is merely one of several ways to achieve the program's purpose).

112. Shipley, *supra* note 12, at 399 (footnotes omitted).

113. See *id.*

114. Copyright Report, *supra* note 2, at 89 (quoting William S. Strauss, Copyright Office Study No. 27, Copyright in Architectural Works (1959), in Senate Committee Print, 86th Cong., 2d Sess., 1966 Copyright Law Revision Study at 67).

simple geometric forms made of one inch thick aluminum.¹¹⁵ Because these pieces meet a minimal level of originality, they would be protected under copyright laws.¹¹⁶ Philip Johnson's Glass House in New Canaan, Connecticut is an architectural equivalent to Kelly's abstracts. It is composed of a rectangular plan with minimal partitions and glass panels for exterior walls.¹¹⁷ Thus, although Philip Johnson's house is very simple in its form, it presented the idea of "house" in an entirely new way and, like Kelly's work, should be protected.¹¹⁸

Furthermore, Shipley correctly suggests that "[i]n some respects functional architectural works are analogous to factual literary works."¹¹⁹ Just as major portions of these writings contain factual data, there exist "functional" or nonprotectible parts of a building—such as, structural processes or borrowings from common sources.¹²⁰ Yet, illogically, the factual work is accorded copyright protection and the functional building is not.

Finally, subject matter much less deserving of protection than buildings can be copyrighted. Compilations¹²¹ such as the yellow pages, for instance, are copyrightable.¹²² As one commentator has noted on this point, "Virtually any distinguishable variation created by an author in an otherwise unoriginal work of art will constitute sufficient originality to support a copyright. Therefore, a very modest quantum of originality will suffice."¹²³ Moreover, as Nimmer points out, simple butterfly and vegetable designs have been held protectible, as well as a statuette of a dog in the show position.¹²⁴ Without question, many buildings are more deserving of copyright protection than these examples.

b. *Limitations on Methods and Processes*

Although architectural copyright should include many functional elements, protection should not be limitless. Copyright history in the United States, in all areas, indicates that protection does not extend to

115. See Janson, *supra* note 107, at 745 (describing and providing a photograph of Kelly's work).

116. See Neil F. Siegel, *The Resale Royalty Provisions of the Visual Rights Act: Their History and Theory*, 93 Dick. L. Rev. 1, 15-16 (1988).

117. See Roth, *supra* note 86, at 306, 319-21 (describing and providing photographs of the Glass House).

118. *But see* Magic Mktg., Inc. v. Mailing Servs., 634 F. Supp. 769, 772 (W.D. Pa. 1986) (denying protection to envelope with a black line marked on it and "Priority Message" written on it).

119. Shipley, *supra* note 12, at 447.

120. *See id.*

121. A compilation is a collection of facts arranged in a particular way such that it becomes an original work. *See* 17 U.S.C. § 101 (1988).

122. *See* 17 U.S.C. § 103 (1988); *Key Publications, Inc. v. Chinatown Today Publishing Enters., Inc.*, 945 F.2d 509, 514 (2d Cir. 1991); *see also* Shipley, *supra* note 12, at 428 (architectural works are as worthy of protection as compilations).

123. Nimmer, *supra* note 9, § 2.08[B], at 2-87.

124. *See id.*

new ideas, but only to the expressions of these ideas.¹²⁵ Therefore, consistent with this history, new methods of construction or building processes should not be protected under the Architectural Copyright Act. In fact, prior to the Act's passage, the Copyright Office also reached this conclusion, stating that the "exclusive rights of a copyright owner in an architectural work shall apply only to the artistic character and artistic design of the work, and shall not extend to processes or methods of construction."¹²⁶

This limitation on construction processes and methods coincides with the standards of other countries for determining the copyrightability of architectural works. For instance, the WIPO/UNESCO committee settled on an originality standard but limited it to matters of appearance and form, stating that "originality in technical aspects (statics, resistance of materials, etc.) are irrelevant and even their noted absence does not exclude copyright protection. New materials, new methods of construction and other technological novelties are not protected by copyright."¹²⁷ Similarly, copyright protection in India and France does not extend to processes or methods.¹²⁸ The Copyright Office, after conducting a study of foreign laws on architectural copyright, concluded that similar limitations should be imposed on an American architectural copyright act.¹²⁹

The problem presented by the Architectural Copyright Act is simply where to draw the line between protected aesthetic forms that incorporate functional elements, on the one hand, and, on the other, unprotected processes and methods of construction in an architectural work that merges form and function. While the Act seeks to protect the creativity involved in architecture, rather than the architectural elements themselves, a standard is needed to recognize this creativity and clarify the difference between the design itself and elements used in the design.

125. See 17 U.S.C. § 102(b) (1988); *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Baker v. Selden*, 101 U.S. 99, 103 (1879); see also *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 555 F. Supp. 154, 155 (E.D. Tenn. 1983) ("mechanical or utilitarian aspects of works are not protected by copyright").

126. Copyright Report, *supra* note 2, at 113.

127. World Intellectual Property Org., *Works of Architecture: Preparatory Document for and Report of the WIPO/UNESCO Committee of Governmental Experts*, 22 Copyright 403, 406 (1986). It is a different situation, however, when these new processes are used to help the architect create new forms that may qualify for copyright protection. See *id.*; see also Krinsky, *supra* note 87, at 24 (architects use modern technology in their designs).

128. See Wargo, *supra* note 9, at 420-21.

129. See Copyright Report, *supra* note 2, at 119, 163 ("[D]esign features of buildings responsive primarily to engineering, structural, or other functional considerations would generally not be protected."). It is unclear, however, how foreign courts determine the scope of protection of a structure. See Adolf Dietz, *Letter from the Federal Republic of Germany: The Development of Copyright Between 1979 and the Beginning of 1984*, 20 Copyright 426, 431 (1984) (noting that the German court denied copyright protection for hostels but granted it for a swimming pool enclosure).

B. *Alternative Standards to Determine Architectural Copyrightability*

Having identified the flaws inherent in the “functionality” standard, it is necessary to conceive an alternate methodology for determining the copyrightability of architectural works.

1. Other Proposed Standards

Some commentators have suggested what elements of an architectural work are copyrightable and have proposed their own tests to distinguish the copyrightable aspects of a building from the nonprotectible aspects.

a. *Dual Functions*

The Frank Lloyd Wright Foundation has suggested that the test of 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.”¹³⁰ This dual function test, however, disfavors modern and novel works of architecture because an ordinary observer may not regard modern architecture as art. This would lead to the realization of the fear expressed by Justice Holmes that triers of fact would be making artistic judgments without proper knowledge and expertise.¹³¹

Another conceptual separability test that has been proposed poses two questions: (1) “Can an ordinary observer conceive the presence of artistic features in [the] structure . . . ?” and (2) “If so, are those features dictated by the [structure’s primary] function . . . ? If not, then the artistic features are conceptually separable and thus protectible under this theory.”¹³² The first part of this test is inadequate for the same reasons as the test proposed by the Frank Lloyd Wright Foundation. It too is subject to traditional prejudices against modern architecture, and it requires courts to make unqualified artistic judgments. In addition, works that meet the first part of this test may very well fail its second part when “form follows function” in an architectural work, again discriminating against modern architecture.

b. *Artistic Architectural Structures*

Commenting in a Copyright Office Report to Congress, William Strauss sought to protect architectural works that were also works of art, offering “broad delineations” to determine what is an “artistic architectural structure.”¹³³ Strauss recognized that a monumental structure meant to be appreciated for its aesthetic form should qualify for protec-

130. Comments of the Frank Lloyd Wright Foundation to U.S. Copyright Office Notice of Inquiry on Architectural Work Protections 21, in Copyright Report, *supra* note 2, app. C.

131. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

132. Copyright Report, *supra* note 2, at xx.

133. Strauss, in Senate Committee Print, *supra* note 114, at 77.

tion.¹³⁴ On the other end of the spectrum, however, Strauss stated that “[t]he ordinary structure designed for functional use (such as dwellings, shops, office buildings, factories, etc.) though attractive of its kind, would rarely, if ever, qualify as a ‘work of art.’”¹³⁵

Nevertheless, “[d]wellings, shops, office buildings, and factories are more and more conceived of and executed as works of art and too often churches, museums, and auditoriums are erected which are without artistic value.”¹³⁶ Although Strauss may have sought to exclude functional structures lacking in artistic merit, his test clearly provides inadequate protection to many architectural works. Some of the most innovative architectural works include private residences, retail boutiques, and office buildings. Specific examples of buildings unprotected under Strauss’s test, yet famous for their designs and deserving of copyright protection, include the AT&T Building¹³⁷ and the Citicorp Building,¹³⁸ both in New York City, and houses designed by Frank Gehry in California.¹³⁹

Strauss did recognize that most architecture falls somewhere between the two extremes of unprotectible ordinary structures and protectible artistic statements. His only suggestion, however, was to have a relatively shorter term of protection for these works, similar to “ornamental designs for useful articles.”¹⁴⁰ This solution is untenable. Not only did Strauss fail to offer any reason for this distinction, but also—as a matter of principle—some architectural works should not receive lesser copyright protection than other works, nor should architecture be treated dif-

134. *See id.*, in Senate Committee Print, *supra* note 114, at 77.

135. *Id.*, in Senate Committee Print, *supra* note 114, at 77. At the time Strauss submitted his study, there were numerous well-designed buildings that he would consider unprotectible. For example, Albert Kahn had designed auto factories that had received recognition from the architectural press. *See* Gretchen G. Bank, *From High Rise to Low-E*, *Architectural Rec.*, July 1991, at 144, 146.

136. Joshua Cahn, Comments and Views Submitted to the Copyright Office on Copyright in Architectural Works (1959), in Senate Committee Print, 86th Cong., 2d Sess., 1966 Copyright Law Revision Study 86 (made in response to the study submitted by Strauss).

137. The AT&T Building is best known for its Chippendale style roofline and was named one of the best corporate headquarters in the United States. *See Best Corporate Headquarters Built in the 1980's*, *USA Today*, Nov. 28, 1989, at 6A (describing the building and including a photograph).

138. The Citicorp’s angled roof and sleek tower shaft has become a significant part of Manhattan’s skyline. *See* Paul Goldberger, *Best Views of the New City of Lights*, *N.Y. Times*, Mar. 4, 1983, at C1 (describing the building); Andrea E. Monfried, *Technics: High Profiles*, *Progressive Architecture*, Feb. 1990, at 49 (same). The Citicorp Building received numerous awards including the American Institute of Architects Honor Award for Achievement of Excellence in Architectural Design in 1979 and the New York City Chapter AIA Award for Outstanding Contribution to Life in New York City in 1978. Telephone Interview with Deborah Mahoney, Director of Marketing of Stubbins Associates, in New York, N.Y. (Mar. 4, 1992).

139. The Schnabel Residence and the Winton Residence Guest House both received National American Institute of Architects Honor Awards (1990 and 1988, respectively). *See Honor Awards*, *Architecture*, Mar. 1990, at 96 (Schnabel Residence); John Pastier, *Assemblage of Disparate Objects*, *Architecture*, May 1988, at 166-69 (Winton Residence).

140. Strauss, in Senate Committee Print, *supra* note 114, at 77.

ferently than other fields granted copyright protection. Other fields of artistic endeavor do not grant more or less protection to works depending on their artistic merit.¹⁴¹ This, in fact, is what Congress specifically and copyright protection generally have sought to prevent.¹⁴²

c. *Compelled by Use*

Ginsburg proposes that conceptual separability¹⁴³ could be applied to architecture and still allow broad protection.¹⁴⁴ She states:

Assume that the courts developed a rule that a design feature is conceptually separable if its appearance was not *compelled* by the useful purpose of the building. In that case, even useful elements in the design might be protected, so long as the arrangement of the useful elements proved arbitrary.¹⁴⁵

Ginsburg uses the Pompidou Center as an example of when functional elements can be protected.¹⁴⁶ Although the steam pipes are essential to the building's function, their placement on the exterior facades is not.¹⁴⁷ Thus, because the functional elements are incorporated into a design and their placement is not dictated by any function, the entire design is protectible even though it includes functional elements.

Determining when a building's use compels a design rather than merely influences it is analogous to applying the "merger doctrine" to utilitarian articles. The merger doctrine states that if there are limited ways of expressing an idea, then the expression and idea merge together and both are noncopyrightable.¹⁴⁸ Although Ginsburg's proposal is useful to help judges determine what is copyrightable in a structure, a clearer standard is still needed to ensure uniformity.

d. *Architectural Expression*

Prior to the enactment of the Architectural Copyright Act, Shipley suggested that architecture could be protected under the separability test by interpreting the 1976 Copyright Act to protect the architect's original expressions, and by taking an expansive approach in determining what is

141. Copyright in "pictorial, graphic, and sculptural" works does not give more or less protection to a work depending on its artistic merit. See Nimmer, *supra* note 9, § 2.01[B], at 2-13 to 2-16.

142. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); H.R. 735, *supra* note 4, at 21, reprinted in 1990 U.S.C.C.A.N. at 6952.

143. See *supra* note 74 and accompanying text (defining conceptual separability).

144. See Ginsburg & Kernochan, *supra* note 6, at 24-26.

145. *Id.* at 26 (emphasis in original).

146. See *id.*

147. See *id.*

148. See *infra* notes 154-55 and accompanying text (discussing the "merger doctrine" in further detail). The merger doctrine was developed in *Baker v. Selden*, 101 U.S. 99, 103 (1879) and *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

copyrightable.¹⁴⁹ As Shipley stated, “[P]rotect[ed] design features should include, among other things, the specific configuration of rooms and their dimensions, the arrangement of spaces and shapes, the location of doors and windows, and some of the choices of materials.”¹⁵⁰ Shipley also gave a specific list of examples of nonprotectible items, including ideas, processes and methods of construction, general design concepts, “the use of elements like skylights, atriums, courtyards, domes, columns, and basic shapes” that cannot be monopolized.¹⁵¹

Although Shipley’s lists are helpful, they are not all-inclusive, and thus are ineffective substitutes for specific guidelines informing architects on what they can expect to receive protection. Despite Shipley’s examples, a court faced with copyright questions involving features outside his list may still be at a loss in determining copyrightability.

Furthermore, some of Shipley’s examples of protected design features should not be protected in certain contexts and some of his unprotected design features should be protected. For example, many common material choices should not be protected, while basic shapes arranged together may very well qualify for protection. Thus, I.M. Pei’s use of a pyramidal skylight at the Louvre should be copyrightable because of his unique expression of an entrance,¹⁵² while room configurations and dimensions—protected under Shipley’s formulation—often follow traditional standards and should not be protected.¹⁵³

Shipley’s best illustration of what is copyrightable in a structure is his example of a “design competition.”¹⁵⁴ Although the competition has strict rules—for example, materials, cost, space, and program requirements—architects will present different solutions and these differences are what is protectible. If all architects in a competition design one aspect of the building in the same manner, then it is unlikely that many alternate means of expression exist, and such aspects of the building should not be protected by copyright.¹⁵⁵ Moreover, even if these similarities are found to be copyrightable, they were prepared independently without copying and therefore do not infringe on another’s copyright.¹⁵⁶

Like Ginsburg’s proposal, Shipley’s example of the design competition is analogous to applying the merger doctrine to architectural structures. In this respect, his illustration is useful for courts to determine architec-

149. See Shipley, *supra* note 12, at 435, 442.

150. *Id.* at 431.

151. *Id.* at 439, 445.

152. See Paul Goldberger, *In Paris, A Love Affair Between New and Old*, N.Y. Times, Apr. 2, 1989, at B1 (providing a description and photograph of the building).

153. For example, the proportion of a room may be based on a double cube.

154. See Shipley, *supra* note 12, at 430. In a design competition, architects are invited to submit their proposals for a project, all following the same rules. See *id.*

155. See *Ga-On Homes, Inc. v. Spitzer Homes, Inc.*, 178 U.S.P.Q. (BNA) 183, 185 (M.D. Fla. 1973), *aff’d*, 181 U.S.P.Q. (BNA) 685 (5th Cir. 1974) (although most homes include the same rooms, their particular arrangement should be protected).

156. See Shipley, *supra* note 12, at 430.

tural copyrightability. If courts recognize that the tests proposed by Shipley and Ginsburg reflect an application of a traditional copyright principle—namely, the merger doctrine—courts will be better able to determine architectural copyrightability.

2. A Proposed Standard to Replace Functionality

Because of the concerns related to architecture in specific and to copyright in general, the appropriate test to apply in determining what is copyrightable in architecture is a *modified* form of the separability test. This test consists of three parts: (1) is there a minimal level of creativity in the architectural work; (2) is the work based on implementing a process or method; and (3) if it is a process or method, are there still alternative means of expression such that the work is copyrightable?

a. *Is there a Minimal Level of Creativity?*

The first step in determining whether a building design is copyrightable is to determine if the building's design elements are original or, specifically, to decide whether there exists some *minimal* level of creativity in the structure's design. This is the test used for all other areas of copyright.¹⁵⁷ In fact, the legislative history on this point clearly states that, "[f]irst, an architectural work should be examined to determine whether there are original design elements present, including overall shape and interior architecture."¹⁵⁸

A standard of originality requiring only a minimal level of creativity avoids the problems that are inherent in courts deciding on the artistic merits of architecture.¹⁵⁹ This is a particularly desirable result because, in general, society has a limited view of what works of architecture are also works of art.¹⁶⁰ In addition, as numerous scholars have realized, more commonplace structures do have some artistic elements, and architecture generally should be considered "artistic." As one judge has stated:

I don't think you could build a house, in [sic] a modern home in America, without having a kitchen and a bedroom and a family room. . . . But the peculiar arrangement of them sometimes results in a design concept which, when all put together, is an appealing, saleable product. That is the concept that can be copyrighted and was

157. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S.Ct. 1282, 1287 (1991); *Nimmer*, *supra* note 9, § 2.01[B], at 2-11 to 2-16.

158. H.R. 735, *supra* note 4, at 20, reprinted in 1990 U.S.C.C.A.N. at 6951.

159. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); *supra* notes 141-42 and accompanying text (discussing the general copyright principle that copyright protection should not depend on artistic merit).

160. See Copyright Report, *supra* note 2, at 88. The addition to the Louvre by I.M. Pei, for instance, was detested by many people when it was in the design stage. See Goldberger, *supra* note 152, at B1.

copyrighted.¹⁶¹

Finally, to require more than originality—for example, to use a Ninth Circuit test stating that “[a] thing is a work of art if it appears to be within the historical and ordinary conception of the term art”¹⁶²—only “transfer[s] aesthetic judgments to a different jury,” and results in subjective determinations of what is art.¹⁶³ As indicated numerous times in this Note,¹⁶⁴ such subjective determinations should be avoided.

b. *Is It a Process or Method?*

If an architectural work is found to be original, the next question should be whether the protection being sought consists of a method or process of construction. This is an important determination because of Congress’s stipulation that methods and processes are excluded from copyright protection.¹⁶⁵ If the answer is no, then the work should be copyrightable. Because the first step determines whether there are original “design” elements present, if no method or process is involved, there are simply no barriers to protection.¹⁶⁶

c. *Are There Alternative Means of Expression?*

If the work is found to be a method or process of construction under step two then, as a third step, one must determine whether its placement is purely functional or whether it contributes to the building’s aesthetic design.¹⁶⁷ If placement serves a purely functional purpose, protection should be withheld. In contrast, if reasonable alternative methods of incorporation are available, copyright protection should exist.

The problems that arise under this prong are not whether specific functional elements of a building are protectible. Instead, the focus is on whether certain types of buildings are precluded from protection because of their functional elements. In other words, a designer would not seek protection for one useful aspect of his structure under the Architectural Copyright Act, as the Act is meant to protect the “design of a building” and not an object.¹⁶⁸ Even further, “individual standard features” are specifically excluded from the Act.¹⁶⁹ Thus, this step is meant to exclude

161. *Ga-On Homes, Inc. v. Spitzer Homes, Inc.*, 178 U.S.P.Q. (BNA) 183, 185 (M.D. Fla. 1973), *aff’d*, 181 U.S.P.Q. (BNA) 685 (5th Cir. 1974).

162. *Rosenthal v. Stein*, 205 F.2d 633, 635 (9th Cir. 1953).

163. *Denicola*, *supra* note 32, at 714-15.

164. *See supra* notes 76, 88-89, 131 and accompanying text.

165. *See* 17 U.S.C. § 102(b) (1988); *supra* notes 125-28 and accompanying text.

166. For example, facade arrangements generally do not include methods or processes. Thus, if the design of these facade arrangements is found to be original, they should be protected.

167. *See supra* note 111 (although computer codes consist of some functional requirements, they are still copyrightable).

168. *See* H.R. 735, *supra* note 4, at 18, *reprinted in* 1990 U.S.C.C.A.N. at 6949.

169. *See* Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 702(a), 104 Stat. 5133, 5133 (1990) (codified at 17 U.S.C. § 101 (Supp. II 1990)).

structures that are completely dictated by function—such as assembly plants— from the protection provided by the Act.

Determining whether an architectural work is purely functional and devoid of protection is analogous to determining what are the utilitarian aspects of “pictorial, graphic and sculptural” articles. For example, if a building’s sequence of rooms is the most efficient layout for the function of the building, and if that functionality is not consciously attributed to the architect’s design, the plan should not be protected. Similarly, if there are only a few ways in which to express a certain structure, such as a lighthouse, again the designer could not receive protection.

This analysis is analogous to portions of Shipley’s test¹⁷⁰ and to the Supreme Court’s “merger doctrine” which states that, if there are limited ways of expressing an idea, then the expression and idea merge together and both are noncopyrightable.¹⁷¹ Thus, while a building element may be deemed to be functional, the way in which it is incorporated into the design of the building may still be copyrightable. Ginsburg’s example of the Pompidou’s steam pipes on its facade is a perfect example of such a scenario.¹⁷² Although the pipes are a functional requirement of the building, their placement is dictated by aesthetic rather than functional or budgetary concerns. The facade, therefore, is still protectible because of the original way in which the pipes are placed. In contrast, if the pipes could only be placed on the exterior of this type of building, then their expression and idea would “merge” and the placement of the pipes would not be protected.

When *both* protectible nonfunctionally-determined elements and non-protectible functional elements exist in an architectural work, copyright protection should still be granted. Granting protection would not only give architects the recognition they deserve as artists, but also would be consistent with the Act’s legislative history. The history suggests that the Copyright Office would issue a certificate of registration to designers in these cases,¹⁷³ and leaves it up to the courts to decide the scope of protection on an ad hoc basis.¹⁷⁴

Overall, this analysis will allow an architect to determine in advance whether she can copy another’s work. In addition, when the architect is in doubt, she will seek out alternatives, thereby enriching the architectural environment and answering her own question as to whether the former architect’s work is the only way to express the idea.

CONCLUSION

The Architectural Copyright Act and its legislative history provide

170. See *supra* notes 154-55 and accompanying text (describing a design competition).

171. See *Baker v. Selden*, 101 U.S. 99, 103 (1879); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

172. See *supra* notes 146-47 and accompanying text.

173. See H.R. 735, *supra* note 4, at 21, reprinted in 1990 U.S.C.C.A.N. at 6952.

174. See *id.*

minimal guidance in determining what aspects of an architectural work are protectible. They are also unclear as to how to treat works that cannot be categorized solely as architecture or art or nonhabitable three-dimensional structures. What is clear, however, is that the legislative history attempts to limit copyright protection to only a few structures by using a functionality test. In contrast, this Note suggests that architecture should be given expansive copyright protection.

Because there is no guidance for the Copyright Office to determine protection for architectural works under the new Act, additional standards for granting protection must be developed. Thus, the term "building" under the Architectural Copyright Act should be defined as broadly as possible to ensure that all deserving architectural works are protected. In addition, sculptural architectural works should receive dual protection under the categories of both sculpture and architecture. Finally, to determine the copyrightability of architectural works, a three-step standard should be applied. First, the work must be "original." Second, if the work is not a method or process, it should receive protection. Lastly, if the work is a method or process, a court must determine whether the placement of the disputed feature is one of only several possible manners of expression. If it is, then it should not be copyrightable. But, if there are a number of alternate ways of placing this feature, then it should be copyrightable. Only by adopting such new standards can the modern law of copyright in architecture truly meet the dual goals of both protecting designs and encouraging creativity.