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Copyright Wrong: The United States' Failure To Provide Copyright Protection For Works Of Architecture

COPYRIGHT WRONG: THE UNITED STATES' FAILURE TO PROVIDE COPYRIGHT PROTECTION FOR WORKS OF ARCHITECTURE

Congress protects drawings, prints, and other works relative to architecture under the Copyright Act of 1976 (Copyright Act).[1] Under the Copyright Act's pictorial, graphic, and sculptural works clause, courts protect architectural plans, drawings, and models against unauthorized duplication.[2] The United States Copyright Act does not, however, prevent the duplication of the actual architectural structures.[3] Lobbying efforts to remedy the United States lack of structural protection for architecture recently have increased in response to the United States accession to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention or Berne).[4] The Berne Convention is an international copyright

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1. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-914 (1988)) (including pictorial, graphic, and sculptural works as protectable subject matter in § 102 of Copyright Act). Section 101 of the Copyright Act defines pictorial, graphic, and sculptural works as including diagrams, models, and technical drawings, including architectural plans. *Id.*

2. *See* 17 U.S.C. §§ 101-102 (1988) (stating in § 102 that pictorial, graphic, and sculptural works are protectable as subject matter under Copyright Act of 1976 and defining "pictorial, graphic, and sculptural works" clause in § 101 to include architectural drawings and plans); J. HAZARD, COPYRIGHT LAW IN BUSINESS & PRACTICE, 2-18 n.51 (1989) (stating that § 102 of Copyright Act of 1976 protects architectural blueprints and drawings under section's pictorial, graphic, and sculptural works clause). *But see* Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (5th Cir. 1972) (holding that architectural plans are copyrightable as writings, not pictorial works, under Copyright Act of 1976).

3. *See* Baker v. Selden, 101 U.S. 99, 101-03 (1879) (holding in dispute over reproduction of similarly styled bookkeeping ledgers that copyright law protects description of work of art, but not idea that actual work of art represents); Shipley, *Copyright Protection for Architectural Works*, 37 S.C.L. REV. 393, 395 (1986) (stating that United States copyright law protects architectural drawings, but not structures that drawings depict). In *Baker* the Supreme Court stated that copyright protects the description of a work of art, but not the work of art itself. *Baker*, 101 U.S. at 105. The *Baker* Court considered whether a copyright on ledger books gives the author exclusive rights to the peculiar system of bookkeeping that the ledgers depict. *Id.* at 101. The author in *Baker* contended that the copyright on the author's ledger prevented others from using similarly ruled lines and headings. *Id.* To resolve the issue, the Court examined the relationship between copyright protection and that of letters-patent. *Id.* at 102-03. The Court reasoned that published descriptions of art, illustrations, or diagrams are subject to copyright benefit, but not the art itself. *Id.* at 104-05. According to the Court, only letters-patent law can protect the art itself. *Id.* at 105. Consequently, copyright alone does not grant exclusive right to the author's bookkeeping system. *Id.* at 107. Courts have extended the *Baker* holding to deny protection to architectural structures. *See infra* note 13 (citing courts' denial of architectural protection for residential structures based on *Baker* holding).

4. *See generally Comments Submitted in Response to Notice of Inquiry, Copyright in Works of Architecture, Report of the Register of Copyrights*, U.S. Copyright Office, Library of Congress (June 1989) (reproducing comments that public submitted to Copyright Office for Office's consideration in favor of and opposed to adoption of architectural copyright protec-

convention that affords protection for architectural structures, including the right to prohibit modification or distortion of an architect's work.[5] Administered by the World Intellectual Property Organization (WIPO), the Berne Convention has been in effect since 1886, with the United States acceding to the Convention in 1989.[6] The United States joined the Convention, however, without amending the United States Copyright Act to comply with Berne provisions that afford protection for architectural structures.[7] Therefore, in response to the lobbying efforts for increased protection of architectural structures and to bring the United States into international compliance with the Berne Convention, the Copyright Office outlined four policy options to provide for United States protection of architectural structures.[8] Unfortunately, the Copyright Office failed to offer a satisfactory proposal for protection of architectural structures because the Copyright Office

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tion). United States accession to the Berne Convention for the Protection of Literary and Artistic Works prompted a Copyright Office report on current deficiencies in architectural copyright. *Id.* at 2-4. In anticipation of resulting United States architectural protection, the Frank Lloyd Wright Foundation already has submitted copyright applications for selected Wright designs, including New York's Guggenheim Museum. *Proposal to Include Architectural Works Under Copyright*, 18 LIBR. HOTLINE 4 (1989).

5. *See* DuBoff, Caplan, Gerdes, & Victoroff, *The Berne Convention: New Dimensions in Copyright*, 12 L.A. LAW. 41 (1989) [hereinafter DuBoff, Caplan] (stating that Berne Convention is oldest and most elaborate international treaty governing protection of copyright); *Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, reprinted in* 33 J. COPYRIGHT SOC'Y 183, 260 (1986) [hereinafter *Preliminary Report*] (stating that Berne includes works of architecture as protectable subject matter). Article 2(1) of the Berne Convention includes as protectable subject matter "works of drawing, painting, architecture, sculpture, engraving and lithography" and "illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." *Id.* Article 2(1) of the Convention thus obligates member countries to protect works of architecture, plans and sketches, and architectural models. *Changes in Law Called for to Protect Architectural Works*, 48 LIBR. CONG. INFORMATION BULL. 234 (1989); *see infra* note 169 (discussing Berne Convention protection of moral rights, including architect's right to prohibit modification or distortion of architect's work).

6. *See* R. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS, ISSUES AND CONTROVERSIES 5 (1987) (stating that Berne Convention has been in effect since 1886); DuBoff, Caplan, *supra* note 5, at 41 (stating that United States accession to Berne became final on March 1, 1989).

7. *See generally* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 9, 102 Stat. 2853 (1988) (failing to amend United States Copyright Act to bring United States copyright law into compliance with Berne standards by granting protection to works of architecture).

8. *See Copyright in Works of Architecture, The Report of the Register of Copyrights*, United States Copyright Office, Library of Congress 1 (1989) [hereinafter *Copyright Office Report*] (outlining domestic and international copyright protection for works of architecture and suggesting four policy options to bring United States into international compliance). In the United States House of Representatives, Representative Robert W. Kastenmeier, Chairman of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, requested a Copyright Office report on current United States protection for works of architecture. *Id.* at 1. Senator Patrick J. Leahy, Chairman of the Senate Subcommittee on Science and Technology and a member of the Subcommittee on Patents, Copyrights and Trademarks, requested the same report in the Senate. *Id.*

proposals either offer a level of protection beyond that which the United States Congress can tolerate or below that which American architects desire.[9] Consequently, even if Congress adopts any of the Copyright Office's proposals, United States protection of architecture may remain at a level insufficient to protect adequately domestic architecture or to bring the United States into compliance internationally.

Currently, the United States copyright law protects works relative to architecture, including blueprints, drawings, and models.[10] The United States Copyright Act includes pictorial, graphic, and sculptural works as protectable subject matter.[11] The Copyright Act includes architectural plans and drawings in the definition of "pictorial, graphic, and sculptural works."[12] Courts, however, have held that this umbrella of protection does not extend to architectural structures.[13] Consequently, architects must seek protection for their creations through the inadequate remedies of design patent law, trademark law, or the common-law remedies of unfair trade practice.[14]

Most nations, however, provide copyright protection to an architect seeking to guard against duplication, modification, and distortion of the

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9. *See infra* note 38 and accompanying text (discussing United States refusal to recognize broad paternity rights in artistic works, focusing instead on limited economic rights). *See generally infra* notes 26-117 and accompanying text (discussing four Copyright Office proposals for architectural protection).

10. *See* 17 U.S.C. § 102 (1988) (protecting drawings, models, and architectural plans under pictorial, graphic, and sculptural works clause of Copyright Act); *also supra* notes 1-2 and accompanying text (describing protection of works relative to architecture under pictorial, graphic, and sculptural works clause of Copyright Act).

11. 17 U.S.C. § 102 (1988).

12. *See id.* § 101 (defining "pictorial, graphic, and sculptural works" to include diagrams, models, and technical drawings, including architectural plans).

13. *See* Scholz Homes, Inc. v. Maddox, 379 F.2d 84, 86 (6th Cir. 1967) (holding that no copyright infringement exists where builder uses plans to construct building, absent actual copying of those plans); *also* Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972) (holding that copyrighted architectural plans do not grant plans' author with exclusive right to construct structure plans depict); Schuchart & Assocs. v. Solo Serve Corp., 540 F. Supp. 928, 941 (W.D. Tex. 1982) (holding that unauthorized use of copyrighted architectural plans to construct shopping center was not copyright violation); DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184, 196 (M.D. Fla. 1962) (holding that copyright law does not extend to protection of structure or building itself, but limits protection to plans only). *See generally* Baker v. Selden, 101 U.S. 99 (1879) (holding that work is protectable but not idea that work represents). The denial of structural protection in *Scholz*, *Schuchart*, *Imperial*, and *DeSilva* results from the *Baker* holding that although a work is protectable, the idea that the work represents is not protectable. Shipley, *supra* note 3, at 417 n.122. For example, in *Scholz Homes v. Maddox* the United States Court of Appeals for the Sixth Circuit first suggested that although architects might desire protection against the unauthorized use of their plans, *Baker* created uncertainty that such protection exists. *Scholz*, 379 F.2d at 85-86. The *Scholz* court indicated that no copyright infringement existed if the infringer used plans to construct a building rather than to communicate to others how one could construct the building that the plans depict. *Id.*

14. *See infra* notes 96-107 and accompanying text (discussing alternative avenues of protection for architectural structures).

architect's structural creations.[15] Additionally, the premier instrument on international copyright, the Berne Convention, has provided for such architectural protection since 1908.[16] Of eighty-four Berne member nations that the Copyright Office surveyed, only three, excluding the United States, do not provide protection for structural works of architecture in the member nation's own copyright statutes.[17] The Berne member nations that provide architectural protection make express reference in the members' copyright laws for protection of buildings and structures.[18] Prompted by United States accession to Berne in March 1989, proponents of architectural protection have advocated a statutory amendment to the United States Copyright Act to bring the United States into international compliance by explicitly protecting architectural structures against duplication and modification.[19]

In considering whether to amend the United States Copyright Act to offer a Berne level of protection for architectural works, Congress requested a report from the Copyright Office detailing current protection for architectural works and the need for additional protection.[20] The report concluded that the Berne Convention requires copyright protection for works of architecture beyond that now available under United States law.[21] The report further stated that the Copyright Office supports appropriately drafted legislation to make United States law consistent with the international standards of Berne.[22] Finally, the Copyright Office outlined for congressional consideration four possible solutions to remedy the lack of protection for works of architecture.[23] None of the four proposals, however, offers a

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15. *See infra* notes 16-18 and accompanying text (discussing international protection for works of architecture under Berne Convention).

16. *See Preliminary Report*, *supra* note 5, at 264 (stating that Berne Convention granted protection to works of architecture in 1908 Berlin text).

17. *See Copyright Office Report*, *supra* note 8, at 158 (identifying Belgium, Greece, and Spain as only three countries that Copyright Office surveyed that do not statutorily provide for architectural protection).

18. *Id.* at intro. xxi; *see, e.g.*, Art. 3, Law No. 57-298 of 1957 (protecting architecture in France); Art. 10 (I)(V), Law No. 48 of 1970 (protecting architecture in Japan); Art. 3 (I)(b), Act of 1956 (protecting architecture in United Kingdom).

19. *See* 17 U.S.C. §§ 101-118 (1988) (omitting copyright protection for architectural structures against either modification or duplication); *supra* note 4 and accompanying text (detailing current calls to extend copyright protection compatible with Berne Convention to works of architecture).

20. *See Copyright Office Report*, *supra* note 8, at Appendix A (reproducing letter from Rep. Kastenmeier to Ralph Oman, Register of Copyrights, requesting that Copyright Office prepare report on current levels of United States architectural protection and compatibility with Berne levels of architectural protection); *also supra* note 8 (discussing requests for Copyright Office Report in United States House of Representatives and United States Senate).

21. *Copyright Office Report*, *supra* note 8, at xxii.

22. *Id.*; *see Changes in Law Called for to Protect Architectural Works*, 48 LIBR. CONG. INFORMATION BULL. 234 (1989) (stating that Copyright Office supports appropriate amendments to Copyright Act to bring United States into compliance with Berne).

23. *See generally Copyright Office Report*, *supra* note 8, at 223-26 (outlining deficiencies in United States copyright protection for architectural works and suggesting four possible solutions).

pragmatic solution for architectural protection in light of the prevailing attitudes concerning United States copyright law because the scope of protection is too broad to meet Congressional standards.[24] If architects hope to derive any protection from United States courts, Congress instead must adopt an approach to architectural protection narrower than the broad plans for protection that the Copyright Office proposes.[25]

The first option of the Copyright Office report proposes to create a new Copyright Act subject matter category expressly protecting architectural structures as works of architecture.[26] According to the Copyright Office, Congress easily can implement this first option by adding "architectural structures" to the Copyright Act's definition of "pictorial, graphic, and sculptural works," which already protects architectural drawings, plans, sketches, models, designs, and sculptures.[27] Three bills have addressed the creation of a new subject matter category for architectural structures.[28] All three bills propose to include in the Copyright Act "architectural works"

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24. *See infra* note 38 and accompanying text (stating that United States copyright protection focuses on economic and property rights).

25. *See infra* notes 145-68 and accompanying text (suggesting limited protection approach to provide copyright protection for works of architecture).

26. *See* 17 U.S.C. §§ 101-118 (1988) (detailing subject matter protection of United States copyright under Copyright Act); *Copyright Office Report*, *supra* note 8, at 223-24 (describing first Copyright Office option to protect architectural structures). According to the Copyright Office report, the first option to provide additional protection to architectural structures requires that Congress consider the exact nature of the buildings that the creation of a new subject matter category would cover, the nature of any limitations on the exclusive rights that the new category would grant, the nature of specific moral rights protection that the new category would grant, and the nature of any remedies for infringement. *Id.*

27. *See* 17 U.S.C. § 101 (1988) (defining current copyright protection under pictorial, graphic, and sculptural works clause, including architectural plans, but not structures); *see generally* Kernochan, *Comments on Discussion Bill and Commentary Prepared for the April 15 Subcommittee Meeting as a Proposed Draft of Implementing Legislation to Permit U.S. Adherence to Berne*, 10 COLUM. J.L. & ARTS 693 (1986) (commenting on Copyright Office's preliminary draft of legislative provisions designed to revise Copyright Act to make United States adherence to Berne Convention possible). Kernochan believes that the creation of a new subject matter category for architectural structures, such as the Copyright Office suggests in the first option, might infringe on patent law domain. *See id.* at 698 (concluding that Congress would have no difficulty in recognizing architectural works as copyrightable subject matter with limiting language in area of patent domain). Kernochan thus states that § 113(a) of the Copyright Act, limiting the exclusive rights of copyright holders, should contain the phrase "or primarily functional elements or features" to keep architectural copyright from infringing on patent law domain. *Id.* at 698.

28. S. 1301, 100th Cong., 1st Sess. (1987) [hereinafter S. 1301]; S. 1971, 100th Cong., 1st Sess. (1987) [hereinafter S. 1971]; H.R. 1623, 100th Cong., 1st Sess. (1987) [hereinafter H.R. 1623]; *see The Berne Convention Implementation Act of 1988, Hearings Before the Senate Subcomm. on Pat., Copyright & Trademark of the Senate Judiciary Comm.*, 100th Cong., 2d Sess. 1 (1988) [hereinafter *Implementation Act Hearings*] (statement of Ralph Oman, Register of Copyrights) (detailing bills S. 1301 and S. 1971); *also Copyright Office Report*, *supra* note 8, at 223 (suggesting H.R. 1623 as satisfactory legislation to provide architectural protection). Senator Leahy sponsored bill S. 1301 to amend the Copyright Act. *Implementation Act Hearings*, *supra*, at 1. Senator Hatch sponsored the Reagan administration bill, S. 1971, to amend the Copyright Act. *Id.*

as protectable subject matter.[29] However, architectural works protection under the Berne Convention not only protects the structures against duplication, but also against modification, distortion, or destruction.[30] Consequently, two of the bills that propose this Berne level of protection also set forth several limitations that narrow the scope of an architect's exclusive rights to prevent modification or distortion of the architect's creations.[31]

Defining and limiting an architect's exclusive rights to prevent modification or distortion is the point at which the first option fails to offer a satisfactory solution. Architects expect copyright law to afford protection against alterations in the architect's design that would detract from the desired aesthetic effect.[32] Inherent in this protection against alterations is the concept of moral rights.[33] Moral rights include the right of an artist to claim paternity of, and a right of respect in, the artist's work.[34] The right of paternity includes the right of the artist not to have the artist's name attached to a work that the artist does not acknowledge.[35] The right of respect, or right of integrity, recognizes a continuing relationship between

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29. *See Implementation Act Hearings*, *supra* note 28, at intro. (discussing proposal of S. 1301 and S. 1971 to create "architectural works" clause in Copyright Act to provide architectural copyright protection); *Copyright Office Report*, *supra* note 8, at 223 (discussing proposal of H.R. 1623 to protect architectural works under Copyright Act). Two bills introduced to amend the Copyright Act, S. 1301 and S. 1971, both propose to amend 17 U.S.C. § 101 to add a definition of architectural works. *Implementation Act Hearings*, *supra* note 28, at 12. Both bills also propose to include architectural works in the pictorial, graphic and sculptural works clause of 17 U.S.C. § 102. *Id.*

30. *See infra* note 169 (discussing moral rights protection under Berne Convention, including protection against modification, distortion, or destruction of artistic work); *see also Implementation Act Hearings*, *supra* note 28, at 13 (proposing new § 119 setting forth several limitations on exclusive rights of architects to prevent modification or demolition).

31. S. 1301, S. 1971, *supra* note 28; *see Implementation Act Hearings*, *supra* note 28, at 13 (discussing limitations under S. 1301 and S. 1971 on architect's exclusive rights to prohibit modification or distortion of architect's work). Two bills that propose to amend the Copyright Act, S. 1301 and S. 1971, favor a limitation clause to protect the right of an owner to make alterations to a building to enhance utility. *Implementation Act Hearings*, *supra* note 28, at 13. Senator Leahy's bill, S. 1301, also would reserve to the building owner the right of demolition. *Id.* The administration's bill, S. 1971, would not extend copyright protection to processes or methods of construction. *Id.*

32. *See Comments of the Frank Lloyd Wright Foundation to U.S. Copyright Office Notice of Inquiry on Architectural Work Protections*, at 6, *reprinted in Copyright Office Report*, *supra* note 8, Appendix C (stating that courts should grant remedies for mutilation or other alterations of architectural structures that fall within moral rights protection under Berne Convention).

33. *See supra* notes 30-31 and accompanying text (discussing protection of architects' moral rights to safeguard their works against such alterations as modification, distortion, or destruction).

34. *See* E. PLOMAN & L. HAMILTON, COPYRIGHT; INTELLECTUAL PROPERTY IN THE INFORMATION AGE 52 (1980) (discussing moral rights protections under international law, including paternity rights and right of integrity).

35. *See* DuBoff, *Artists' Rights: The Kennedy Proposal to Amend the Copyright Law*, 7 CARDOZO ARTS & ENT. L.J. 227, 228 (1989) (discussing Senator Edward Kennedy's 1987 proposal to grant right of paternity to all American artists).

the artist and the artist's creation.[36] This right of respect allows the artist to prevent the alteration, mutilation, or destruction of the artistic work.[37] However, United States copyright law does not grant paternity or integrity rights in any artistic work, focusing instead on the economic and property rights of the work's current owner.[38] In fact, United States efforts to adhere to the Berne Convention first waned after the 1928 Rome text of Berne offered moral rights protection.[39] And, in 1988, to ensure that the controversial issue of moral rights would not prevent the United States from joining the Berne Convention, Congress adopted the legislative strategy of keeping the issue of moral rights separate from the enabling legislation permitting United States adherence to the Berne Convention.[40]

The Copyright Office proposes to minimize the first option's inclusion of moral rights protection by imposing appropriate limitations on an architect's rights.[41] The Copyright Office report suggests limitations on an architect's exclusive rights such as granting a building owner the right to make technical alterations to the building.[42] Two of the three proposed bills include limitations on an architect's exclusive rights such as allowing an owner to make alterations to a building to enhance utility, reserving to the owner the right of demolition, and limiting architectural protection to a building's artistic character.[43] Any limitation of an architect's exclusive rights, however, is an unsatisfactory compromise because the limitation either strips a building's owner of the owner's property rights in the building or else fails to protect an architect from distortion of the architect's work.

An additional problem with the option of granting subject matter protection to works of architecture is determining the proper remedy.[44]

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36. *Id.* at 228.

37. *Id.*

38. *See* R. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS, ISSUES AND CONTROVERSIES 6 (1987) (analyzing current problems with United States trademark, copyright, and patent laws considering new technologies and evolving international standards, including fact that United States protections focus on property rights whereas international protections recognize moral rights); *also Preliminary Report supra* note 5, at 215-16 (concluding that 17 U.S.C. § 106(2) (1988), giving copyright owner right to prepare derivative works based upon copyrighted work, is closest that United States comes to offering moral rights protection).

39. DuBoff, Caplan, *supra* note 5, at 41.

40. *See* Schwartz, *The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process*, 36 J. COPYRIGHT SOC'Y 138, 139 (1989) (stating that, to avoid controversy that might prevent United States accession to Berne, Congress deliberately failed to address moral rights protection in Berne enabling legislation).

41. *Copyright Office Report*, *supra* note 8, at 224.

42. *Id.*

43. *See* S. 1301 and S. 1971, *supra* note 28 (suggesting paternity right protection for architects' works, with necessary limitations); *see also supra* notes 30-31 and accompanying text (expressing need for limitations on architect's exclusive rights).

44. *See* S. 1301 and H.R. 1623, *supra* note 28 (suggesting that tension exists in attempt to provide remedy for copyright infringement on architectural structures without encroachment on building owners' property rights or on public domain). To preserve a building owner's property rights and to insure benefit to the public domain, S. 1301 includes limitations under

Possible remedies for architectural infringement include destruction of the infringing building, injunction against further construction, or monetary damages.[45] However, each of these possible remedies has problems.[46] For instance, courts would promote economic waste by permitting the destruction of a sound, albeit infringing building.[47] Additionally, courts may not be apt to grant an injunction against further construction merely on the suspicion that the structure might infringe upon completion.[48] Furthermore, remedies such as injunctions and demolition could cause dislocations in the construction industry.[49] Finally, measuring monetary damage to an architect's reputation or economic interests by infringement is difficult, if not impossible.[50] Consequently, the first option that the Copyright Office proposes is unsatisfactory.

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the bill's § 119 on the copyright owner's exclusive rights in architectural works. S. 1301, *supra* note 28. For instance, the bill does not include the right of the copyright owner to prevent the making, distributing, or public display of pictorial representations of the structure. *Id.* Also, the bill does not entitle the copyright owner to obtain an injunction to restrain the construction or use of an infringing building, if construction has substantially begun. *Id.* Further, the copyright owner may not obtain a court order requiring that an infringing building be demolished or seized. *Id.*; *see also Copyright Office Report supra* note 8, at 224 (suggesting limitation of injunctive relief against building construction and limitation on destruction of building as possible remedies).

45. *See supra* note 44 (suggesting possible theories to remedy copyright infringement of architectural structures, including injunction against further construction and demolition of infringing structures); *Copyright Office Report*, *supra* note 8, at 223 (stating that copyright statutes of other Berne nations have general infringement provisions for damages except that injunction generally is not available once construction of alleged infringing building has begun, and courts may not order demolition of infringing buildings as remedy).

46. *See infra* notes 47-50 and accompanying text (discussing disadvantages of potential remedies for copyright infringement).

47. *See supra* notes 44-45 (expressing reluctance of legislators to permit destruction of infringing buildings because of economic waste involved).

48. *See* Demetriades v. Kaufman, 680 F. Supp. 658, 666 (S.D.N.Y. 1988) (denying injunctive relief against alleged infringement of copyrighted plans). In *Demetriades* the United States District Court for the Southern District of New York considered whether the owners of a house could enjoin the defendants from constructing a house substantially similar to the owners' custom house on the same street. *Id.* at 659-61. In constructing the duplicate home, the defendants used the original builder's plans and photographs of the original house. *Id.* at 660. Relying on the Supreme Court's decision in Baker v. Selden, 101 U.S. 99 (1879), the court found that although courts grant an owner of copyrighted architectural plans the right to prevent the unauthorized copying of those plans, that individual does not obtain a protectable interest in the useful article the plans depict. *Id.* at 665-66. Consequently, the court enjoined defendants from using the copyrighted plans. *Id.* at 666. The court did not, however, enjoin the defendants from constructing the house. *Id.*; *see also supra* notes 44-45 (discussing legislative reluctance to allow injunctions against construction of allegedly infringing buildings).

49. *See Copyright Office Report*, *supra* note 8, at 225 (suggesting that architectural protection could cause dislocation in construction industry); *Id.* at 116 (reproducing suggestion of United States Representative Moorhead that architectural protection without limitations on remedies could compromise practices in construction industry); *Id.* at 110 (stating that architects rely on free expression of ideas in public domain).

50. *See supra* note 38 and accompanying text (stating that copyright protection focuses on artists' economic and property rights, rather than reputation, therefore making monetary calculation of infringement difficult).

The second Copyright Office proposal suggests its own remedy against architectural infringement.[51] The proposal extends protection of the copyrighted blueprints to prohibit the prints' unauthorized use.[52] Currently, in the United States, an architect's copyright on plans does not prevent a person from constructing a substantially identical dwelling.[53] The second option gives the copyright owner the right to prohibit unauthorized use of the original plans to construct substantially similar buildings.[54]

The Copyright Office report concludes that this second option particularly will aid smaller architectural firms that are more likely to have others copy their works.[55] However, while the Copyright Office correctly concludes that the major incidents of copying occur from residential duplication and not from major office complexes and sophisticated structures, the small scale designer also is more susceptible to copying absent use of the original blueprints, a problem that this option does not address.[56] Whereas duplication of a technical building requires use of the original blueprints, one can duplicate a house from varied sources.[57] Yet the second proposed option merely prevents duplication through the use of the original blueprints.[58] Accordingly, duplication still may occur if the duplicator uses other methods. In one case, a court permitted duplication of a "Chateau" model house through the use of a floor plan in the developer's advertising brochure.[59] In another, a court observed that a person could study a house, draw up

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51. *See Copyright Office Report*, *supra* note 8, at 224 (suggesting as second proposal for structural protection that copyright owner retain right to prohibit unauthorized construction of substantially similar buildings based on owner's copyrighted plans).

52. *Copyright Office Report*, *supra* note 8, at 224.

53. *See supra* note 13 and accompanying text (discussing copyright protection under *Baker* for architectural plans, but not for structures plans depict).

54. *Copyright Office Report*, *supra* note 8, at 224. The American Institute of Architects favors the Copyright Office proposal to permit the owner of copyrighted blueprints to prevent construction of substantially similar buildings based on those blueprints. *Id.*

55. *Id.*

56. *See, e.g.*, Imperial Homes v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972) (holding that copyrighted architectural plans do not clothe plans' author with exclusive right to construct houses plans depict); Demetriades v. Kaufman, 680 F. Supp. 658, 664-65 (S.D.N.Y. 1988) (holding that copyright in plans does not extend to design of house without design patent protection); Herman Frankel Org. v. Tegman, 367 F. Supp. 1051, 1053-54 (E.D. Mich. 1973) (holding that copyright of house plans cannot prevent construction of home plans depict through use of floor plans in advertising brochure); DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184, 196 (M.D. Fla. 1962) (holding that copyright law does not extend protection to residential structure, but only to copyrighted plans).

57. *See infra* notes 59-60 and accompanying text (discussing cases that permit architectural duplication from floor plans in brochures, from reconstruction of original plans, and from observation of completed structure).

58. *See Copyright Office Report*, *supra* note 8, at 224-25 (outlining Copyright Office's second proposal to protect architecture by limiting use of original blueprints).

59. *See* Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972) (holding that, while copyright did protect against reproduction of floor plan from architectural drawings, copyright did not protect against use of floor plan as depicted in advertising brochure).

plans, and construct the same dwelling.[60] Thus, while the second option will prevent the unauthorized use of copyrighted plans, the option will not prevent the unauthorized copying of structures through other means.[61] Therefore, the second option does not sufficiently safeguard architects desiring structural protection.

The effectiveness of the second option also is contingent upon an architect discovering an attempt at unauthorized duplication.[62] The proposal does nothing to aid small architectural firms that are less likely than larger firms to discover an infringement.[63] For example, a duplication of the Guggenheim Museum is more susceptible to discovery than the copying of a "Chateau" model house. Consequently, the second option fails to offer a consistent solution for architectural protection. Therefore, Congress should not adopt the Copyright Office's second proposal.

The third solution that the Copyright Office proposes is to amend the definition of "useful article" in the Copyright Act to provide copyright protection for articles having a utilitarian purpose.[64] Presently, the Copyright Act excludes protection of articles with a utilitarian purpose.[65] The Act affords protection to the design of a useful article only if, and only to the extent that, the design incorporates pictorial, graphic, or sculptural features separate and independent from the utilitarian aspects of the article.[66] The Copyright Office denies protection to architectural structures as utilitarian articles by employing a separability test.[67] Under the separability test, the

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60. *See* DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184, 196 (M.D. Fla. 1962) (holding that copyright only restricts unauthorized copying of plans).

61. *See supra* notes 59-60 and accompanying text (stating that one can duplicate architectural structures through reconstruction of original plans or by using floor plan in advertising brochures).

62. *See* Demetriades v. Kaufman, 680 F. Supp. 658, 662-65 (S.D.N.Y. 1988) (rejecting claim by homeowner that construction of similar house on same street was copyright infringement of plaintiff's house). In *Demetriades*, plaintiff brought suit only because plaintiff, living on the same street as the alleged infringing structure, was able to discover the duplication. *See id.* at 660 (relying on plaintiff's own discovery of alleged infringement).

63. *See Copyright Office Report*, *supra* note 8, at intro. xii (stating that smaller architectural firms rely on single-family dwelling projects and not more notable structures such as office buildings, health care facilities, or multi-family dwellings); *supra* note 62 (exemplifying unlikelihood of discovering copies of single family dwellings).

64. *See* 17 U.S.C. § 101 (1988) (defining "useful article" as article having intrinsic utilitarian function that is not merely to portray appearance of article or to convey information); *Copyright Office Report*, *supra* note 8, at 225 (proposing to amend definition of useful article under title 17 to exclude unique architectural structures).

65. *See* 17 U.S.C. § 101 (1988) (excluding protection under Copyright Act of pictorial, graphic, or sculptural works with utilitarian purpose).

66. *See* 17 U.S.C. §§ 101-102 (1988) (identifying pictorial, graphic, and sculptural works as copyrightable subject matter); Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM. J.L. & ARTS 89, 114 (describing separability test protection for design of article with utilitarian purpose).

67. *See* Shipley, *supra* note 3, at 419 (1986) (suggesting that Copyright Office limits architectural protection by applying separability test of pictorial, graphic, and sculptural works clause to deny protection to articles with utilitarian purpose).

Copyright Office will not register an industrial design unless the design contains some artistic characteristic that is separable from the utility of the structure.[68] Currently, courts utilize the separability test to determine protectable subject matter under the pictorial, graphic, and sculptural works clause of the Copyright Act.[69] Congress emphasized that courts must exercise the separability test in determining artistic protection versus uncopyrightable industrial design.[70] Accordingly, the only structures currently receiving copyright protection are purely nonfunctional structures such as monuments or structures with separable, copyrightable artistic features.[71]

In its third proposal, the Copyright Office suggests that Congress could amend the definition of "useful article" to exclude unique architectural structures.[72] As a result, the present separability test no longer would deny copyright protection to unique architectural structures as utilitarian articles and, thus, unique architectural structures would receive copyright protection.[73] The Copyright Office argues that if Congress would exclude unique architectural structures from the useful article exception, the Copyright Office could protect the overall shape of a building if the design is original within the meaning of copyright law.[74] The Copyright Office further argues that, by limiting the protection only to unique architectural structures, Congress could minimize the impact of the copyright amendment and avoid

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68. J. HAZARD, COPYRIGHT LAW IN BUSINESS & PRACTICE 2-19 (1989).

69. *See* 17 U.S.C. §§ 101-102 (1988) (granting subject matter protection to article's design separate from article's utilitarian purpose under pictorial, graphic, and sculptural works clause of Copyright Act); *see, e.g.*, Carol Barnhart Inc., v. Economy Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985) (protecting utilitarian article only to extent that article incorporates some element that is separable from utilitarian aspects of that article); Norris Indus., Inc. v. International Tel. & Tel. Corp., 696 F.2d 918, 923-24 (11th Cir. 1983) (applying separability test to grant copyright protection only to design elements of article separable from useful elements of article); Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905, 913 (2d Cir. 1980) (offering copyright protection for product only if product contains some element separable from utilitarian aspects of article). Because United States courts generally consider most works of architecture as useful articles, the separability test only aids architectural structures if the structure incorporates "pictorial, graphic, or sculptural" features that are identifiable separately from the utilitarian aspects of the building. Sandison, *supra* note 66, at 114.

70. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 54 (1976) (emphasizing separability as test for copyright protection under title 17).

71. *See* Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729, 731 (M.D. Pa. 1936) (stating that monuments are analogous to sculptural works of art and, thus, subject to copyright protection); *also* H.R. REP. No. 1476, 90th Cong., 2d Sess. 54 (1976) (describing purely nonfunctional or monumental structures as subject to full copyright protection); Shipley, *supra* note 3, at 425 (concluding that only monuments and other purely nonfunctional structures currently are receiving copyright protection).

72. *See* 17 U.S.C. § 101 (1988) (defining "useful article" under current Copyright Act); *Copyright Office Report*, *supra* note 8, at 225 (proposing to amend definition of useful article in Copyright Act to exclude unique structures). The Copyright Office defines a unique structure as a single copy construction from a given set of plans. *Copyright Office Report*, *supra* note 8, at 225.

73. *See Copyright Office Report*, *supra* note 8, at 225 (proposing to exclude Copyright Act's denial of protection under separability test for unique architectural structures).

74. *Copyright Office Report*, *supra* note 8, at 225.

possible dislocations in the construction industry caused by copyright protection of utilitarian designs.[75] Also, according to the Copyright Office, the third proposal protects unique structures as the structures most deserving of architectural protection.[76]

The problem with the third option is that the proposal leaves a broad class of architectural structures without protection.[77] The "most" deserving structures, such as a Transamerica Tower with its pyramid design, are also the least likely for a builder to attempt to copy without the original plans. However, a less unique building, such as a "Chateau" model house, is more likely for a builder to attempt to copy without the original plans. Consequently, the small scale designer that the Copyright Office felt compelled to protect in the second option is left without recourse under the third option because the Copyright Office is less likely to find the small scale design subject to protection as a unique structure.[78] Thus, the third option is simply not broad enough to provide adequate protection for the architectural industry.

Another problem with the third option is the option's apparent overlap with design patent law caused by excluding the separability test from unique structures.[79] Congress devised the separability test to prevent copyright encroachment on design patent law domain.[80] Patent law addresses the inherent problems in protecting works of architecture by protecting structural design apart from a structure's artistic features.[81] Patent law seeks to reward an architect for innovative design by granting monopoly protection without removing advancements from the public domain.[82] For example, the Patent Office does not want to grant monopoly protection on suspension girders

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75. *Id.*

76. *Id.*

77. *See Copyright Office Report*, *supra* note 8, at 225 (suggesting that those seeking protection for broad class of architectural structures would not favor Copyright Office's third option).

78. *See supra* note 55 and accompanying text (expounding benefits of Copyright Office's second option's protection for smaller architectural firms).

79. *See infra* notes 80-88 and accompanying text (discussing goals of design patent law versus copyright).

80. *See* 35 U.S.C. § 171 (1982) (granting patent protection to design of article); H.R. REP. No. 1476, 94th Cong., 2d Sess. 54 (1976) (emphasizing need for separability test to distinguish copyrightable artistic protection from patentable industrial design protection); *see also* Milch, *Protection for Utilitarian Works of Art: The Design Patent/Copyright Conundrum*, 10 COLUM. J.L. & ART 211 (1986) (discussing tension that exists between copyright and patent when utilitarian article includes artistic features).

81. *See* White, *Standing on Shaky Ground: Copyright Protection for Works of Architecture*, 6 COLUM. J.L. & ARTS 70, 74 (1981) (discussing inherent tension of enacting patent legislation that encourages creativity by offering economic incentives through design monopoly without infringing on copyright protection of creativity).

82. *See* 35 U.S.C. § 171 (1982) (providing protection for new, original, and ornamental designs under patent law); *also* U.S. PATENT AND TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 1502 (5th rev. ed. 1989) (interpreting design protection under 35 U.S.C. § 171 (1982)).

that might serve the public benefit, or on glass enclosure systems that are beneficial to all buildings.[83] The dilemma is to enact legislation protecting designs of architectural structures without diminishing architectural advancements in the public domain.[84] Currently, to receive patent protection the design must be novel, and the standard of novelty is exceedingly high.[85] Consequently, design patent protection is difficult to obtain.[86] The Patent Office will reject a design if the application is merely a modification of an existing design.[87] By eliminating the separability test and relegating design protection decisions to the more readily obtainable protection of copyright, copyright law might deprive the public of access to ideas and beneficial contributions.[88] Public comments submitted to the Copyright Office similarly argued that a large facet of architecture involves the compilation of useful ideas from other architectural sources.[89] Revoking the protection of the separability test that Congress emphasized and that the courts apply could prove disastrous to the industry by granting monopoly protection to beneficial design methods.[90] In sum, the third option is not broad enough and encroaches on patent law domain. Consequently, Congress should not adopt the third option.

The fourth option of the Copyright Office is to do nothing and allow the courts to develop new legal theories of protection under existing federal statutory and case law.[91] The option presupposes that attitudes on intellectual property are evolving with United States accession to Berne and that federal courts are on the forefront of this change in attitudes, waiting to thrust

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83. *See* White, *supra* note 81, at 74 (discussing problems of patent precluding public use of beneficial designs).

84. *Id.*; *see also infra* note 88 and accompanying text (expressing view that inherent tension exists in patent law between protecting rights of ownership and allowing access to ideas).

85. *See* White, *supra* note 81, at 74 (discussing difficulty in obtaining patent protection as opposed to copyright protection). Generally, patentable designs must embody a "new, original, and ornamental design for an article of manufacture" and must meet the requirements of novelty, originality, and nonobviousness. *Copyright Office Report*, *supra* note 8, at 64; *see also infra* notes 98-99 and accompanying text (analyzing difficulty in obtaining design patent law protection).

86. *See* White, *supra* note 81, at 74 (stating that design patent protection is difficult to obtain).

87. White, *supra* note 81, at 74.

88. *See generally* Morris, *Expanding Proprietary Entitlements and the Public Interest in Dissemination of Art*, 7 CARDOZO ARTS & ENT. L.J. 269 (1989) (discussing tension inherent in copyright law between rights of ownership and public access to ideas).

89. *See Copyright Office Report*, *supra* note 8, at Appendix C (comment of Francis X. Arvan) (opining that field of architecture relies on copying other works).

90. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 54 (1976) (containing separability test that Congress recommended courts employ); *supra* notes 66-68 and accompanying text (discussing separability test for copyright protection of articles with utilitarian purpose). *See generally Copyright Office Report*, *supra* note 8, at Appendix C (comment of Francis X. Arvan) (emphasizing architectural industry's reliance on copying to certain extent).

91. *Copyright Office Report*, *supra* note 8, at 225-26.

protection upon architectural structures.[92] The Copyright Office report concludes that novel theories for extending protection to works of architecture abound under federal law.[93] These theories include protection under design patent law, unfair competition common law, trademark law, and the separability test of copyright law.[94] The Copyright Office believes that these legal theories will permit the courts to develop architectural protection based on fact-specific circumstances.[95] The Office, however, admits that the fourth option leaves open the possibility of inadequate and conflicting theories of protection for architectural works[96] because United States courts, as well as the Patent and Trademark, and Copyright Offices, have been reluctant to grant protection to architectural structures under any of the Copyright Office's alternative legal theories.[97] For example, present architectural protection under the alternative theory of design patent law is difficult to obtain.[98] The design must be novel and the standard of novelty is exceedingly high.[99] Similarly, the federal courts offer little protection to works of architecture under the alternative of common-law protection of unfair

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92. *See id.* at 225 (stating that alternative theories for providing architectural protection exist under federal law). The Copyright Office report expresses the belief that novel theories for extending protection to works of architecture abound under federal law. *Id.* The report states that Congress could permit the courts to review these novel theories in light of Berne adherence. *Id.*

93. *Copyright Office Report*, *supra* note 8, at 225; *see supra* note 92 (expressing Copyright Office's opinion that methods of protecting architectural structures abound under federal law).

94. *See Copyright Office Report*, *supra* note 8, at 63-69 (analyzing various avenues of protection for architectural works other than copyright); *supra* notes 66-68 and accompanying text (detailing separability test protection for works of architecture); White, *supra* note 81, at 74 (suggesting alternative theories for protection of architectural structures). *See generally* Note, *Protecting Architectural Plans & Structures with Design Patents and Copyrights*, 17 DRAKE L. REV. 79 (1967) (describing design patent as an alternative source to copyright for architectural protection).

95. *Copyright Office Report*, *supra* note 8, at 225.

96. *Id.* at 225-26.

97. *See infra* notes 98-117 and accompanying text (discussing inadequacies of architectural protection under patent law, trademark law, common law, or copyright law); *Copyright Office Report*, *supra* note 8, at 13-14 (analyzing case history in United States concerning copyright protection for works of architecture). In analyzing the history of the United States courts on protection for works of architecture, all cases that the Copyright Office found held that a work of architecture is not a copy of the plans. *Id.* Courts in six cases held that a copyright in plans does not extend to the structure depicted therein. *Id.* The Copyright Office found no cases that squarely presented the issue of a claim to copyright in a work of architecture. *Id.* According to the Copyright Office, courts, being disposed not to protect buildings, have found other ways besides copyright enforcement to punish deliberate infringers. *Id.*

98. *See supra* notes 83-86 and accompanying text (discussing difficulty of obtaining design patent protection for architectural works). According to the Copyright Office, in addition to the difficulty of obtaining a patent, the relatively short design patent term, 14 years, may be inadequate to satisfy proponents of architectural protection. *Copyright Office Report*, *supra* note 8, at 64.

99. *See supra* notes 84-87 and accompanying text (discussing stringent requirements of patent law drafted to encourage advancements without depriving public).

competition.[100] Although the common law protects the "passing off" of a person's work for that of another, the test for unfair competition severely limits the test's application.[101] The test for protection is whether the structure so resembles another that the public will mistake the defendant's work for that of the original architect.[102] Cases meeting that standard are exceedingly rare.[103]

In an equally number of rare cases, United States trademark law, another alternative theory of architectural protection, has offered protection to distinctive architectural works.[104] The test for protection under trademark law is whether the public perceives the structure as an identification of the merchant's goods or services.[105] In proper cases, courts have held that a uniquely designed building can serve as a trademark.[106] The report of the Ad Hoc Committee on Berne Adherence, however, concluded that the trademark avenue of protection is not sufficiently analogous to copyright protection to offer the copyright level of protection that architects desire for their works.[107]

A final existing legal theory for architectural protection is through the copyright separability test.[108] Currently, the only copyright protection available for works of architecture is under the "pictorial, graphic, or sculptural

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100. *See infra* notes 101-03 and accompanying text (discussing common-law protection of unfair trade practices); *cf.* 15 U.S.C. § 1125 (1986) (providing statutory unfair competition protection). Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988), provides broad statutory unfair competition coverage in addition to the limited common-law protection of unfair trade practices. *Copyright Office Report*, *supra* note 8, at 65.

101. *See* White, *supra* note 81, at 74 (stating that common law protects passing off of artist's work for that of another artist).

102. *Id.* at 74.

103. *Id.*

104. *See In Re* Port-a-Hut, Inc., 183 U.S.P.Q. 680, 682 (P.O.T.M.T. App. Bd. 1974) (denying trademark protection to applicant's portable steel sheds because sheds were essentially functional and utilitarian in character). *But see Copyright Office Report*, *supra* note 8, at 65-67 (suggesting that trademark protection is possible for certain works of architecture). The Lanham Act, 15 U.S.C. §§ 1051-1127 (1988), provides for trademark protection. *Copyright Office Report*, *supra* note 8, at 65.

105. *See In Re Port-A-Hut*, at 681-82 (applying consumer identification test to satisfy trademark protection requirements for applicant's portable building, but denying trademark registration because building was primarily utilitarian); White, *supra* note 81, at 74 & nn.81-83 (discussing *In Re Port-A-Hut* test for architectural trademark protection).

106. *See* Fotomat Corp. v. Cochran, 437 F. Supp. 1231, 1245 (D. Kan. 1977) (allowing Fotomat Corp. to enforce trademark of its Fotomat booths); Fotomat Corp. v. Houck, 166 U.S.P.Q. 271, 272-73 (Fla. Cir. Ct. 1970) (allowing Fotomat Corp. to enforce trademark of its Fotomat booths). Proper cases for trademark protection of architectural structures typically involve configurations of shapes and colors, in conjunction with the name or logo of a company, that establish a link in the consumer's mind between the service and the structure. *Copyright Office Report*, *supra* note 8, at 65.

107. *Preliminary Report*, *supra* note 5, at 264 (1986).

108. *See supra* notes 65-71 and accompanying text (outlining copyright protection for artistic features of utilitarian article under separability test).

works" clause of the Copyright Act.[109] Under this clause, the Act protects a work of architecture only to the extent that the work incorporates pictorial, graphic, or sculptural features that courts can identify separately from the work's utilitarian aspects.[110] Because the Act does not protect articles with a utilitarian purpose such as buildings, courts apply the separability test to determine the specific elements of an architectural structure that can receive copyright protection under the pictorial, graphic, or sculptural works clause.[111] Under current copyright law, adornments or embellishments to a building can receive copyright protection, but the structure, as a useful article, is not eligible for copyright protection.[112] However, the United States District Court for the Middle District of Pennsylvania considered a nonfunctional architectural structure, a memorial monument, analogous to a sculptural work and afforded the structure full copyright protection.[113] Hence, the Copyright Office will protect the Washington Monument and artistic features of buildings displaying gargoyles or decorative inlays.[114] In contrast, the streamlined contours of the United Nation's plaza, having no identifiable design conceptually different from the building's utilitarian function, does not have access to copyright protection.[115] Because most works of architecture do not have ornamental embellishments, and courts generally consider structures to be useful articles, the separability analysis offers architects little protection.[116] Furthermore, architects and other advocates of architectural protection are concerned with the difficulty in distinguishing between

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109. *See* 17 U.S.C. § 101 (1988) (containing clause defining copyright subject matter protection of pictorial, graphic, and sculptural works clause); Shipley, *supra* note 3, at 398 n.18, (citing 17 U.S.C. § 101 (1988)) (defining subject matter protection of pictorial, graphic, and sculptural works clause).

110. *See* 17 U.S.C. §§ 101-118 (1988) (describing subject matter protection of copyright, including separability test protection under pictorial, graphic, and sculptural works clause); Shipley, *supra* note 106, at 398 n.18 (stating that Copyright Act only protects architectural structure to extent that structure depicts artistic features separable from structure's design); *Preliminary Report*, *supra* note 5, at 264 (defining "useful article"); *see also* 17 U.S.C. § 113(b) & (c) (1988) (limiting architectural works protectable because structures, having utilitarian purpose, are useful articles).

111. *See* 17 U.S.C. §§ 101-102 (1988) (including in § 102 of Copyright Act, pictorial, graphic, and sculptural works as protectable subject matter and in § 101 of Copyright Act, defining pictorial, graphic, and sculptural works); *supra* notes 65-71 and accompanying text (explaining use of separability test to determine protection for articles with utilitarian purpose).

112. *Preliminary Report*, *supra* note 5, at 264.

113. *See* Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729, 730-31 (M.D. Pa. 1936) (holding monuments analogous to sculptural works and, therefore, subject to full copyright protection); Shipley, *supra* note 3, at 404 n.48 (stating that purely nonfunctional structures are analogous to sculptural works and, thus, subject to copyright protection); H.R. REP. No. 1476, 94th Cong., 2d Sess. 55 (1976) (describing purely nonfunctional or monumental structures as subject to full copyright protection).

114. White, *supra* note 81, at 71.

115. *Id.*

116. *See* Shipley, *supra* note 3, at 437 (1986) (stating that advocates of architectural protection are justifiably concerned with level of difficulty in distinguishing under separability test between article's functional and artistic features).

an article's functional and artistic features.[117] Thus, the separability test offers no consistent or comprehensive mode of protection for architectural works.

Therefore, the Copyright Office is justifiably concerned with the possible disadvantages of adopting a do-nothing policy about protection of architectural structures.[118] Inaction not only will leave architects without protection for their structures, but also will leave United States copyright protection in noncompliance with international standards.[119] Currently, United States protection for architectural works falls short of the international standard of protection expounded by the Berne Convention.[120] In fact, the Ad Hoc Working Group on Berne Adherence concluded that present United States methods of protection for architectural works fail to meet the Berne Convention standards.[121] International compliance with the Berne Convention is important for the United States because the Convention operates on the principles of reciprocal national treatment for foreign artists.[122] The Convention also imposes minimum standards for protection.[123] Nations that are parties to the Convention must grant protection at a level not below that which the Convention mandates.[124] Thus, the Convention implies that to meet the Berne Convention's minimum standards, adhering countries must sacrifice their rigid national conceptions of copyright by bending their

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117. *See id.* (discussing concerns of architectural protectionists over level of difficulty in applying copyright separability test).

118. *See Copyright Office Report*, *supra* note 8, at 225-26 (expressing concern that fourth option of doing nothing to amend Copyright Act leaves open possibility of conflicting theories of protection as well as possibility of inadequate subject matter protection for works of architecture); *supra* notes 97-117 and accompanying text (explaining disadvantages of alternative modes of architectural protection).

119. *See infra* notes 120-121 and accompanying text (discussing Ad Hoc Working Group's conclusion that United States copyright law is not in compliance with Berne Convention with respect to structures as works of architecture).

120. *See* Sandison, *supra* note 66, at 114 (stating that United States copyright protection does not meet Berne Convention standards for buildings and other works of architecture); *Final Report of Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, *reprinted in* 10 COLUM. J.L. & ARTS 513, 603 (1986) [hereinafter *Final Report*] (stating that United States copyright protection falls short of Berne standards with respect to architectural works).

121. *See Preliminary Report*, *supra* note 5, at 260 (concluding that United States copyright protection is consistent with Berne Convention in subject matter with apparent exception of works of architecture); *Final Report*, *supra* note 120, at 603 (maintaining preliminary report finding that United States subject matter protection falls short of Berne with respect to works of architecture).

122. *See* E. PLOMAN & L. HAMILTON, COPYRIGHT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE 49 (1980) (stating that Berne Convention operates on principle of reciprocal national treatment). The Berne Convention protects foreign works and foreign authors in each member country in the same manner as the member country's national works and national authors. *Id.*

123. *Id.*

124. *Id.*

internal legislation to meet internationally recognized rules.[125] Hence, if the United States does not meet the minimum obligations of the Berne Convention, the United States cannot expect to reap the financial rewards of Berne Convention protection in other nations.[126]

Furthermore, the Berne Convention represents the international law on copyright protection.[127] United States law requires United States courts to interpret congressional legislation so as to not conflict with international law.[128] Such interpretation of United States law is difficult when United States law is in such disparity to the international law under the Berne Convention.[129] When United States law directly conflicts with international law, as it currently does in the area of architectural copyright, United States courts cannot give credence to the Supreme Court's admonishment that international law is part of United States law.[130] Also, under the Vienna Convention on the Law of Treaties, the United States has a duty to perform treaty obligations, such as those that the United States assumed in adopting the Berne Convention, in good faith.[131] Finally, a violation of international

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125. *Id.* at 49. *But see Preliminary Report*, *supra* note 5, at 188 (stating that Berne Convention has no procedure for reviewing adhering countries' actual compliance with Berne's minimum standards). The international bureau that administers Berne under Article 24 of the Convention has no procedure for reviewing instruments of accession to determine compatibility with Berne's minimum standards. *Preliminary Report*, *supra* note 5, at 188. Consequently, the Convention has not rejected any instrument of accession on the ground of incompatibility. *Id.*

126. *See* E. PLOMAN & L. HAMILTON, *supra* note 122, at 49 (stating that Berne nations will respect foreign copyrights of foreign artists). The United States joined the Berne Convention to obtain the highest available level of international copyright protection for United States artist, authors, and copyright holders. Presidential Remarks on Signing the Berne Convention Implementation Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1405 (Oct. 31, 1988) [hereinafter Presidential Remarks]. According to *U.S. News and World Report*, Nov. 14, 1988, at 50, the United States International Trade Commission estimated that foreign noncompliance with United States copyrights had cost as much as $61 billion annually in lost revenues, profits and royalties. DuBoff, Caplan, *supra* note 5, at 42. According to then President Ronald Reagan, the entertainment industry may have lost more than $2 billion in revenues and the computer and software industry more than $4 billion in revenues in 1986 alone because foreign nations failed to enforce American copyrights against international pirates. Presidential Remarks, at 1405. Consequently, public pressure mounted for United States accession to the Berne Convention. R. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS, ISSUES AND CONTROVERSIES 7 (1987).

127. *See* R. BENKO, *supra* note 126, at 5 (describing Berne Convention as oldest and most comprehensive international copyright treaty).

128. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that courts must never construe act of Congress to violate law of nations if any other construction is possible).

129. *See Final Report*, *supra* note 120, at 603 (stating that United States law is not compatible with Berne Convention with respect to buildings and other works of architecture).

130. The Paquete Habana, 175 U.S. 677, 700 (1900). In *The Paquete Habana* Justice Gray stated, "International law is part of our law, and must be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination." *Id.*

131. *See* Vienna Convention on the Law of Treaties, Art. 26, U.N. Doc. A/CONF. 39/27 (mandating that nations perform treaty obligations in good faith). Article 26 codifies the international principle of *pacta sunt servanda*, stating that every treaty in force is binding upon the parties to it and must be performed by them in good faith. *Id.*

law renders the United States subject to suit in an international forum by the offended nation.[132] Consequently, the United States should make every effort to adhere to Berne standards and, thereby, comply with international law.

In sum, none of the four Copyright Office options merit Congressional approval because the options fail to offer a satisfactory level of protection for architectural structures. The Copyright Office, however, correctly asserts that the approach of doing nothing leaves open the possibility of insufficient subject matter protection and conflicting theories of architectural protection.[133] Consequently, Congress must take action to protect architecture and bring the United States into compliance with the Berne Convention.[134] Indeed, the Copyright Office ultimately recommends that Congress hold additional hearings and give further serious consideration to enacting additional protection for works of architecture.[135]

Congress, in conducting additional hearings, should give serious consideration to an additional option. To provide proper protection to architectural works, Congress should borrow an idea from the film industry, which, prompted by the process of colorization, successfully lobbied in 1988 for protection of cinematic works under the National Film Preservation Act.[136] Under the Act, the National Film Preservation Board protects twenty-five films annually against material alteration by naming the twenty-five films to the National Film Registry.[137] The Board annually chooses twenty-five

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132. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 (1965) (stating that treaty violation is grounds for international suit by offended state); *see also* L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, INTERNATIONAL LAW: CASES & MATERIALS 115 (1980) (discussing adjudication of treaty violations through use of international forums).

133. *See Copyright Office Report*, *supra* note 8, at 225-26 (stating that doing nothing to provide increased architectural protection leaves open possibility of conflicting theories of architectural protection as well as possibility of insufficient subject matter protection for architecture).

134. *See generally Copyright Office Report*, *supra* note 8, at 226 (stating that Copyright Office expresses no preference for particular solution, legislative or otherwise, to provide architectural protection).

135. *See Copyright Office Report*, *supra* note 8, at 226 (recommending that Congress hold additional hearings and give further consideration to enacting additional protection for works of architecture).

136. *See* National Film Preservation Act of 1988, Pub. L. No. 100-446, 102 Stat. 1782, 2 U.S.C. § 178 (1988) [hereinafter National Film Preservation Act] (creating Film Preservation Board to protect 25 films annually against material alterations). *See generally* Renberg, *The Money of Color: Film Colorization and the 100th Congress*, 11 HASTINGS COMM./ENT. L. J. 391 (1989) (discussing legal and legislative impediments to passage of National Film Preservation Act); Schwartz, *The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process*, 36 J. COPYRIGHT SOC'Y 138 (1989) (detailing legislative history of National Film Preservation Act in 100th Congress); Swyrydenko, *Film Artists Bushwacked by the Coloroids: One Hundredth Congress to the Rescue?* 22 AKRON L. REV. 359 (1989) (discussing initial legislative remedies to prevent colorization of films).

137. National Film Preservation Act, *supra* note 136, § 178(b); *see* Schwartz, *supra* note 136, at 156 (stating that National Film Preservation Act protects 25 films annually by naming

films that are culturally, historically, or aesthetically significant for inclusion in the National Film Registry.[138]

Adoption of the National Film Preservation Act, while a seemingly innocuous amendment to the Interior Appropriations Act for fiscal year 1989, had a profound impact on defining copyright in the United States.[139] The important issues that the amendment addressed included not only colorization, but also material alteration to an artistic work, moral rights, and even United States adherence to the Berne Convention.[140] In previous years, Congress had examined extensively the controversial issue of moral rights in the context of United States adherence to Berne.[141] But the congressional strategy was to keep the issue of moral rights separate from the enabling legislation permitting United States adherence to the Berne Convention.[142] Therefore, United States Representative Richard Gephardt introduced subsequent legislation to provide moral rights for film artists, which Congress subsequently rejected.[143] But the National Film Preservation Act, by limiting its scope to twenty-five annual designates, was able to implement drastic changes in copyright law, including the moral right prohibition against material alteration, over the objection of many key members of the House Committee on the Judiciary, the committee with jurisdiction over copyright matters.[144] Thus, although the Act may not have fleshed out many of the issues in the larger legislative battle over moral rights, the Film Preservation Act prevented a confrontational legislative battle in Congress by circumventing the volatile issue of moral rights and, instead, adopting a limited approach to film protection.[145]

Advocates of architectural protection should adopt a similarly limited approach in order to circumvent hostile congressional reactions, and, hence, congressional inaction. Under a proposal similar to that of the National

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films to National Film Registry). Protection against material alteration of films in the original Mrazek-Yates amendment that called for a National Film Preservation Act was changed to protection against material alteration of films unless the film contained a labeling description of the alteration. *Id.* at 147.

138. National Film Preservation Act, *supra* note 136 at §§ 178(a), (b); *see* Schwartz, *supra* note 136, at 156 (stating that National Film Preservation Board chooses annually for protection 25 culturally, historically, or aesthetically significant films).

139. *See* Schwartz, *supra* note 136, at 138 (emphasizing importance of National Film Preservation Act on United States intellectual property law, although expenditure amounted to only $250,000 of $9.9 billion appropriations act).

140. *See id.* (emphasizing importance of National Film Preservation Act beyond issue of colorization, to include moral rights issue and United States adherence to Berne Convention).

141. Schwartz, *supra* note 136, at 139.

142. *Id.*

143. *See id.* at 140 (describing Rep. Gephardt's unsuccessful attempt to enact Film Integrity Act of 1987, which would have provided moral rights legislation for film artists).

144. *See* Schwartz, *supra* note 136, at 140-41 (detailing passage of Mrazek-Yates amendment creating National Film Preservation Act over objections of Committee on Judiciary).

145. *See* Schwartz, *supra* note 136, at 140-41 (describing film preservation proponents' strategy of avoiding confrontation over moral rights by adopting limited approach to film protection).

Film Preservation Act's protection of cinematic works, Congress annually could protect a limited number of the most deserving architectural structures.[146] Selection of the limited protection proposal's annual designates would not fall under the domain of either the Copyright or Patent and Trademark Offices, but would be decided by an independent architectural protection board, similar to the National Film Preservation Board.[147] Although the original bill for the National Film Preservation Act proposed to amend the Copyright Act to create the Film Preservation Board, the final amendment did not touch the Act, creating a Board independent of the Copyright Office.[148] Similarly, by divorcing the architectural board from the Copyright Office, Congress need not amend the Copyright Act to effectuate the limited protection proposal for architecture.[149] The composition of the architectural protection board can similarly mirror that of the National Film Preservation Board.[150] Under the National Film Preservation Act, film protection decisions are left to the National Film Preservation Board, composed of thirteen individuals selected from thirteen separately designated organizations with an interest in the film industry.[151] The architectural protection board might include representatives from the Frank Lloyd Wright Foundation and the American Institute of Architects as interested parties from the architectural industry.[152]

While the original amendment proposed to have the Film Protection Board operate under authority of the Interior Department before moving the Board to the Library of Congress because of the Library's ready supply of films,[153] the architectural board could remain under the authority of the

146. *See infra* notes 147-55 and accompanying text (outlining current method of protection for cinematic works).

147. *See* Schwartz, *supra* note 136, at 154-55 (outlining independence of National Film Preservation Board decisions from Copyright Office). Originally, the National Film Preservation Board was to operate within the National Foundation on the Arts and the Humanities under the Department of the Interior. *Id.* at 142-43. Through various amendments of the National Film Preservation Act, however, the Board shifted from the Interior Department, to the Smithsonian Institution, to the Patent and Trademark Office, to the National Endowment for the Arts, and, finally, to the Library of Congress. *Id.* at 149. The Library of Congress was chosen because of its ready vault of film holdings. *Id.* at 154. The Library of Congress' film collection consists of 75,000 titles and is the largest motion picture collection in the United States and one of the largest collections in the world. *Id.*

148. National Film Preservation Act, *supra* note 136, § 178(g); *see* Schwartz, *supra* note 136, at 141-42 (stating that original Mrazek-Yates bill to create National Film Preservation Act proposed to amend Copyright Act under title 17).

149. *See supra* note 148 and accompanying text (stating that National Film Preservation Board exists independently from Copyright Office).

150. *See infra* note 151 and accompanying text (describing composition of National Film Preservation Board).

151. Schwartz, *supra* note 136, at 156-57.

152. *See Copyright Office Report*, *supra* note 8, at Appendix C (including comments from both Frank Lloyd Wright Foundation and American Institute of Architects as interested parties in architectural protection).

153. *See* Schwartz, *supra* note 136, at 149 (stating that jurisdiction over Film Commission was moved from Interior Department, to Smithsonian Institution, to Patent and Trademark Office, to National Endowment for Arts, and, finally, to Library of Congress).

Interior Department, with the Secretary of the Interior appointing the board members for two-year terms.[154] And, while Congress opted for twenty-five designates for the film industry, Congress could alter this number for the architectural industry.[155] Congress should select a number high enough to sufficiently exhibit the desire to offer national protection for architectural structures that are works of art, yet limited enough not to effect dislocations in the construction industry caused by halting modifications to existing structures or severely to prohibit architects from borrowing structural ideas in the public domain.[156]

Such a limited protection approach to architecture is similar in scope to that of the Copyright Office's third option,[157] as copyright law under this proposal would protect only a limited number of unique architectural structures.[158] Like the third option, this limited protection proposal unfortunately leaves a broad class of architectural structures unprotected.[159] Unlike the third option, however, the limited protection proposal does not abolish the separability test Congress intended and the courts employ to prevent copyright from encroaching on patent domain.[160] Some buildings still could obtain limited protection under the separability test.[161] Therefore, by not eliminating the separability test, courts can maintain the distinction between copyright and design patent protection, with copyright protecting artistic features and patent protecting utilitarian design.[162]

Finally and most importantly, as a trade-off for the limited scope of architectural protection, the limited protection proposal should offer archi-

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154. *See* Schwartz, *supra* note 136, at 150-51 (describing initial proposal that Secretary of Interior appoint members of Film Preservation Board).

155. *See* National Film Preservation Act, *supra* note 136, § 178(b) (setting 25 as adequate number of films for Film Preservation Board annually to protect).

156. *See supra* notes 44-45 and accompanying text (detailing architectural remedies that would disrupt construction industry, including injunctions and demolition of infringing constructions); *Copyright Office Report*, *supra* note 8, at Appendix C (comment of Francis X. Arvan) (expressing concern that architects need to rely to extent on copying to enhance creativity).

157. *See supra* notes 74-76 and accompanying text (discussing scope of protection for architecture under Copyright Office's third option to provide architectural protection).

158. *See* National Film Preservation Act, *supra* note 136, § 178(b) (setting 25 as adequate number of films subject to annual protection); *supra* note 155 and accompanying text (suggesting that number of annually protectable architectural structures could vary from number chosen for films).

159. *See supra* notes 74-77 and accompanying text (expressing concern that subject matter protection under Copyright Office's third proposal for architectural protection is not broad enough for works of architecture).

160. *See supra* notes 72-73 and accompanying text (proposing to abolish separability test for copyright protection under pictorial, graphic, and sculptural works clause in Copyright Office's third proposal for architectural protection).

161. *See supra* notes 67-70 and accompanying text (explaining that certain architectural structures can receive copyright protection under separability test of Copyright Act's pictorial, graphic, and sculptural works clause).

162. *See supra* note 80 and accompanying text (detailing need for separability test to prevent copyright protection of structural design); *supra* notes 81-87 and accompanying text (discussing patent law protection of works with utilitarian design).

tects moral rights protection.[163] Copyright then would protect the annual designates against modification, distortion, or demolition.[164] Consequently, the building owner could not, for example, build a wing from New York's Guggenheim Museum.[165] Furthermore, the proposal opens the door to moral rights protection for other art forms in the United States by taking a step forward in the United States evolving attitude on intellectual property.[166] Works of architecture, in addition to cinematic works, would have the distinction of being among the first recipients of this moral rights protection in the United States.[167] But, like the National Film Preservation Act, this limited protection proposal for architecture would be only a first step, with further adoption of moral rights necessary to grant to United States architects and artists the European level of protection that they desire.[168]

Unfortunately, the moral rights protection of the limited protection proposal remains the decisive difference between the European and United States levels of copyright protection.[169] And, because architects expect to have a right of integrity in their work, the moral rights dispute accounts for the omission of structural architectural protection in the 1988 amendments to the United States Copyright Act.[170] Although United States acces-

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163. *See supra* notes 32-37 and accompanying text (expressing need for moral rights protection in field of architecture).

164. *See supra* note 38 and accompanying text (discussing lack of copyright protection for architect's exclusive rights of paternity and integrity); *cf. supra* note 31 and accompanying text (placing limitations on architect's exclusive rights over demolition and modification).

165. *See Proposal to Include Architectural Works Under Copyright*, 18 LIBR. HOTLINE 4 (1989) (stating that Frank Lloyd Wright Foundation already has submitted applications for selected Wright designs, including New York's Guggenheim Museum, to Copyright Office in anticipation of future copyright protection).

166. *See generally* White, *The Colorization Dispute: Moral Rights Theory as a Means of Judicial and Legislative Reform*, 38 EMORY L.J. 237 (1989) (presenting arguments in film colorization dispute, including exploration of several existing legal theories that incorporate moral rights into argument against modification).

167. *See generally id.* (discussing initial provision for limited moral rights protection that National Film Preservation Act offers American artists).

168. *See* Schwartz, *supra* note 136, at 141 (quoting concession of Rep. Mrazek, chief sponsor of National Film Preservation Act, that film preservation act was only first step in expanding intellectual property protection).

169. *See* R. BENKO, *supra* note 126, at 6 (discussing controversy surrounding moral rights issue in United States copyright law). United States copyright law is based on the Anglo-American tradition of economic and property rights. *Id.* Inclusion of a moral rights provision in the 1928 Rome text of the Berne Convention became the first stumbling block to United States accession to the Convention and remains the decisive difference between United States copyright protection and international protection under Berne. DuBoff, Caplan, *supra* note 5, at 41. Article 6 of Berne states that an author, after transfer of a work, shall have the right to object to any distortion, mutilation, or other modification of the work that would prejudice the author's honor or reputation. *Preliminary Report*, *supra* note 5, at 214. The United States Berne Implementation Act explicitly declared that United States adherence to Berne in no way granted any right of an author of a work to object to any distortion, mutilation, or other modification that would prejudice the author's honor or reputation. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

170. *See supra* note 169 (discussing United States refusal to adopt Berne Convention

sion to the Berne Convention was a momentous occasion for all United States artists, architects included, the accomplishment did not compensate American artists, especially architects, for Congress' refusal to amend the Copyright Act to include a moral rights provision.[171] Current United States participation in Berne fails to secure the highest available level of international copyright protection for United States architects, artists, authors, and copyright holders because of Congress' refusal to adopt Berne moral rights provisions.[172] The United States must move towards adopting moral rights protection to bring United States copyright law into compliance with the international standards of the Berne Convention. By extending United States protection into the field of moral rights, the United States can take a quantum leap towards reaching what authorities recognize as "Berne's standard *par excellence*."[173] Then the United States will have reached a higher level of intellectual property protection.[174]

Currently, United States copyright law does not protect adequately works of architecture.[175] United States accession to the Berne Convention alone did not grant United States architects a European level of copyright protection, and, thus, did not bring the United States into international compliance.[176] United States artists, writers, and architects need changes in current United States copyright law to obtain paternity rights in their creations because the Berne enabling legislation failed to provide this pro-

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standard of moral rights); *supra* note 32 (discussing architect's expectation of moral rights protection under United States copyright).

171. *See* Renberg, *supra* note 136, at 420-21 (stating that although United States accession to Berne was momentous occasion for United States artists, accession did nothing to provide United States artists with moral rights protection).

172. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (declaring that adherence to Berne in no way granted any right of author of work to object to any distortion, mutilation, or other modification that would prejudice author's honor or reputation); *cf.* Presidential Remarks, *supra* note 126, at 1405 (declaring that United States membership in Berne Convention secures highest available level of international copyright protection for United States artists, authors, and copyright holders).

173. *See* Sandison, *supra* note 66, at 119 (quoting Judge Wyzanski who stated that development of international copyright resembles rising staircase, from bottom step of non-protection to top step where Berne's "standard *par excellence*" prevails).

174. *See* Presidential Remarks, *supra* note 126 (stating that United States membership in Berne secures highest available level of international copyright protection).

175. *See supra* note 3 and accompanying text (stating that copyright protects architectural drawings, but not structures); Sandison, *supra* note 66, at 114 (stating that United States copyright is compatible with Berne except in protection of works of architecture). The report of the Ad Hoc Working Group on Berne Adherence concluded that United States copyright law is compatible with Berne in subject matter with the exception of buildings and other works of architecture. *Preliminary Report*, *supra* note 5, at 260; *Final Report*, *supra* note 120, at 603.

176. *See supra* notes 4-8 and accompanying text (expressing need for amendment to bring United States architectural protection into compliance with Berne); Berne Convention Implementation Act of 1988, *supra* note 172, at § 2 (stating that Berne is not self executing on United States, meaning that United States adherence to Berne only adopts Berne provisions to extent that provisions are compatible with United States Copyright Act).

tection.[177] The emphasis in copyright must shift from economic rights to moral rights in order to meet architects' demands for structural protection.[178] The four options that the Copyright Office outlines for architectural protection fail to offer a satisfactory solution given current United States attitudes on intellectual property rights.[179] Adopting a protection proposal similar to that granted to the film industry will protect the most deserving architectural structures while expanding moral rights into the fabric of American intellectual property theory.[180] Only by taking these gradual steps can the United States ascend the staircase to the heightened intellectual property protection of the Berne Convention and the world at large.[181]

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177. *See supra* note 32 and accompanying text (citing request of Frank Lloyd Wright Foundation for protection of paternity rights).

178. *See supra* note 38 and accompanying text (stating that United States copyright law focuses on economic and property rights).

179. *See supra* note 38 and accompanying text (stating that United States copyright law focuses on economic rights rather than moral rights).

180. *See supra* note 169 and accompanying text (discussing United States reluctance to adopt moral rights protections for American artists).

181. *See supra* note 173 (describing copyright protection as rising staircase at top of which Berne's standard *par excellence* prevails).