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PGS, I Love You: Rebuilding Copyright for Architecturally-Situated Pictorial, Graphic, and Sculptural Works

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PGS, I Love You: Rebuilding Copyright for Architecturally-Situated Pictorial, Graphic, and Sculptural Works

Llewellyn Kittredge Shamamian*

Abstract

Over twenty years ago, in Leicester v. Warner Bros., the Ninth Circuit limited copyright protection for a certain sculptural complex located within a downtown Los Angeles high-rise. The court determined that the sculpture, otherwise protected from pictorial reproduction, could be visually replicated without infringing on the artist's copyright because it was part of its architectural context.

This Note explores two recent copyright cases where companies capitalized on painted street art, using the works as backdrops for social media advertising. The resulting litigation calls into question Leicester's holding and the extent to which it may allow visual reproduction of non-sculptural works incorporated into architecture. This Note's introduction addresses the rise of legal disputes in the street art community and the circumstances of these recent cases. Part II addresses fundamentals of domestic copyright law and the varied protection for certain forms of authorship. Part III discusses an important exception for the visual reproduction of architectural works and judicial application of the exception to disputes involving painted street art. Part IV argues that Leicester should

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not serve as the legal standard for all such controversies, and Part V articulates a clarified inquiry to limit judicial dependency on Leicester.

Table of Contents

I.	Introduction	273
II.	Copyright Law and Its Relationship to Architectural Works	281
	A. Guiding Principles.....	282
	B. Architecture and Copyright.....	284
	1. The Outer Limit of Copyright: Functionality	285
	2. The Architectural Works Copyright Protection Act (AWCPA)	287
III.	Judicial Interpretation of Copyright for Architecturally-Situated PGS Works	288
IV.	Certain Architecturally-Situated PGS Works Should Not Be Subject to the Pictorial Representation Exemption of the AWCPA	293
	A. The Effect of the Pictorial Representation Exemption.....	294
	B. <i>Leicester's</i> Interpretation and <i>Falkner's</i> Limitation	295
	C. A Limitation on <i>Leicester</i> Accords with the Copyright Act	298
	D. <i>Falkner</i> Appropriately Limits <i>Leicester</i> , but Its Holding Is Insufficient	302
V.	Refining the <i>Leicester</i> Test	308
	A. Creating the Proper PGS Subcategory	310
	B. An Alternative Test for Non-Sculptural Street Art. 313	
	1. Timing	313
	2. Two-Dimensionality Requirement	316
	3. "Non-functional" Defined	317
VI.	Conclusion.....	321

I. Introduction

Banksy wrote: “copyright is for losers©.”¹ Having recently pursued a trademark dispute in a European court, Banksy may sincerely wish to eschew copyright law in favor of alternative intellectual property claims.² Perhaps—and this is the more probable explanation—the comment is meant to be provocative.³ This intent tracks the artist’s public persona that is both instigative and evasive, and, most importantly, the root of his notoriety.⁴ Widely considered among the most famous street artists, Banksy ironically holds responsibility for bringing the genre mainstream.⁵ His original work appears on streets across the world, from London, Paris, and Vienna to Detroit and San Francisco.⁶ While the ubiquity and public accessibility of his

1. BANKSY, BANKSY: WALL AND PIECE i (2005).

2. See Taylor Dafoe, *In a Threat to Banksy’s Empire, an EU Court Rules That He Can’t Hold Trademarks While His Identity Remains a Mystery*, ARTNET (Sept. 17, 2020), <https://perma.cc/292V-92TE> (reporting on Banksy’s years-long legal battle with a greeting card company).

3. Banksy’s artwork is notoriously outrageous. See, e.g., Scott Reyburn, *Banksy Painting Self-Destructs after Fetching \$1.4 Million at Sotheby’s*, N.Y. TIMES (Oct. 6, 2018), <https://perma.cc/P3TZ-M856> (describing the auction house spectacle). For more on Banksy’s “anti-authoritarian whimsy,” see also Lauren Collins, *Banksy Was Here: The Invisible Man of Graffiti Art*, NEW YORKER (May 7, 2007), <https://perma.cc/2S2G-ZYWL> (discussing the important of Banksy’s anonymity).

4. When selected for *Time* magazine’s list of *The World’s 100 Most Influential People* in 2010, he provided the magazine with a picture of himself, face covered with a paper bag. See Shepard Fairey, *The 2010 Time 100: Banksy*, TIME MAG. (Apr. 29, 2010), <https://perma.cc/H62Z-28ZM> (providing background on Banksy). The excerpt reads in part:

Many people recoil at the thought of a guy in a hoodie with a spray-paint can and something to say. Others foam at the mouth when they see the same guy’s artwork auctioned off for hundreds of thousands of dollars. Banksy just laughs at all of it. He has a gift: an ability to make almost anyone very uncomfortable. He doesn’t ignore boundaries; he crosses them to prove their irrelevance.

Id.

5. See Will Ellsworth-Jones, *The Story behind Banksy*, SMITHSONIAN MAG. (Feb. 2013), <https://perma.cc/25EA-M5AQ> (describing “the phenomenon that has come to be known as the ‘Banksy effect’—the artist’s astounding success in bringing urban, outsider art into the cultural, and increasingly profitable, mainstream”).

6. See *id.* (stressing the broad geographical range of Banksy’s work).

images are part of a larger commentary on the art world,⁷ unauthorized reproductions of these works are also widespread.⁸ Banksy's recent attempts to enforce ownership rights, especially those within the intellectual property sphere, have received mixed responses.⁹

Whatever their intended effect, Banksy's words are representative of the evolving dynamic between street artists and copyright law.¹⁰ Historically, street art wore its illegality as a badge of infamy.¹¹ This infamy accrued value, leading to the recognition of street art as a commodified art form—one that has fetched millions at auction and drawn viewers from across the world.¹² Unprotected, the commodity was exploited.¹³ Accordingly, many artists within the genre have turned to

7. The Smithsonian article offers a quote from Banksy: “[A]ll you need now is a few ideas and a broadband connection. This is the first time the essentially bourgeois world of art has belonged to the people. We need to make it count.” *Id.*

8. See Enrico Bonadio, *Banksy Finally Goes to Court to Stop Unauthorized Merchandising, despite Saying Copyright Is for Losers*, THE CONVERSATION (Aug. 9, 2019, 7:28 AM), <https://perma.cc/E3KL-EK9F> (noting the recurrent copying of Banksy's works).

9. See Techdirt, *Banksy's Fake Store is an Attempt to Abuse Trademark Law to Avoid Copyright Law*, ABOVE THE LAW (Oct. 11, 2019), <https://perma.cc/U3YB-HPQW> (remarking that Banksy's stance shift on IP law “isn't very anti-commercial”).

10. See Enrico Bonadio, *Graffiti Copyright Battles Pitch Artists against Advertisers*, THE CONVERSATION (Aug. 9, 2014, 1:02 PM), <https://perma.cc/SZ2R-F9SE> (arguing that “[s]treet artists . . . might find in copyright law an ally, a friend that can help them in giving added value to their works and reacting to ‘art stealers’ and (why not?) making money out of their job, and their passion”).

11. See Tony Chackal, *Of Materiality and Meaning: The Illegality Condition in Street Art*, 74 J. AESTHETICS & ART CRITICISM 359, 360 (2016) (“[P]olitical cachet became a goal intended by artists over time, and many . . . realized that illegality provided a distinctive political dimension to works.”).

12. See Diana Hubbell, *Street Art Has Become a Global Business—And Artists Are Worrying Over Its Future*, WASH. POST (Aug. 30, 2018, 10:00 AM), <https://perma.cc/GPP4-RUND> (“But commodification changes a medium, especially one with radical roots, and some members of the community are conflicted about street art's evolution.”).

13. See *id.* (discussing promotion and profitable use of street art).

courts to enforce their legal rights.¹⁴ While some see the deployment of legal tactics as cutting against the public identity of street art, others see an opportunity to occupy new territory.¹⁵ This category of legal dispute has increased,¹⁶ with some cases receiving viral support.¹⁷

The resulting controversies involve a variety of legal issues. For example, *Cohen v. G&M Realty L.P.*,¹⁸ one of the most famous cases involving the property rights of graffiti artists, resulted in a verdict of over \$6 million.¹⁹ The case concerned the expansive 5Pointz complex in Long Island City, Queens, and the rights of the artists who—with the permission of the owner—transformed the warehouse property with a panoply of painted murals.²⁰ When the owner whitewashed the walls of the complex, the artists sued under the Visual Artists Rights Act

14. See Eileen Kinsella, *They Had No One in Their Corner: Meet the Lawyer Who is Battling Big Corporations on Behalf of Street Artists*, ARTNET (Nov. 7, 2019) <https://perma.cc/87SW-MEPK> (describing the efforts of one lawyer to pursue claims on behalf of street artists).

15. See generally ANDREA BALDINI, A PHILOSOPHY GUIDE TO STREET ART AND THE LAW (2018) (arguing that street art uses its “rebellious attitude” toward the law as a creative resource, reshaping its relationship with intellectual property).

16. See Alan Feuer, *G.M. Used Graffiti in a Car Ad. Should the Artist Be Paid?*, N.Y. TIMES (July 17, 2018), <https://perma.cc/SYN6-VKH9> (providing examples of recent lawsuits brought by graffiti artists).

17. See Enrico Bonadio, *Big Brands Ripping Off Street Art Is Not Cool: Why Illegal Graffiti Should Be Protected by Copyright*, THE CONVERSATION (Mar. 16, 2018, 12:01 PM), <https://perma.cc/6S65-X346> (reporting on H&M’s withdrawal of its lawsuit against street artist Jason “Revok” Williams); see also Jenna Amatully, *People Are Boycotting H&M Over Alleged Infringement of An Artist’s Graffiti*, HUFFPOST (Mar. 15, 2018, 18:09 GMT), <https://perma.cc/6PUZ-AAUU> (describing backlash against the retailer). This consumer reaction comports with the evolving social perception of street art generally. See Cathay Y. N. Smith, *Street Art: An Analysis under U.S. Intellectual Property Law and Intellectual Property’s “Negative Space” Theory*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 259, 260–261 (2013) (describing the shift of street art from social nuisance to a form of cultural heritage).

18. 320 F. Supp. 3d 421 (E.D.N.Y. 2018), *aff’d sub nom.* *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

19. See Alan Feuer, *Graffiti Artists Awarded \$6.7 Million for Destroyed 5Pointz Murals*, N.Y. TIMES (Feb. 12, 2018), <https://perma.cc/X2NB-HXBE> (describing the case as “a decisive victory” for the art world).

20. See Lauren Hard, *5 Years Ago, Their 5Pointz Art Was Erased. Now There’s a Museum for It*, N.Y. TIMES (Sept. 16, 2018), <https://perma.cc/WK8S-XZY5> (providing a description of the 5Pointz complex).

(VARA)²¹ and ultimately prevailed in a New York district court.²² Under VARA, the author of a work of “visual art” created on or after June 1, 1990 has the right, among others, to prevent “any destruction of a work of recognized stature.”²³ To hold the owner liable under VARA, the court required a showing that the graffiti was in fact “of recognized stature,” which the plaintiffs were able to demonstrate.²⁴

The 5Pointz victory signals a shift in the perception surrounding this art form. After the City Council granted approval to raze the complex to replace it with condominiums, the judge, who denied the artists’ request for an injunction to block the building’s demolition, reportedly stated: “I love the work and it’s going to tear my heart out to see it torn down, but as a judge I have to apply the law . . . [t]he building, unfortunately, is going to have to come down.”²⁵ The judge expressed a similar sentiment in his written order, writing “our souls owe a debt of gratitude to the plaintiffs for having brought the dusty walls of defendants’ building to life.”²⁶ The Second Circuit recently affirmed the district court’s verdict, and the Supreme Court denied certiorari.²⁷

Nevertheless, the 5Pointz case is an outlier.²⁸ In fact, the majority of potential claims brought by street artists to exercise their property rights afforded through their authorship of a work settle swiftly, foreclosing the option of litigation for

21. 17 U.S.C. § 106A.

22. *Cohen*, 320 F. Supp. 3d at 428.

23. 17 U.S.C. § 106A(a)(3).

24. *Cohen*, 320 F. Supp. 3d at 421.

25. Sarah Cascone, *It ‘Makes No Sense’: 5Pointz Developer Vows to Appeal Landmark Ruling that Favored Graffiti Artists*, ARTNET (Feb. 21, 2018), <https://perma.cc/AZ44-7ZTV>.

26. Memorandum & Opinion at 23, *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018) (No. 13-cv-05612), ECF No. 37.

27. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) (mem.); *see also* Cascone, *supra* note 25 (reporting that the developer is “confident that the appeals court will acknowledge ‘how ridiculous this whole things is’”).

28. *See* Feuer, *supra* note 19 (identifying other graffiti art lawsuits which settled contemporaneously with the 5Pointz verdict).

would-be plaintiffs.²⁹ The dearth of courtroom victories may embolden action by putative infringers, who could otherwise be deterred by adverse precedent.³⁰ Moreover, the absence of a clear legal standard decreases the options for those artists who wish to sue.³¹ Facing a daunting courtroom battle against a corporation with resources to litigate an evolving point of law, many artists will choose to settle immediately.³²

This Note focuses on outlier artists whose respective courtroom battles with well-known car manufacturers raised novel issues at the intersection of street art and copyright. In both cases, the manufacturers appropriated the artists' works to use as urban backdrops for their respective social media advertising campaigns.³³ The resulting litigation compelled two district courts to issue opinions during the pre-trial phase on a point of law highly relevant to street art: copyright protection for an architecturally-fixed painted mural.³⁴ These cases mark the first judicial involvement with an issue unpursued in court

29. See, e.g., Henri Neuendorf, *Street Artist Revok and H&M Settle Dispute over an Ad That Featured His Work without Permission*, ARTNET (Sept. 7, 2018), <https://perma.cc/S6WM-CQC8> (discussing the lawsuit against H&M); Carlos Suarez de Jesus, *Aholsniffsglue, American Eagle Outfitters Reach Settlement in Copyright Lawsuit*, MIAMI NEW TIMES (Dec. 2, 2014), <https://perma.cc/5YDE-TLY8> (reporting on American Eagle's settlement with a graffiti artist).

30. See Feuer, *supra* note 19 (describing the issue as "unsettled").

31. See *supra* note 29 and accompanying text.

32. Even street artist Adrian Falkner, who prevailed against General Motors on its motion to dismiss, recently settled. See Notice of Settlement at 2, *Falkner v. Gen. Motors LLC*, No. 18-cv-00549 (C.D. Cal. Nov. 16, 2018), ECF No. 46.

33. See generally *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927 (C.D. Cal. 2018) (denying summary judgment against General Motors for copyright infringement); *Mercedes Benz, USA v. Lewis*, Nos. 19-10948, 10949, 10951, 2019 WL 4302769 (E.D. Mich. Sept. 11, 2019) (defending Mercedes' motion for declaratory judgment).

34. See *Falkner*, 393 F. Supp. 3d at 931–32 (describing the issue before the court); *Lewis*, 2019 WL 4302769, at *4–5 (examining the issue under copyright for architectural works).

since 2000.³⁵ Both cases have since settled, foreclosing the opportunity for further clarity in this area of the law.³⁶

The first case involves street artist Adrian Falkner, also known as “Smash 137,” and his discovery of an unauthorized advertising campaign by General Motors (GM) on social media.³⁷ GM’s campaign featured his mural, which was painted as part of an art gallery marketing project and adorned the wall of a Detroit parking garage.³⁸ Falkner sued GM in the District Court for the Central District of California in 2017.³⁹ The court ruled in Falkner’s favor on GM’s motion for summary judgment, but the case ultimately settled in 2018.⁴⁰

The second case concerns a dispute between artists James Lewis, Daniel Bombardier, Jeff Soto, Maxx Gramajo and Mercedes Benz regarding an advertising campaign on Instagram.⁴¹ The artists created their respective murals between 2015 and 2017, during an annual arts festival known as Murals in the Market.⁴² Mercedes used the murals in the backdrop of its G 500 photoshoot.⁴³ Furious, the artists sent Mercedes letters through counsel in which they threatened to file an infringement suit against Mercedes.⁴⁴ Mercedes responded by filing a suit seeking declaratory judgment, asking the District Court for the Eastern District of Michigan to rule that the artists possessed no copyright in their works.⁴⁵ The artists unsuccessfully requested that the court dismiss

35. See *infra* Part III (discussing sculptor Andrew Leicester’s litigation against Warner Brothers).

36. See *supra* note 32 and accompanying text; see also Stipulated Order of Dismissal at 1, Mercedes Benz, USA v. Lewis, No. 19-10948 (E.D. Mich. June 1, 2020), ECF No. 48 (dismissing the action with prejudice).

37. *Falkner*, 393 F. Supp. 3d at 929.

38. *Id.*

39. *Id.*

40. See *id.* at 937 (declining General Motors’s copyright infringement argument as a matter of law); see also *supra* note 32 and accompanying text.

41. See *Lewis*, 2019 WL 4302769 at *1 (describing the factual circumstances of the alleged infringement).

42. *Id.*

43. *Id.*

44. *Id.*

45. See *id.* at *2 (Mercedes requesting, among other things, judicial declaration that the artists’ murals are exempt from copyright protection).

Mercedes's declaratory judgment claim.⁴⁶ The court initially refused, and the case remained active until it was voluntarily dismissed in June 2020.⁴⁷

With respect to the artists' work, illegality was not at issue in either case; rather, the cases centered on promoted street artists and the advertisers who reproduced their work without permission.⁴⁸ In both *Falkner v. General Motors LLC*⁴⁹ and *Mercedes Benz, USA v. Lewis*,⁵⁰ the car manufacturers defended the infringement claims by asserting that the artists' works were not eligible for copyright protection under the current legal scheme and, in doing so, invoked a somewhat novel area of copyright law concerning the relationship between painted works and architecture.⁵¹

This relationship is legally significant because of the distinctive aspects of United States copyright law. One of these aspects is the differing degrees of protection offered to certain "works of authorship."⁵² Painting is considered one form of authorship, and it exists in a category of copyrighted material referred to as "pictorial, graphic, and sculptural works" (PGS).⁵³ Architecture occupies its own sphere in copyright law, and enjoys comparably limited protection to that of PGS works.⁵⁴

46. See *id.* at *5–6 (finding no support for the artists' position in existing case law).

47. See *supra* note 36 and accompanying text.

48. See *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 929 (C.D. Cal. 2018) (clarifying that Falkner was invited to paint on the garage); *Mercedes Benz, USA v. Lewis*, Nos. 19-10948, -10949, -10951, 2019 WL 4302769, at *1–2 (E.D. Mich. Sept. 11, 2019) (noting that each mural was created during an arts festival). This Note will not address the issue of illegality, which has been raised as defense in various copyright suits involving street art. For more on this issue, see John Eric Seay, *You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case against a Major International Retailer*, 20 J. INTEL. PROP. L. 75 (2012) (discussing whether illegal graffiti is eligible for copyright).

49. 393 F. Supp. 3d 927 (C.D. Cal. 2018).

50. Nos. 19-10948, -10949, -10951, 2019 WL 4302769 (E.D. Mich. Sept. 11, 2019).

51. See *supra* notes 34–35 and accompanying text (describing the legal context of this issue and the lack of recent case law).

52. See 17 U.S.C. § 102(a) (listing categories of "works of authorship").

53. *Id.* § 102(a)(5).

54. See *id.* §§ 102(a)(8), 120 (creating a new category for architectural works and limiting its scope).

While pictorial representations of PGS works are subject to fair use analysis, pictorial representations of architectural works “ordinarily visible from a public space” are permitted by § 120(a) of the Copyright Act, whether or not the representation is fair use.⁵⁵

Falkner and *Lewis* analyzed the extent to which the pictorial representation exemption for architecture limits the copyright protection of a PSG work that is physically connected to architecture.⁵⁶ The two courts came to opposite conclusions: *Falkner* decided that the mural at issue may be entitled to copyright protection, notwithstanding the pictorial representation exemption,⁵⁷ while *Lewis* opined that the same provision may be fatal to the artists’ copyright.⁵⁸ The cases unveil a potential class of “losers” in copyright law whose rights surrounding reproduction of their work are currently at risk.⁵⁹ This Note will argue that certain architecturally-fixed PGS works should receive independent copyright protection and will propose a test for courts to determine the dividing line that separates those works from other forms of authorship within copyright law.⁶⁰

This Note continues in Part II with an introduction to copyright law in the United States and explores principles that should underly judicial analysis of copyright issues. Part III examines the current judicial interpretation of § 120(a) and its effect on copyright protection for PGS works. Part IV argues that § 120(a) should not apply to all PGS works that are affixed to architecture; rather, courts should apply a test resembling that proposed in Part V. The test offers guidance on how to create a judicial delineation among PGS works, in order to

55. See *id.* §§ 107, 120 (subjecting all copyrightable material to the fair use defense but further limiting the scope of protection for architectural works only).

56. See *Falkner*, 393 F. Supp. 3d at 930–31 (discussing whether protection for that work is limited by § 120(a)); *Lewis*, 2019 WL 4302769, at *5 (considering protection for a PGS work “embodied” in architecture).

57. See *Falkner*, 393 F. Supp. 3d at 937 (distinguishing *Falkner*’s claim from prior case law holding that a PGS work may lose its independent copyright protection when affixed to architecture).

58. See *Lewis*, 2019 WL 4302769, at *5 (viewing prior case law as unresponsive of the artists’ position).

59. See *supra* note 1 and accompanying text.

60. See *infra* Parts IV and V.

prevent exploitation of non-sculptural street art that is clearly separate from its architectural canvas.

II. Copyright Law and Its Relationship to Architectural Works

United States copyright originates in the Constitution,⁶¹ but the concept of bestowing certain property rights in the creator of a work predates the republic.⁶² While some aspects of domestic copyright law emanate from foreign sources, including the English common law tradition, the United States differs in important respects.⁶³ In fact, an important area of dissimilarity is the issue explored in this Note; that is, the effect of copyright protection for architectural works on other copyrightable subject matter.⁶⁴ Some additional principles explain the source of this incongruity and the context within which Congress operated to eventually remedy the dissonance.⁶⁵

61. See U.S. CONST. art. I, § 8, cl. 8 (charging Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

62. See PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 37–77 (1994) (discussing the genesis of copyright law within the context of technological revolution in Europe).

63. See generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1995) (tracing the formation of copyright from eighteenth-century Britain); see, e.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) (following the dissent of Judge Yates interpreting the English Statute of Anne, 8 Ann. C. 19 (1710) (Eng.)). Judge Yates wrote:

The labors of an author have certainly a right to a reward: but it does not from thence follow, that his reward is to be infinite, and never to have an end. Here, it is ascertained. The Legislature have fixed the extent of his property: they have allowed him twenty-eight years; and have expressly declared, he shall have it no longer. Have the Legislature been guilty of injustice? Little cause has an author to complain of injustice, after he has enjoyed a monopoly for twenty-eight years, and the manuscript still remains his own property.

Millar v. Taylor (1769) 98 Eng. Rep. 201, 232 (Yates, J. dissenting).

64. See *infra* Part III.

65. See *infra* Part II.B.

A. Guiding Principles

Adherence to aesthetic objectivity underpins copyright law in the United States.⁶⁶ Aesthetic objectivity is not to be confused with the requirement for originality;⁶⁷ rather, it compels protection for any work of authorship that meets statutory requisites, *regardless of whether the work is good*.⁶⁸ Although early case law struggled with separating these concepts,⁶⁹ judicial interpretation of copyright law explicitly limited its reach by the early twentieth century.⁷⁰ Credited for articulating the prohibition on judging a work's merit, Justice Holmes wrote:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of the public, they have a commercial value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.

66. See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 248 (1998) (“The inherent ambiguity of aesthetics is considered incompatible with the supposedly objective rules and principles that govern judicial opinions.”).

67. See 17 U.S.C. § 102 (“Copyright protection subsists . . . in *original* works of authorship . . .” (emphasis added)).

68. See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (“No matter how poor artistically the ‘author’s’ addition, it is enough if it be his own.”).

69. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 53 (1884) (holding that a photograph of Oscar Wilde fulfilled the originality requirement for copyright protection because it was “useful, new, harmonious, characteristic, and graceful”); see also John B. Fowles, *The Utility of a Bright-Line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in Leicester v. Warner Bros.*, 12 UCLA ENT. L. REV. 301, 304 (2005) (noting that the *Burrow-Giles* court essentially “performed an aesthetic valuation to determine copyrightability”).

70. See *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251–52 (1903) (establishing the judicial endorsement of aesthetic objectivity).

That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's rights.⁷¹

The Copyright Act of 1976⁷² further enshrined the idea of aesthetic objectivity in its clarification of copyrightable "pictorial, graphic, and sculptural works"⁷³ as distinguishable from potentially patentable "works of industrial design."⁷⁴ The House report stressed that the distinction did not imply the need for aesthetic considerations, emphasizing a tenet of United States copyright law.⁷⁵

In addition, domestic copyright law centers around a policy debate concerning the balance between private rights and the public sphere.⁷⁶ The flow of learning and information is crucial; thus, copyright law strikes a balance that will incentivize creators: "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."⁷⁷

There is a certain economic pragmatism present within this principle. That is, copyright is a form of economic subsidy.⁷⁸ As such, copyright can be altered by the legislature to serve purposes other than the protection of innate rights of authorship.⁷⁹ Taken together, the principles of aesthetic objectivity and economic subsidization should ensure an aesthetically-neutral approach to copyright decisions that flow

71. *Id.* at 251–52.

72. Pub L. No. 94-553, 90 Stat. 2441 (codified as amended at 17 U.S.C. §§ 101–810).

73. 17 U.S.C. § 102(a)(5).

74. H.R. REP NO. 94-1476, at 55 (1976).

75. *Id.* at 54 ("[t]he definition of 'pictorial, graphic, and sculptural works' carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality.").

76. See Fowles, *supra* note 69, at 305 (identifying relevant competing interests).

77. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), *superseded by statute*, 17 U.S.C. § 110(5).

78. See *Bleistein*, 188 U.S. at 251–52 (1903) ("[W]hen courts interpret the contours of copyrightable subject matter, the single out certain works for special economic subsidy.").

79. See *supra* note 63 and accompanying text.

from considerations of economic fairness and utility.⁸⁰ This Note adheres to these principles in its subsequent proposals.

B. *Architecture and Copyright*

As previously mentioned, United States copyright law differs in important respects from other regimes around the world.⁸¹ This Note focuses on the ramifications of addressing one of these inconsistencies: the legislative implementation of copyright protection for architectural works, which were previously unprotected.⁸² The legal paradigm by which Congress first addressed this specific incongruity was the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention” or the “Convention”).⁸³ After waiting over one hundred years to ratify the treaty,⁸⁴ the United States acceded to the Convention in 1988, amending the existing Copyright Act to afford greater protection to architectural works in compliance with the Convention.⁸⁵ The Berne Convention Implementation Act of 1988⁸⁶ added “diagrams, models and technical drawings, including architectural plans” to its compilation of copyrightable material.⁸⁷ However, this language

80. See *supra* notes 66–78 and accompanying text.

81. See *supra* Part II.A.

82. See Vanessa N. Scaglione, *Building Upon the Architectural Works Protection Copyright Act of 1990*, 61 *FORDHAM L. REV.* 193, 194 (1992) (“Prior to the Architectural Copyright Act, American copyright law did not protect architecture per se, although monumental architecture and certain works related to architecture were protected.”). For example, consider an arguably sculptural work such as the Washington Monument. *Id.* at 202. Historically, this characterization would entitle the work to copyright protection. *Id.* at 194.

83. Art. 2(1), Sept. 9, 1886, 828 *U.N.T.S.* 221 (Paris Text 1971) (as amended Oct. 2, 1979) [hereinafter Berne Convention] (including as protected subject matter “works of drawing, painting, architecture, sculpture . . .”).

84. See Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 *CORNELL INT’L. L.J.* 171, 172 (1989) (“Despite the evident benefits of Berne membership, the United States waited more than 102 years to ratify the treaty.”).

85. See Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 701, 703 (codified at 17 *U.S.C.* §§ 101(5), 102 (a)(8), 120)) [hereinafter AWCPA] (extending copyright protection to architectural works).

86. Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 *U.S.C.*).

87. *Id.*

merely codified an existing right, which courts enforced prior to the Act's implementation.⁸⁸ In that regard, proponents of the Convention considered the amendment insufficient, because there was still no legal prohibition on copying architecture, as long as the copying occurred without use of another's plan.⁸⁹ Others wished to see as little change as possible in domestic copyright law and considered independent copyright protection for built works a radical departure from current law.⁹⁰ Ultimately, the treaty altered the way the United States managed issues of copyright protection for architectural works.⁹¹

1. *The Outer Limit of Copyright: Functionality*

Before copyright law considered architecture a protected form of authorship, built architectural works were excluded because of their inherent functionality.⁹² The lack of specific protection for architectural works compelled the interpretation of provisions addressing sculpture, its closest relative.⁹³ Sculpture found itself limited by this prohibition on functionality:

88. See *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 899 (5th Cir. 1972) ("If copyrighted architectural drawings of the originator of such plans are imitated or transcribed in whole or in part, infringement occurs."); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 262–63 (D. Neb. 1982) (awarding damages to plaintiff for unauthorized use of construction plans); *Arthur Rutenberg Corp. v. Dawney*, 647 F. Supp. 1214, 1215–16 (M.D. Fla. 1986) (same).

89. The Convention imagined protection for three-dimensional works of architecture, not solely monumental works. See U.S. COPYRIGHT OFF., ANNUAL REP. OF THE REG. OF COPYRIGHTS 5–6 (1989) (discussing adherence to the Berne Convention).

90. See H.R. REP. NO. 100-609, at 9 (1988) ("The U.S. should and can adhere to Berne without making major changes in U.S. law").

91. See *Fowles*, *supra* note 69, at 320 n.145 (describing the attenuated protection received by architectural works from certain provisions of copyright law).

92. See *id.* at 328 (describing functionality as "any aspect that made the structure a 'useful article,' such as e.g. inhabitability"). This broad interpretation automatically excluded most architecture from copyright protection. *Id.*

93. See *Scaglione*, *supra* note 82, at 194 (explaining architecture's derivative protection).

[PGS works] shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.⁹⁴

By the same logic, “[p]urely nonfunctional or monumental [architectural] structures would be subject to full copyright protection under the [1976 Act] and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure.”⁹⁵ As such, nonfunctional works of architecture, such as the Washington Monument, were theoretically copyrightable as sculpture.⁹⁶ Alternatively, elements of functional architectural structures could also be eligible for copyright, only if they were “conceptually separable” from the functional elements of the structure.⁹⁷ For example, separable ornamentation such as a gargoyle affixed to a Gothic cathedral would be protected, but not the building itself.⁹⁸ Outside of these exceptions, copyright protection for architecture existed only for written plans.⁹⁹ In practice, this protection was limited.¹⁰⁰ Therefore, true adherence to the

94. 17 U.S.C. § 101. A “useful article” is “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” *Id.*

95. H.R. REP. NO. 94-1476, at 55 (1976).

96. See Laura E. Steinfeld, Note, *The Berne Convention and Protection of Works of Architecture: Why the United States Should Create a New Subject Matter Category for Works of Architecture under Section 120(a) of the Copyright Act of 1976*, 24 IND. L. REV. 459, 473 (1991) (citing *Jones Bros. Co. v. Underkoffler*, 16 F. Supp. 729 (M.D. Pa. 1936)) (discussing one of the two ways architecture availed itself of copyright protection before accession to the Berne Convention).

97. H.R. REP. NO. 94-1476, at 55. For more on this concept, see *infra* Part II.B.2.

98. Steinfeld, *supra* note 96, at 473.

99. See *supra* note 88 and accompanying text.

100. See *Baker v. Selden*, 101 U.S. 99, 104 (1880) (providing that copyright protects only an author’s expression and not the useful idea being expressed), *superseded by statute*, 17 U.S.C. § 102(b); *Demetriades v. Kaufmann*, 680 F. Supp. 658, 664 (S.D.N.Y. 1988) (“[C]onsistent with *Baker* . . . although an

treaty would have the effect of solidifying a makeshift legal solution with bespoke protection for built architectural works, regardless of functionality.¹⁰¹

2. *The Architectural Works Copyright Protection Act (AWCPA)*¹⁰²

However, in order to respect the dividing line between functional and nonfunctional, courts developed a series of tests—separability tests—to distinguish functional aspects of eligible works of authorship.¹⁰³ The elements that passed the test received copyright protection.¹⁰⁴ John Fowles argues that Congress’s interpretation of its constitutional mandate “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”¹⁰⁵ has “put courts ‘adrift on the murky sea of common law’ regarding aesthetically pleasing, but useful, articles.”¹⁰⁶ According to the House report:

Although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee’s intention is not to offer it copyright protection under the bill. Unless the shape of an . . . industrial product contains some elements that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from “the utilitarian aspects of the article” does not depend upon the nature of its design—that is, even if the appearance of an article is determined by esthetic (as opposed to functional)

owner of copyrighted architectural plans is granted the right to prevent the unauthorized copying of those plans, that individual, without benefit of a design patent, does not obtain a protectable interest in the useful article depicted by those plans.”).

101. See *infra* Part II.B.2.

102. Pub. L. No. 101-650, 701, 104 Stat. 5089, 5133 (1990) (codified at 17 U.S.C. §§ 101(5), 102 (a)(8), (120)).

103. See Fowles, *supra* note 69, at 310 (describing the origin of these tests).

104. See *id.* at 328 (providing that “artistic sculpture or decorative ornamentation or embellishment . . . would have to survive the conceptual separability tests spawned by the 1976 Act’s ‘identified separately’ language”).

105. U.S. CONST. art. I, § 8, cl. 8.

106. Fowles, *supra* note 69, at 308 (quoting *Columbia Hyundai, Inc. v. Carll Hyundai, Inc.*, 484 S.E.2d 468, 470 (S.C. 1997)).

considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable.¹⁰⁷

In some courts, the congressional explanation of the test prompted the development of a straightforward test centered around physical separability.¹⁰⁸ Other courts formed tests contingent upon conceptual separability.¹⁰⁹ Fowles counts at least ten different separability tests in total.¹¹⁰

Ultimately, Congress selected adherence to the Convention and implemented a specific provision that codified architectural works as a protected category of authorship.¹¹¹

In 1990, Congress passed the AWCPA, amending the current United States Copyright Act.¹¹² The amendment provided distinct copyright protection for a category of creative expression that had previously existed outside the scope of copyright law.¹¹³ The effect of the law on contemporary interpretation of copyright protection became clear a decade later, in a Ninth Circuit case tackling the issue of whether conceptual separability survived the enactment of the AWCPA.¹¹⁴

III. Judicial Interpretation of Copyright for Architecturally-Situated PGS Works

In *Leicester v. Warner Brothers*,¹¹⁵ the Ninth Circuit considered copyright protection for a sculptural work commissioned as part of a greater architectural project when sculptor Andrew Leicester sued Warner Brothers for its unauthorized use of his work created in conjunction with the

107. H.R. REP. NO. 94-1476, at 55 (1976).

108. Fowles, *supra* note 69, at 310.

109. *Id.*

110. *Id.* at 322.

111. See 17 U.S.C. § 102(a)(8) (listing architecture as an enumerated form of protected authorship).

112. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2441 (codified as amended at 17 U.S.C §§ 101-810).

113. See *supra* Part II.B.1.

114. See *infra* Part III.

115. 232 F.3d 1212, 1219 (9th Cir. 2000).

construction of the 801 Tower in downtown Los Angeles.¹¹⁶ To fulfill a condition mandated by the Los Angeles Community Redevelopment Agency (CRA),¹¹⁷ R&T, the development company, hired Leicester to design a courtyard space on the south side of the 801 Tower, which Warner Brothers used in one of its films, *Batman Forever*.¹¹⁸

The courtyard tells an allegorical story of the history of Los Angeles through its component parts, the centerpiece of which is a courtyard with a sculptural fountain, benches, and various towers also adorned with sculpture.¹¹⁹ Leicester also designed a group of five towers to form a wall, punctuated by the entrance to the courtyard and building.¹²⁰ Two of these towers are capped with brass metal work in the form of smoke.¹²¹ Two additional towers support lanterns crested with grill work.¹²² The final of the five streetwall towers is topped with a vampire figure.¹²³ When the gates close, the figure represents a vampire bat meant to evoke William Mulholland's description of Los Angeles as a "water vampire."¹²⁴

In 1994, Warner Brothers selected the 801 Tower and four of Leicester's five towers—the smoke towers and the lantern towers that form the building's southern streetwall—to represent the Second Bank of Gotham in *Batman Forever*.¹²⁵ The vampire tower and courtyard proper do not appear in the film, but Warner Brothers obtained the rights from R&T development to create a miniature model for special effects

116. See *id.* at 1214 (discussing the conceptualization of the project).

117. See *id.* (describing the CRA instructions to Leicester and the 801 Tower's architect, John Hayes).

118. *Id.* at 1215

119. *Id.* at 1214. In center of the courtyard stands a fountain through which water flows to a channel representing the *Zanja Madre*, translating to "Mother Ditch," which brought water into the city in its early establishment. *Id.* The garden, fountain, and benches symbolize the mountains surrounding Los Angeles, which provide the city water. *Id.*

120. See *id.* (considering the "streetwall" portion of the artwork).

121. See *id.* (referring to these towers the "smoke towers").

122. See *id.* (naming these towers the "lantern towers").

123. See *id.* (describing how the gates form the vampire's "wings").

124. *Id.*

125. See *id.* at 1215 (clarifying that Leicester and the architect were not consulted; Warner Bros received permission directly from R&T).

purposes.¹²⁶ Leicester claimed that Warner Brothers' use of his work infringed upon his copyright.¹²⁷ In opposition, Warner Brothers contended that any use of Leicester's sculpture fell within the § 120(a) exemption for pictorial representations of architectural works.¹²⁸ The court decided that the pictorial representation of the miniature model fell summarily in Warner Brothers' favor while the use of the remaining four towers was vigorously contested in both the district court and on appeal.¹²⁹

The district court found that the four towers "have functional aspects designed to be part of the building plan and from their appearance are designed to match up with the architecture of the building."¹³⁰ In addition, "the artistic work at the tops are incorporated into the tower structure and design, and are therefore an integrated part of the architectural work."¹³¹ The Ninth Circuit did not disturb these findings on appeal, but did examine the legislative history of the AWCPA to address Leicester's contention that "the towers are conceptually separate from the building and are protectable as a sculptural work after the 1990 Act as they were before."¹³² The Ninth Circuit considered the district court's analysis of the 1990 amendments, which codified the AWCPA:

126. Leicester v. Warner Bros., 232 F.3d 1212, 1215 (9th Cir. 2000).

127. See *id.* (listing Leicester's additional claims).

128. *Id.*

129. See *id.* at 1220 ("[T]he district court correctly construed the contract as conferring on R&T an exclusive right to make three-dimensional representations of the Zanja Madre of all sizes; therefore, R&T could sublicense that right to Warner Brothers."); see also *id.* at 1213–14 ("Leicester argues that the court erred by refusing to consider [his work] as a unitary sculptural work, and by construing the 1990 Act so as to eliminate separate protection for sculptural works attached to buildings.").

130. *Id.*

131. *Id.*

132. The district court also included a detailed inquiry concerning the legislative history of the AWCPA. See Leicester v. Warner Bros., 47 U.S.P.Q.2d 1501, 1508 (C.D. Cal. 1998), *aff'd*, 232 F.3d 1212 (9th Cir. 2000) (reaching the conclusion that Congress, when amending § 120(a) of the Copyright Act, intended to "substitute the new protection afforded architectural works for the previous protection sometimes provided under the conceptual separability test for non-utilitarian sculptures . . . incorporated into a work of architecture"); see also Falkner v. Gen. Motors LLC, 393 F. Supp. 3d 927, 933–34 (C.D. Cal. 2018) (summarizing the Ninth Circuit's use of legislative history in *Leicester*).

[The district court] declined to construe the 1990 amendments as Leicester urged, to leave intact the previously authorized protection for sculptural works that were “conceptually separable” from the building of which they are a part, concluding instead that the intent of Congress was to substitute the new protection afforded architectural works for the previous protection sometimes provided under the conceptual separability test for non-utilitarian sculptures (such as gargoyles and stained glass windows) incorporated into a work of architecture.¹³³

Ultimately, the Ninth Circuit avoided making a direct ruling on this interpretation. Instead, it relied upon the district court’s determination on Leicester’s conceptual separability argument, writing, “the district court found otherwise and we cannot say its finding lacks support.”¹³⁴ However, the Ninth Circuit found the district court reasoning compelling:

When copyright owners in architectural works were given protection for the first time in 1990, the right was limited by § 120(a) so that publicly visible buildings could be freely photographed. This reflected a shift from the prior regime of relying on “ad hoc determinations” of fair use. Having done this, it would be counterintuitive to suppose that Congress meant to restrict pictorial copying to some, but not all of, a unitary architectural work.¹³⁵

Evidently, the concept of conceptual separability for architectural works is disapproved of but not foreclosed by the Ninth Circuit, but the finding that the sculptural work is (1) functional and (2) integrated subjects it to the pictorial representation limitation of the AWCPA.¹³⁶ Thus, *Leicester* suggests that the designation of a PGS work as either part of or separate from its architectural surroundings is crucial to an artist’s infringement claim.¹³⁷

133. *Leicester*, 232 F.3d at 1215.

134. *Id.* at 1219.

135. *Id.* at 1219–20.

136. See Fowles, *supra* note 69, at 336 (summarizing the district court’s holding, affirmed by the Ninth Circuit).

137. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219 (9th Cir. 2000) (applying the § 120(a) exemption “[b]ecause the streetwall towers are *part of* the architectural work” (emphasis added)).

By affirming the district court's "integrated concept" test,¹³⁸ the *Leicester* court placed the integration determination at the beginning of the inquiry.¹³⁹ The court then declined to explore the applicability of the conceptual separability doctrine,¹⁴⁰ which had previously been used to distinguish non-functional aspects from works of architecture that were otherwise ineligible for copyright protection before the implementation of the AWCPA.¹⁴¹

Scholars are divided on the outcome of *Leicester* and its resulting curtailment of copyright for PGS authors who create works affixed to architecture.¹⁴² Fowles argues that *Leicester* indicates the utility of a bright line rule in determining whether a PGS work physically connected to an architectural structure retains independent copyright protection, while Jay Orlandi contends that "an abridgment, modification, or omission of any or all of the copyright rights initially conferred upon [a PGS work]" should not be revoked absent statutory basis.¹⁴³ Notably, *Leicester's* applicability to all PGS works is still unclear to

138. *Id.* at 1217.

139. *See id.* at 1219 (suggesting that the inquiry occurs separately from any possibly available separability test).

140. *See id.* at 1221 (quoting *Leicester*, 47 U.S.P.Q.2d at 1508) ("[T]he district court found it unnecessary to decide whether the streetwall towers were conceptually separable because it concluded as a matter of law that 'the enactment of Section 120(a) had the effect of limiting the conceptual separability concept to situations not involving architectural works.'").

141. *See* Fowles, *supra* note 69, at 308 (describing the "quagmire of conceptual separability" (quoting *Leicester*, 232 F.3d at 1223 (Tashima, J., concurring))).

142. *Compare id.* (applauding the Ninth Circuit's avoidance of the conceptual separability doctrine), with Jay Orlandi, *Gargoyles in Gotham: A Sculpture Incorporated into an Architectural Work Should Retain Independent Copyright Protection*, 29 SW. U. L. REV. 617, 644–52 (2000) (proposing a multipart test to prevent the misapplication of limited copyright protection to works that should otherwise enjoy full PSG protection).

143. *See* Fowles, *supra* note 69, at 303 ("[T]he *Leicester* court's strict construction of the AWCPA's bright-line rule has saved judges from aesthetic controversy and conceptual separability in cases regarding the copyright of PSG works attached to architectural works."); Orlandi, *supra* note 142, at 617 (arguing that there is no statutory basis for the district court's decision in *Leicester*).

courts.¹⁴⁴ Considered by both the *Falkner* and *Lewis* courts with respect to painted murals, *Leicester* has yet to provide a succinct answer for all PGS works, some of which are demonstrably incompatible with *Leicester's* reasoning.¹⁴⁵ The following section explores this incongruity in depth.

IV. *Certain Architecturally-Situated PGS Works Should Not Be Subject to the Pictorial Representation Exemption of the AWCPA*

PGS works, grouped within an enumerated category in the Copyright Act, are eligible for certain protection from reproduction.¹⁴⁶ The category encompasses a broad range of works.¹⁴⁷ Unifying this group of copyrightable subject matter is a lack of “utilitarian aspects.”¹⁴⁸ Historically, this protection has been preserved even when PGS works were affixed to a functional article.¹⁴⁹ Until *Leicester*, fair use served as the

144. See *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 934 (C.D. Cal. 2018) (noting that *Leicester* did not provide “a single, determinative test”). *But see Mercedes Benz, USA v. Lewis*, Nos. 19-10948, -10949, -10951, 2019 WL 4302769, at *5 (E.D. Mich. Sept. 11, 2019) (“In sum, nothing in *Leicester* supports defendants’ argument that Mercedes does not have a claim under the AWCPA.”).

145. See *infra* Part IV.D (discussing *Leicester's* applicability to non-sculptural works).

146. 17 U.S.C. § 102(a)(5) (including pictorial, graphic, and sculptural works as copyrightable subject matter).

147. See *id.* § 101

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

148. *Id.*

149. See *Mazer v. Stein*, 347 U.S. 201, 217 (1953) (holding that a PGS work with arguably functional aspects can still be eligible for copyright), *superseded*

limiting principle for PGS copyright protection.¹⁵⁰ However the subsequent interpretations of *Leicester* signal that protection for PGS works affixed to architecture may be in jeopardy not because of their functionality but solely due to the author's choice of fixed medium.¹⁵¹ This Part argues that certain PGS works should be insulated from § 120(a)'s reach and contends that an exception for certain PGS works, such as that identified by *Falkner*, comports with the objectives of the Copyright Act.¹⁵² This Part concludes that *Falkner's* nascent reasoning does not offer enough clarity to courts: *Leicester's* application is still unclear, and a new test built upon *Falkner's* foundation should be proposed.¹⁵³

A. *The Effect of the Pictorial Representation Exemption*

When Congress amended the Copyright Act to comply with international treaty obligations, it added § 120(a), which allows pictorial representations of architectural works “located in or ordinarily visible from a public space.”¹⁵⁴ Prior to 1990, architectural works were excluded from copyright to the extent that they were considered useful ideas and not forms of expression.¹⁵⁵ Although architectural works are currently among the enumerated provisions in the Copyright Act, the

by statute, 17 U.S.C. § 101; *see also* H.R. REP. NO. 94-1476, at 55 (1976) (“A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like.”).

150. *See* 17 U.S.C. § 107 (listing factors to be considered in determining whether reproduction of copyrighted material is fair use).

151. *See Lewis*, 2019 WL 4302769, at *5 (finding *Leicester* unresponsive of the artists' position).

152. *See infra* Part IV.C (arguing that a limitation on *Leicester's* broad applicability complies with the objectives of the copyright act).

153. *See infra* Part IV.D.

154. 17 U.S.C. § 120(a). § 120(a) reads in full:

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

155. *See supra* note 100 and accompanying text; *see also* Fowles, *supra* note 69, at 320 n.145 (2005) (describing the attenuated protection received by architectural works from certain provisions of copyright law).

extent to which they are insulated from reproduction varies from PGS works.¹⁵⁶ Under current copyright law, § 120(a) allows pictorial representations of architecture regardless of whether those representations are fair use.¹⁵⁷ Because of this difference, the designation of an architecturally-fixed PGS work as either part of or separate from its surroundings is crucial to an artist's infringement claim, because that determination affects the applicability of this pictorial representation exemption.¹⁵⁸ If § 120(a) applies, there is no method for an artist to protect the work from pictorial reproduction.¹⁵⁹ The effect of this provision is clear from *Falkner* and *Lewis*, where the rights of multiple artists who had their works indisputably reproduced and used for commercial purposes without their permission faced an uphill battle in court.¹⁶⁰

B. Leicester's *Interpretation and Falkner's Limitation*

Unfortunately for artists like *Falkner* and *Lewis*, *Leicester's* interpretation of the § 120(a) provision encourages its broad application to PGS works.¹⁶¹ *Leicester* holds that PGS works which are “*part of*” an architectural structure do not retain

156. See 17 U.S.C. § 101(a)(8) (adding architectural works as an enumerated form of authorship). *But see id.* § 120(a) (providing an exemption for certain reproductions of architectural works).

157. See *id.* § 120(a) (allowing pictorial representations absent fair use analysis).

158. Compare *Leicester v. Warner Bros*, 232 F.3d 1212, 1219 (9th Cir. 2000) (applying the § 120(a) exemption “[b]ecause the streetwall towers are *part of* the architectural work (emphasis added)), with *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (declining to apply the § 120(a) pictorial representation exemption without first concluding that the mural was part of the architectural work).

159. 17 U.S.C. § 120(a).

160. See generally *Falkner*, 393 F. Supp. 3d 927; *Mercedes Benz, USA v. Lewis*, Nos. 19-10948, -10949, -10951, 2019 WL 4302769 (E.D. Mich. Sept. 11, 2019) (considering limited protection for PGS works that would otherwise be covered by copyright).

161. See *Leicester*, 232 F.3d at 1220 (“[I]t would be counterintuitive to suppose that Congress meant to restrict pictorial copying to some, but not all of, a unitary architectural work.”) Although *Leicester's* holding is not explicitly this broad, the majority's reading of congressional intent favors the application of § 120(a) to all PGS works. *Id.*

independent copyright protection.¹⁶² The court did not explicitly design a test for making this designation, but “part of” carries with it an implication that the work is both integrated and functional.¹⁶³ An integrated work “includes both architectural and artistic portions” that, as a whole, create “the artistic and architectural impression.”¹⁶⁴ A finding that portions of the integrated concept serve an “architectural and urban design purpose” supports their designation as “functional.”¹⁶⁵ Moreover, functionality of component parts may imbue functionality within the entire work.¹⁶⁶ The propriety of this conclusion is arguable based on the circumstances of *Leicester*, as the boundary between sculpture and architecture is easily obfuscated.¹⁶⁷ Yet there are other works within the greater PGS category that are comparatively distinguishable, painted murals among them.¹⁶⁸

162. *See id.* at 1219 (“Because the streetwall towers are part of the architectural work, § 120(a) applies.”).

163. *See supra* note 136 and accompanying text.

164. *Leicester*, 232 F.3d at 1217.

165. *Id.*

166. *Id.* at 1218 (quoting 17 U.S.C. § 101) (“[A]rchitectural work’ extends to the ‘overall form as well as the arrangement and composition of spaces and elements in the design’ [of the building].”).

167. *See id.* at 1222 n.2 (Tashima, J., concurring) (“Here, the disputed PGS work is the functional equivalent of a building wall, serving the architectural purpose of extending the building line itself . . .”); *see also* BRUNO ZEVI, ARCHITECTURE AS SPACE: HOW TO LOOK AT ARCHITECTURE 76 (Milton Gendel, trans., Horizon Press 1957)

Anyone seeking primarily a conception of architectural space might well point to the Greek temple as a horrible example of non-architecture. Yet, whoever views the Parthenon as a giant piece of sculpture must be impressed by it as by the few works of human genius. Every architect, we have seen, must also be something of a sculptor in order to extend his spatial theme to the plastic and decorative treatment of the structure, but the persistent myth that it was Phidias, the sculptor, rather than architects Ictinus and Callicrates, who conceived the Parthenon, is a perfect symbol for the purely sculptural character (and impression) of Greek religious architecture through its seven centuries of development.

168. *See* for example Judge Fisher’s dissent recognizing the “uncertainty” and “[o]ther difficulties” presented by a blanket application of § 120(a) to all PGS works:

Falkner began to articulate the limits of *Leicester* in its exploration of § 120(a)'s application to a painted mural.¹⁶⁹ Following an in-depth analysis of *Leicester*, *Falkner* offered its own interpretation of the opinion: “[I]n order for a PGS work to be treated as an architectural work (and subject to the § 120(a) exemption that limits the protection of architectural works), the PGS work must either be an independent architectural work or be ‘part of’ an architectural work.”¹⁷⁰ Distilling factors and their relevant indicia, the *Falkner* court settled on an inquiry:

Although the court in *Leicester* did not define a single, determinative test for what renders a PGS work “part of” an architectural work, it did describe factors. It considered whether the PGS work had a concept that integrated it into the underlying architectural work or whether the PGS work could itself be considered an architectural feature. It also commented that PGS works may be part of an architectural work when they are designed to appear as part of the building or when they serve a functional purpose that is related to the building.¹⁷¹

Using this interpretation, the court held that the facts in *Leicester* were “entirely distinguishable” from *Falkner*'s

Ultimately, the only way to maneuver cleanly around these admitted difficult problems is to read (as the concurrence suggests) the AWCPA so broadly as to eliminate fully the rights of *any* PGS work that is even a modest part of an architectural work, with no attention given to the size of the work, placement, impact on the building, degree of functionality or possible conceptual separability. I believe this goes too far. It would discourage an artist from painting even a small work on the building. A sculptor would rightfully be wary of placing a piece too close to a building, or on a pedestal made with the same themes or patterns as the architectural work.

Leicester v. Warner Bros, 232 F.3d 1212, 1233 (9th Cir. 2000) (Fisher, J., dissenting).

For a proposed distinction between sculpture and architecture, see also *ZEV*, *supra* note 167, at 28 (“Beautiful architecture would then be architecture in which the internal space attracts us, elevates us and dominates us spiritually . . . no work lacking internal space can be considered architecture.”).

169. *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 931 (C.D. Cal. 2018).

170. *Id.* at 934 (quoting *Leicester*, 232 F.3d at 1217 (majority opinion)).

171. *Id.* at 937.

claim.¹⁷² Noting a “*lack* of a relevant connection between the mural and the parking garage,” the court could not hold as a matter of law whether § 120(a) applied.¹⁷³

In sum, although *Leicester* provides a compelling analysis as to why a certain *sculpture* should not retain copyright protection beyond that afforded to architectural works under the Copyright Act, this conclusion should not reach all PGS works.¹⁷⁴ *Falkner* represents the conceptual struggle in attempting to apply the holding of *Leicester* to a PGS work that is clearly not part of the architectural structure to which it is physically connected.¹⁷⁵ By distinguishing the PGS work at issue from the sculptural courtyard considered in *Leicester*, the *Falkner* court flags a potential exception that could prevent total loss of independent copyright protection for a subclass of PGS works, even with its narrow procedural holding.¹⁷⁶ The following section explores this exception’s compatibility with the Copyright Act.

C. *A Limitation on Leicester Accords with the Copyright Act*

A significant portion of the *Leicester* analysis concerns the tension between established copyright protection for PGS works and the 1990 amendments to the Copyright Act, which added the pictorial representation exemption for works of architecture.¹⁷⁷ The majority indicates the obvious frustration that would occur in attempting to sever a PGS work from its architectural backdrop, as Congress added the exemption for pictorial representation of architecture to ensure that these works could be freely photographed without the possibility of

172. *Id.*

173. *Id.*

174. *See* Orlandi, *supra* note 142, at 619 (arguing that *Leicester* should not jeopardize copyright protection for all PGS works).

175. *See Falkner*, 393 F. Supp. 3d at 937 (remarking that the facts of the case are entirely distinguishable from *Leicester*). The court notices that there is in fact “a lack of a relevant connection between the mural and the parking garage.” *Id.*

176. *See id.* (denying defendant’s motion for summary judgment because the mural could not be declared part of the architectural structure as a matter of law).

177. *See Leicester*, 232 F.3d at 1217 (discussing congressional reasoning regarding the pictorial representation exemption).

infringing.¹⁷⁸ This issue was also addressed by the concurrence¹⁷⁹ as well as the dissent.¹⁸⁰

This confusion can be attributed to the inherent functionality of Leicester's courtyard.¹⁸¹ In fact, Judge Tashima expressed a preference for a narrow holding.¹⁸² The observations made by the *Leicester* court are compelling, but—as *Falkner* recognized—do not foreclose separate copyright protection for every PGS work affixed to architecture.¹⁸³ This conclusion, rather than the alternative complete loss of copyright protection for PGS works, adheres to the purpose of the Copyright Act.¹⁸⁴

178. *See id.*

Otherwise, § 120(a)'s exemption for pictorial representations of buildings would make no sense. When copyright owners in architectural works were given protection for the first time in 1990, the right was limited by § 120(a) so that publicly visible buildings could freely be photographed.

179. *See Leicester v. Warner Bros.*, 232 F.3d 1212, 1222 (9th Cir. 2000) (Tashima, J., concurring)

There is ample support in the legislative history of the Act that the protection for architectural works in 17 U.S.C. § 102(a)(8) is now the exclusive remedy for PGS works embodied in an architectural work—at least for those PGS works that are so functionally a part of a building that § 120(a)'s exemption would be rendered meaningless for such buildings, if conceptual separability were applied to them.

(citing H.R. REP. NO. 101-735, at 6952 (1990)).

180. *See id.* at 1229 (Fisher, J., dissenting) (noting that Congress enacted the Architectural Works Copyright Protection Act concurrently with the Visual Artists Rights Act). Judge Fisher remarked: "It would be odd to interpret the AWCPA as eliminating protection for certain works of PGS artists when, contemporaneously with the AWCPA, Congress enhanced the rights of PGS artists through [that] separate legislation." *Id.*

181. *See id.* at 1219–20 (majority opinion) (repeatedly emphasizing the courtyard's functional aspects).

182. *See id.* at 1222 (Tashima, J., concurring).

In these factual circumstances, where a joint architectural/ artistic work functions as part of a building, the district court concluded that § 120(a)'s exemption applied to protect Warner Bros. pictorial representation of the streetwall towers against a claim of copyright infringement. I agree with that conclusion in the narrow circumstances of this case.

183. *See Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (noting distinguishing facts from those of *Leicester*).

184. *See generally* Orlandi, *supra* note 142 (arguing for a test that preserves copyright for some PGS works).

The Copyright Act explicitly protects PGS works of authorship.¹⁸⁵ Historically, this protection has been preserved even when PGS works were affixed to a functional article.¹⁸⁶ The resulting doctrine of conceptual separability—the continued applicability of which the *Leicester* majority did not address¹⁸⁷—demonstrates the degree to which the law accommodated copyright protection for PGS works intertwined with functional objects.¹⁸⁸ In sum, copyright law has dealt with severing PGS works from functional objects before.¹⁸⁹ A clear test that performs this inquiry with architecture and a non-functional object, such as a painted mural, is more compatible with the object of copyright protection than the removal of a historically protected category that has little to do with the functional aspects of its architectural background.¹⁹⁰

Moreover, a limitation on *Leicester* does not frustrate the purpose of § 120(a). With the enactment of the AWCPA, Congress provided underlying reasons for the inclusion of the pictorial representation exemption.¹⁹¹ The reasons identified concern tourism and academia, undergirded by the assumption that the public purpose served outweighs the potential harm to the author.¹⁹² The House report states:

Architecture is a public art form and is enjoyed as such. Millions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip. Additionally, numerous scholarly books

185. 17 U.S.C. § 102(a)(5).

186. See *supra* note 149 and accompanying text.

187. See *Falkner*, 393 F. Supp. 3d at 936 (“In sum, an important question appears to remain open, at least partially, after *Leicester*: whether conceptual separability applies in the context of architectural works.”).

188. See Fowles, *supra* note 69, at 308–22 (providing an overview of the various separability tests in copyright law).

189. *Id.*

190. See Orlandi, *supra* note 142 at 644 (“Given the underlying purpose of copyright law, and the small likelihood that the public will be harmed by allowing artists to retain independent copyrights in incorporated works of art, creation of a test is necessary to protect artists on the verge of incorporating their works into larger architectural schemes.”).

191. See H.R. REP. NO. 101-735, at 12 (1990) (discussing the enactment of the AWCPA).

192. *Id.*

on architecture are based on the ability to use photographs of architectural works. These uses do not interfere with the normal exploitation of architectural works. Given the important public purpose served by these uses and the lack of harm to the copyright owner's market, the Committee chose to provide an exemption, rather than rely on the doctrine of fair use, which requires ad hoc determinations.¹⁹³

In response to the tourism concern, museums that display protected art have no issue relying upon fair use.¹⁹⁴ In addition, the same issues are faced in digitizing museum collections for scholarly books and classroom use, both of which are based upon the ability to use photographs of potentially protected artwork.¹⁹⁵ Moreover, the "lack of harm" is relative.¹⁹⁶ This statement concerns a creative category that previously lay outside the purview of copyright.¹⁹⁷ In other words, limited copyright protection is preferable to no copyright protection, hence the relatively low level of harm. The same cannot be said for the removal of copyright protection from a category of authorship that has historically enjoyed inclusion, with no other limitation outside of fair use, within the copyright sphere.¹⁹⁸

However, adhering to the congressional preference to avoid fair use inquiries, an exception from the pictorial representation exemption should be created for painted murals to ensure their protection from commercial exploitation, but also to preserve the right of the public to freely take photographs of the architectural structure.¹⁹⁹ This exception should strike a

193. *Id.*

194. See Jennifer Saranow Schultz, *When It's Illegal to Photograph Artwork*, N.Y. TIMES (Sept. 21, 2010, 5:13 PM), <https://perma.cc/8SL2-SSGG> (discussing personal reproductions of copyright-protected art in museums).

195. See Ann C. Shincovich, *Copyright Issues and the Creation of a Digital Resource: Artists' Books Collection at the Frick Fine Arts Library*, 23 J. ART LIBRS. SOC'Y N. AM. 8, 8 (2004) (examining the issues of copyright law for the creation of a digital resource from art books).

196. See *supra* note 191 and accompanying text.

197. See 17 U.S.C. § 102(a)(8) (1994) (codifying a portion of the AWCPA).

198. See *supra* note 150 and accompanying text.

199. See H.R. REP. NO. 101-735, at 12 (noting that § 120(a) advantageously "provide[s] an exemption, rather than rely on the doctrine of fair use, which requires ad hoc determinations").

balance between the language of the AWCPA, while fulfilling the principles of copyright law.²⁰⁰

D. Falkner Appropriately Limits Leicester, but Its Holding Is Insufficient

The classification “part of” carries with it total loss of copyright status—a harsh consequence considering that notwithstanding its fixture, the work is independently eligible for protection.²⁰¹ An austere application of *Leicester* could lead a court to conclude that there is some legally discernible difference between a work painted directly onto the exterior of a building and a work first executed on canvas prior to display on the same exterior structure.²⁰² This superficial distinction is exactly where the putative infringers in *Falkner* and *Lewis* ask the court to draw a line.²⁰³ However, unlike the sculptural courtyard in *Leicester*, painted works do not lend themselves to the “part of” inquiry.²⁰⁴ Applied to painted works, the factors that weigh in favor of integration—such as physical attachment—do not represent any meaningful distinction that justifies total loss of copyright protection.²⁰⁵ In fact, the analysis

200. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

201. See 17 U.S.C. § 106 (granting exclusive reproduction rights to the owner of copyright). *But see id.* § 120(a) (limiting exclusive rights to pictorial representations of architectural works).

202. See *supra* note 168 and accompanying text.

203. See Defendant General Motors LLC’s Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment at 7, *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927 (C.D. Cal. Sept. 17, 2018) (No. 18-cv-00549) (arguing that *Falkner*’s infringement claim fails as a matter of law because the allegedly infringed mural is incorporated into a building); Plaintiff Mercedes Benz USA LLC’s Opposition to Defendant Daniel Bombardier’s Motion to Dismiss, *Mercedes Benz, USA v. Lewis*, 2019 WL 4302769 (No. 19-cv-10951) (arguing that the AWCPA protects Mercedes’s photograph).

204. See *Falkner*, 393 F. Supp. 3d at 937 (concisely noting that the factors relevant in *Leicester* do not apply to the facts at hand).

205. The idea of concurrence is implied in the *Falkner* analysis; whether the PGS work was painted contemporaneously with construction would weigh in favor of there being an “integrated concept.” See *id.* (considering “whether the PGS work had a concept which integrated into the underlying architectural work”).

appears to be an easily resolved issue absent the extraordinary characterization of the painting as an architectural work itself.²⁰⁶ Although *Falkner*'s conclusion is correct, its analysis shows that the test could be more clear, perhaps completely distinct from the *Leicester* analysis.²⁰⁷ Moreover, the *Lewis* court's interpretation demonstrates that courts will not always interpret *Leicester* correctly.²⁰⁸ This possibility should be curtailed.

In its examination of *Leicester*, the *Falkner* court identified a list of factors to be considered in determining whether a PGS work is part of an architectural structure.²⁰⁹ These factors include (1) "whether the PGS work had a concept that integrated it into the underlying architectural work," (2) "whether the PGS work could itself be considered an architectural feature," (3) whether the PGS work is "designed to appear as part of the building," or (4) whether the PGS "serve[s] a functional purpose."²¹⁰ Although the court did not explicitly state how these factors are meant to weigh in relation to one another, it is unlikely that any one of these factors is dispositive in the analysis.²¹¹ Considering these factors in turn—from least applicable to arguably applicable—it is clear that the *Leicester* analysis yields no meaningful argument for excluding a painted mural from its original protection under the Copyright Act.

Considering whether the mural is part of the architecture work, the *Falkner* court did not thoroughly analyze whether a painted mural could be classified as an architectural feature.²¹² However, applying the *Leicester* reasoning to the PGS work at issue in *Falkner*, it is clear that this factor will almost always weigh against classifying a PGS work as integrated.

206. See *id.* ("Defendant is not arguing that the mural itself is an architectural feature").

207. See *infra* Part V.

208. See *infra* Part IV.D.2.

209. See *Falkner*, 393 F. Supp. 3d at 937 (deriving a list of relevant factors from *Leicester*).

210. *Id.*

211. See *id.* (stating that "[v]ery few if any of these factors appear to be present in the instant case"). This statement suggests the presence of only some factors is insufficient. *Id.*

212. See *id.* at 937 (noting only that "defendant is not arguing that the mural is itself an architectural feature").

In *Leicester*, the court categorized the sculptural courtyard as an architectural feature.²¹³ Setting aside the esoteric discussion that could occur in considering this factor,²¹⁴ the court instead looked to legislative language and intent.²¹⁵ It affirmed the district court's reliance on the language of § 101 of the Copyright Act, which provides: “[architectural] work includes the overall form as well as the arrangement and composition of spaces and elements in the design”²¹⁶ The court also considered testimony from an expert, who stated that streetwalls traditionally constitute an architectural feature: “Particularly in modern urban design, streetwalls are one of the basics of architectural vocabulary, along with columns, windows and doors.”²¹⁷ The *Falkner* court repeated this definition but did not apply it in its analysis of the mural, implying its irrelevance to the PGS work at issue.²¹⁸

In addition, *Falkner* identified an integrated concept factor, examined through the inclusion of “both architectural and artistic portions.”²¹⁹ The court followed *Leicester's* reasoning, which examined the artistic and architectural qualities of the PGS work for an integrated concept.²²⁰ The artistic qualities considered in *Leicester* concerned building material.²²¹ The

213. See *Leicester v. Warner Bros*, 232 F.3d 1212, 1218 (9th Cir. 2000) (“The streetwall [formed by the four towers] was not a creative aspect of Leicester’s work; it was an architectural element mandated by the CRA, which required a structure with sufficient mass to establish the street edge”).

214. See ZEVU, *supra* note 168 (arguing interior space is an essential element of architecture); Fowles, *supra* note 69, at 328–29 (discussing functionality as the division between architecture and sculpture).

215. See *Leicester*, 232 F.3d at 1219; see also *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 936 (C.D. Cal. 2018) (considering the *Leicester* majority’s analysis of legislative history and intent).

216. 17 U.S.C. § 101.

217. *Leicester*, 232 F.3d at 1218.

218. See *Falkner*, 393 F. Supp. 3d at 934 (“[The *Leicester* court] noted, relatedly, that certain PGS works may independently be ‘traditionally considered as architectural features’ or ‘one of the basics of the architectural vocabulary,’ such as columns, windows, and doors.” (quoting *Leicester*, 232 F.3d at 1218)).

219. *Id.* (quoting *Leicester*, 232 F.3d at 1217).

220. See *id.* (citing *Leicester*, 232 F.3d at 1218) (identifying similarities between the PGS work and architectural structure).

221. See *Leicester*, 232 F.3d at 1218 (noting that the bases of the streetwall towers were constructed with the same marble).

architectural qualities identified in *Leicester* involve design iteration, parallel scale, and positioning.²²²

A painted mural does not fit within this analysis, as it lacks the architectural and artistic qualities imagined by the *Leicester* court.²²³ An integrated concept analysis requires consideration of *both* the artistic and architectural qualities of a PGS work. In the case of a painted mural, the circumstances weigh against finding an integrated concept as defined in *Leicester*.

Leicester states that PGS works may be part of an architectural work when they are designed to appear as part of the building.²²⁴ This is likely the sole factor applicable to the analysis of a painted work, as illusionistic, decorative painting can be a part of an architectural design scheme.²²⁵ However, an exterior mural that bears no relationship to the design scheme is distinguishable.²²⁶ *Falkner* makes note of this distinction and adds that the mural was painted after completion of the architectural structure.²²⁷ This reasoning suggests that this factor calls for an intentional design scheme, involving both architecture and painting.²²⁸ While this factor could weigh in favor of certain works within the same medium,²²⁹ it does not capture a non-contemporaneously painted PGS work like the one identified in *Falkner*.²³⁰

222. See *id.* (identifying repetition of architectural motifs in the streetwall towers and the building itself).

223. See *Falkner*, 393 F. Supp. 3d at 937 (noting a lack of “matching decorative design elements, materials, and spacing”).

224. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1218 (9th Cir. 2000).

225. See generally Apollo Spiliotis, *Illusionism in Architecture: Anamorphosis, Trompe L’oeil and Other Illusionary Techniques from the Italian Renaissance to Today* (2008) (unpublished Ph.D. dissertation, Manchester School of Architecture) (providing examples of illusionistic painting in Italian Renaissance architecture) (available at <https://perma.cc/5DUS-DZ6B>).

226. See *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (distinguishing *Falkner*’s mural from *Leicester*’s courtyard).

227. See *id.* at 937 (“There is also no indication that the mural was designed to appear as part of the building . . .”).

228. See *id.* at 929 (noting the lack of directed design scheme).

229. See Spiliotis, *supra* note 225 (providing an example of illusionistic painting).

230. See *Falkner*, 393 F. Supp. 3d at 937 (noting that the parking garage and accompanying building were both complete before *Falkner* began painting).

Perhaps the most important factor weighing against the separation of a PGS work from its architectural backdrop is whether that work has a functional purpose.²³¹ This factor effectively separated the sculptural courtyard in *Leicester* from the PGS category by identifying functionality, the historically limiting factor in copyright protection.²³² However, this factor is illogical when applied to painted works, as they are inherently non-functional.²³³ *Falkner* correctly identified the inapplicability of this factor.²³⁴

In sum, the “test” distilled by *Falkner* is inconclusive.²³⁵ It provides a list of inapplicable factors in determining the copyright protection for a significant subclass of PGS works.²³⁶ As *Falkner* identified, the application of *Leicester* to all PGS works forecloses a remedy for a group of artists who, but for

231. See *Leicester*, 232 F.3d at 1218 (identifying multiple functional purposes for the sculptural courtyard). The majority opinion states:

As Professor Naidorf observed, the lantern towers and smoke towers that form the Figueroa streetwall as well as the smoke towers on the Eighth Street side of the building serve “the architectural and urban design purpose of defining the street frontage and enhancing the pedestrian level of the complex.” In addition, the Zanja Madre streetwall serves the functional purpose of channeling traffic into the courtyard, as metal gates, which open and close for control, latch onto the lantern towers.

Id.

232. See *supra* note 100 and accompanying text.

233. See 17 U.S.C. § 101

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

234. See *Falkner*, 393 F. Supp. 3d at 937.

235. See *id.* (denying defendant GM’s motion for summary judgment because the mural could not be declared part of the architectural structure as a matter of law).

236. See *id.* (finding an insufficient number of facts to support any of the four *Leicester* factors).

their selected canvas, would be protected under the Copyright Act.²³⁷

In addition, *Lewis* illustrates the need for a new test to determine copyright protection for architecturally-situated PGS works. Ruling on the three defendants' motions to dismiss Mercedes' claim for declaratory judgment, the court in *Lewis* declined to distinguish Mercedes's use of the three defendants' murals from that of Warner Brothers' use of Leicester's sculptural courtyard.²³⁸ The court described each artist's mural as "integrated into [the] building" and "a permanent fixture of the . . . cityscape."²³⁹ This decision stands in opposition to *Falkner*, which noted a distinction between the sculpture at issue in *Leicester* and Falkner's mural.²⁴⁰

Moreover, the *Lewis* court did not explicitly address *Falkner*, even though *Falkner* is the sole opinion addressing the issue of copyright for an architecturally-fixed mural.²⁴¹ In fact, the circumstances are entirely parallel.²⁴² The incongruity of these opinions signals a lack of consensus regarding copyright protection for a subclass of PGS works.²⁴³ This lack of clarity is problematic as these lawsuits increase in number.²⁴⁴ To retain

237. See *id.* at 934 (explaining that the application of § 120(a) limits the copyright protection of PGS works attached to architecture).

238. See *Mercedes Benz, USA v. Lewis*, Nos. 19-10948, -10949, -10951, 2019 WL 4302769, at *5 (E.D. Mich. Sept. 11, 2019) (analogizing Mercedes's fair use claim with that of Warner Brothers in *Leicester*).

239. *Id.* at *1–2.

240. See *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) ("[T]he relevant facts in *Leicester* are entirely distinguishable from those here.").

241. See *Lewis*, 2019 WL 4302769, at *5 (concluding its inquiry with no mention of *Falkner*).

242. Both cases concern artwork painted after completion of the architectural structure with no overarching design concept in relation to the structure. See *id.* at *1–2 (noting that the artists' murals were painted during an arts festival); *Falkner*, 393 F. Supp. 3d at 929 ("Plaintiff was given no aesthetic to match and was not told of any function that the mural should play.").

243. See *Falkner*, 393 F. Supp. 3d at 937 (distinguishing *Leicester*), with *Lewis*, 2019 WL 4302769, at *5 (equating *Leicester*).

244. Benjamin Sutton, *How Graffiti Artists Are Fighting Back Against Brands That Steal Their Work*, ARTSY (Aug. 3, 2018, 8:30 AM), <https://perma.cc/G8TZ-AS67>.

uniformity across the copyright system and to address an increasingly common issue, a clear test should be proposed.

V. Refining the Leicester Test

To summarize, the *Leicester* test carries with it at best the risk of misapplication when used to determine copyright protection for non-sculptural street art.²⁴⁵ On one hand, as Judge Wilson points out when describing the mural at issue in the *Falkner* opinion, “very few if any of these [*Leicester*] factors appear to be present in the instant case.”²⁴⁶ There, the court applied the test, found it to be inconclusive, and ultimately separated the mural from the architectural structure.²⁴⁷ In contrast, the *Lewis* court found the *Leicester* test wholly inapplicable and therefore irrelevant to the possible exemption of those murals from the reach of § 120(a).²⁴⁸ Essentially, the artist prevails under *Falkner* but loses under *Lewis*.²⁴⁹

No part of domestic copyright law indicates that pictorial representation should be allowed for PGS works, absent a showing of fair use.²⁵⁰ At most, a tension exists in regard to the application of § 120(a) due to the fine line between pure architecture and sculpture.²⁵¹ Presented with the facts of *Leicester*, the Ninth Circuit concluded that this distinction was not significant enough to prevent the application of § 120(a), thus allowing the pictorial representation of a work arguably

245. See *supra* Part IV.D.

246. *Falkner*, 393 F. Supp. 3d at 937.

247. See *id.* (concluding that the mural could not be considered “part of” the architectural structure as a matter of law). The court did not make a final determination as to the mural’s status under *Leicester* due to the procedural posture of the case. *Id.*

248. *Lewis*, 2019 WL 4302769, at *5 (“In sum, nothing in *Leicester* supports defendants’ argument that Mercedes does not have a claim under the AWCPA.”).

249. This statement should be qualified according to the procedural posture of both cases. *Falkner* denied defendant’s motion for summary judgment. *Falkner*, 393 F. Supp. 3d at 937. *Lewis* concerned defendant artists’ motion to dismiss a declaratory judgment claim. *Mercedes Benz, USA v. Lewis*, Nos. 19-10948, -10949, -10951, 2019 WL 4302769, at *5 (E.D. Mich. Sept. 11, 2019). Neither case offered a decisive victory for either side.

250. See 17 U.S.C. §§ 102(a)(5), 106(1) (providing copyright protection to PGS works, which includes the exclusive right of reproduction).

251. See *supra* note 168 and accompanying text.

resembling sculpture more than architecture.²⁵² In addition, the majority concluded that the 1990 amendments foreclosed any possible application of a conceptual separability test, as those tests had been abrogated by statute.²⁵³ Although *Leicester* certainly limited copyright protection for PGS works affixed to architecture, *Falkner* indicates that its force is not absolute.²⁵⁴ That is, under the correct factual circumstances, a court may still determine that PSG work is not “part of” an architectural work, thus worthy of independent copyright protection.²⁵⁵ Drawing this division, however, may encourage courts to make aesthetic judgments regarding the blurred lines between artistic mediums.²⁵⁶ These judgments affect the uniformity of copyright and result in ad hoc determinations of what should be a federally standardized scheme.²⁵⁷ Thus, the circumstances for when to exempt certain architecturally-fixed PGS works from the *Leicester* holding should be clearly articulated. The question remains: how will courts know how to draw this distinction within the greater PGS category?

The following inquiry aims to answer this question within the confines of *Leicester*.²⁵⁸ It offers guidance to courts who may otherwise find it imprudent to make the distinction between non-sculptural street art and its architecturally-classified structural canvas.²⁵⁹ The purpose of the test is to

252. See *Leicester v. Warner Bros*, 232 F.3d 1212, 1218 (9th Cir. 2000) (considering Leicester’s contention that his work is sculptural, rather than architectural).

253. See *id.* at 1219–20 (discussing the legislative history of the 1990 Act).

254. See *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (reasoning that a work must first be “part of” an architectural structure before § 120(a) applies).

255. See *id.* at 936 (“In sum, an important question appears to remain open, at least partially, after *Leicester*: whether conceptual separability applies in the context of architectural works.”). After making this statement, the opinion continues to analyze the application of the § 120(a) exemption, indicating that conceptual separability can be separated from the inquiry altogether. *Id.* at 936–37.

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

257. See 17 U.S.C. § 102(a)(5) (including pictorial, graphic, and sculptural works as an enumerated, copyrightable subject matter).

258. See *supra* Part II.B.2.

259. See, e.g., *Lewis*, 2019 WL 4302769, at *5 (rejecting the policy argument that the application of § 120(a) forecloses copyright protection for otherwise eligible works).

demonstrate—in clearer terms than the *Leicester* factors—that these works are *not* “part of” the architectural work and are therefore eligible²⁶⁰ for copyright protection, so long as they comply with the statutory requirements for PGS copyright.²⁶¹

A. *Creating the Proper PGS Subcategory*

The specific PGS works of authorship on which this test focuses must be narrowly delineated in order to propose a tailored solution to this issue in copyright law.²⁶² This test does not purport to clarify the relationship between the pictorial representation exemption for architectural works under § 120(a) and *all* PGS works affixed to architecture.²⁶³ Rather, this test should be used to properly classify a *subset* of PGS works as *not* “part of” the architectural structure upon which they were executed.²⁶⁴

260. The test ends with the conclusion that a work is or is not part of the architecture structure; in other words, whether the § 120(a) pictorial representation exemption applies. *See infra* Part V.B (discussing a new test for certain architecturally situated PGS works). Thus, the result of the test has no bearing on whether the pictorial representation infringed on the artist’s copyright. *See* 17 U.S.C. § 120(a) (applying only to architectural works). That inquiry would proceed under a fair use analysis. *See id.* § 107 (providing a list of factors to determine whether use of the work is permissible).

261. *See id.* §§ 101, 102(a)(8) (providing statutory requisites for PGS copyright eligibility).

262. This delineation should be made judicially; this Note does not argue that there should be a change in the existing statutory grouping. *See id.* § 102(a)(5) (including PGS works as one category).

263. Scholars have already analyzed this angle. *See, e.g.,* Fowles, *supra* note 69, at 343 (“By creating a bright-line rule, Congress spared future judges considering the copyrightability of PGS works attached to architectural works from choosing between numerous conceptual separability balancing tests and the resulting aesthetic judgments that contradict essential policy behind copyright law in their determinations.”); Orlandi, *supra* note 142, at 644–52 (proposing a multifactor, equitable test to analyze PGS works that are incorporated into architecture). These articles look at whether there should be a bright line rule for PGS works as an entirety.

264. Both *Leicester* and *Falkner* use the term “part of” to describe a PGS work’s status of incorporation. *See Leicester v. Warner Bros*, 232 F.3d 1212, 1219 (9th Cir. 2000) (“Because the streetwall towers are *part of* the architectural work, § 120(a) applies.” (emphasis added)); *Falkner*, 393 F. Supp. 3d at 937 (“The Court must . . . consider whether the mural is *part of* the parking garage for the purposes of Section 120(a).” (emphasis added)). The

This subset of PGS works to which this test applies is commonly described as “street art.”²⁶⁵ However, by using this term for the works of authorship at issue in this test without further guidance, the exact contours of this PGS category are unclear.²⁶⁶ One scholar contends: “[S]treet art’ refers generally to visual art developed in public spaces including on private property, both sanctioned and unsanctioned”²⁶⁷ While this description is a helpful starting point, this definition needs clarifying parameters to narrow this category.²⁶⁸ First, street art is “visual art,” which is used consistent with its meaning provided in the Copyright Act.²⁶⁹ The Act requires that a “work of visual art” be a painting, drawing, print, or sculpture that exists in a single copy.²⁷⁰ There is no requirement that the work of visual art possess any aesthetic value or objective quality.²⁷¹ The Act excludes, among other things, “any poster, map, globe, chart, technical drawing, diagram model, applied art, motion picture or other audiovisual work”²⁷² However, this test will disregard any three-dimensional work of visual art, e.g.,

application of this term is a distinct inquiry from conceptual separability, discussed *infra*. See *Leicester*, 232 F.3d at 1219 (independently examining Leicester’s conceptual separability argument).

265. John Fekner, a central figure in the street art movement, offers one example of a definition for this term: “all art on the street that’s not [merely] graffiti.” CEDAR LEWISOHN, *STREET ART: THE GRAFFITI REVOLUTION* 23 (1st ed. 2008). Clearly, this definition includes a broad array of public works that may fall within *Leicester*’s precedent; as such, the definition should be further narrowed.

266. For example, under Fekner’s definition, street art could include sculptural art, which this Note will exclude from its inquiry. See *infra* Part V.A.1 (proposing a two-dimensionality requirement).

267. Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 CHI.-KENT J. INTELL. PROP. 204, 205 n.8 (2013).

268. Any art that is three-dimensional excluded from the PGS subcategory. See *infra* Part V.A.1.

269. See 17 U.S.C. § 101 (stating what the term “visual art” includes and does not include).

270. *Id.*

271. Translated: the art does not have to be good. See Copyright Act of 1909, 35 Stat. 1075 et seq. (1909) (codified as amended at 17 U.S.C. 101 *et seq.* (1942)) (replacing the term “works of fine art” with “works of art” to remove any indication of aesthetic valuation).

272. 17 U.S.C. § 101. These exclusions of functional works are important for the purposes of this Note. See *supra* Parts II.B.1, V.A.3 (exploring functionality in copyright law).

sculpture.²⁷³ The reason for this choice is twofold. First, the *Leicester* court has already developed an applicable test for sculptural works.²⁷⁴ Second, the propriety of the *Leicester* test has been properly explored by other sources.²⁷⁵

The second parameter concerns the location of the work. For the § 120(a) exemption to apply, the work must be “located in or ordinarily visible from a public space.”²⁷⁶ Thus, a work that is questionably “part of” an architectural structure will fall outside the scope of this exemption if it does not meet these requirements.²⁷⁷ Moreover, the “public” nature of street art is exactly what makes these works vulnerable in the first place.²⁷⁸

The preceding definition of “street art” is meant to clarify the circumstances under which the test should and should not apply. As such, the test proposed in this section should be presumed to apply only to street art that fits previously described parameters. Those parameters require the work to be two-dimensional, non-sculptural visual art, as described in § 101 of the Copyright Act, that is located in or ordinarily visible from a public space, notwithstanding whether it exists on privately owned property.²⁷⁹ The term “non-sculptural street art” that is used throughout this section will imply that definition.

273. See *infra* Part V.A.2.

274. See generally *Leicester*, 232 F.3d 1212 (determining copyright protection for an incorporated sculptural work).

275. See *supra* note 263 and accompanying text.

276. 17 U.S.C. § 120(a).

277. An example of this would be any PGS work, such as a sculptural fountain, that exists on private property; if its location is outside the public view, then § 120(a) does not apply. *Id.*

278. For example, it would be more difficult for the infringement to occur if the art is on private property and the company advertising must first get permission to enter the property. If that is the case, then there is likely no § 120(a) loophole, because the PGS work is not “located in or ordinarily visible from a public space.” *Id.*

279. See *supra* notes 269, 276 and accompanying text.

B. An Alternative Test for Non-Sculptural Street Art

As a threshold matter, it is necessary to reiterate the narrow applicability of this test to certain PGS works.²⁸⁰ This can be accomplished by distilling the factors that constitute the delineation among PGS works made under the previous Subpart. The following test should only be employed with works that fall within this PGS subcategory; otherwise, the *Leicester* analysis should be applied.²⁸¹ The test is triggered with a showing that the work was not created contemporaneously²⁸² with the architectural structure *or* with a successful rebuttal of the presumption that attaches if it was created contemporaneously.²⁸³ Once this threshold element is met, the court should not use the *Leicester* factors. Rather, the court should determine whether the work is (1) two-dimensional and (2) non-functional.²⁸⁴ If those elements are met, then the work should retain independent copyright protection.²⁸⁵

1. Timing

This threshold element requires the author to make a showing concerning timing in order for the PGS work to retain independent copyright protection. The author must demonstrate that the PGS work was created after the completion of the architectural work, or otherwise rebut a presumption that the work is part of the overall architectural

280. See *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219–20 (9th Cir. 2000) (suggesting that sculpture is susceptible to architecture’s limited copyright protection).

281. See *supra* Part IV.D (analyzing the four *Leicester* factors).

282. “Contemporaneous” means that the PGS work was conceptualized before the completion of the architectural work. For example, the *Leicester* sculpture was created contemporaneously, while the *Falkner* mural was not. See *Leicester*, 232 F.3d at 1213–15 (describing the architectural and artistic collaboration between Leicester and the 801 Tower’s architect, John Hayes); *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (noting that the parking garage had already been completed by the time *Falkner* began his work).

283. See *infra* Part V.A.1.

284. See *supra* note 136 and accompanying text.

285. Otherwise, the work is likely to fall within the *Leicester* holding, and should be analyzed as such. See *supra* note 136 and accompanying text.

design.²⁸⁶ This threshold requirement is necessary for two reasons. The first is that it removes many of the possible functionality issues.²⁸⁷ Second, it prevents the premature application of the *Leicester* test.²⁸⁸ In addition, this element accords with the common conceptualization of street art, which is art that is usually added to an existing structure.²⁸⁹

If a work is not created contemporaneously with the architectural structure, then the *Leicester* test should not apply.²⁹⁰ *Falkner* illustrates this reasoning.²⁹¹ In contrast, if a work is created contemporaneously with the structure, it is more likely to be part of the “overall form as well as the arrangement and composition of spaces and elements in the design” of a building²⁹² and thus gives rise to a presumption that is “part of” the architectural work. In this case, the *Leicester* factors are applicable.²⁹³

286. See *Falkner*, 393 F. Supp. 3d at 929 (emphasizing the timing of the work).

287. See *infra* Part V.A.3. Many of the indicia of derivative functionality center around the idea of an integrated design concept. *Falkner*, 393 F. Supp. 3d at 937. *Falkner* illustrates how the separation of a PGS work’s completion from the construction of the building remedies this issue: “Plaintiff was not instructed that the mural should play a functional role with respect to the parking garage or that the design of the mural should match design elements of the garage. *Indeed, the architecture of the parking garage and accompanying building were already complete before [Falkner] started painting.*” *Id.* (emphasis added).

288. There are instances where the *Leicester* test is helpful for two-dimensional works. See *infra* Part V.A.3 (discussing functionality). If the work is functional, then it fails this proposed test, but has met one of the factors of *Leicester*. In that case, the inquiry should continue under *Leicester*.

289. LEWISOHN, *supra* note 265, at 23. Again, this Note makes no distinction between permissive and non-permissive additions to buildings.

290. Once the remaining two elements are met, then *Leicester* becomes a useless inquiry. See *supra* Part IV.D (examining the applicability of the *Leicester* factors using a mural as a hypothetical); see also *Falkner*, 393 F. Supp. 3d at 937 (commenting on the absence of the factors in analyzing a two-dimensional, non-functional mural added after the completion of the architectural structure).

291. See *Falkner*, 393 F. Supp. 3d at 937 (considering the *Leicester* factors of little relevance to the court’s conclusion).

292. *Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000) (quoting 17 U.S.C. § 101).

293. See *supra* note 210 and accompanying text.

The presumption is necessary because there are certain two-dimensional, non-functional PGS works that truly are conceived as “part of” an architectural structure.²⁹⁴ For example, consider painted (rather than sculptural) frieze adorning a Greek temple.²⁹⁵ The fact that it is two-dimensional and non-functional does not make it any less “part of” the architectural composition.²⁹⁶ In fact, a frieze is one of the requirements of a classical temple façade.²⁹⁷ The inquiry would not be resolved by the proposed test, because even elements that were two-dimensional and purely non-functional would still appear to be “part of” the architectural structure.²⁹⁸ The *Leicester* test is better suited for this inquiry, because it focuses on the architecture’s integrated concept.²⁹⁹ If, however, the *Leicester* test is inconclusive—that is, the court still does not consider the work to be “part of” the architectural structure—then the remaining elements of this refined test can be applied to reach a final conclusion.³⁰⁰

294. See *supra* note 225 and accompanying text.

295. For a description of the frieze, see HERBERT LANGFORD WARREN, *THE FOUNDATIONS OF CLASSICAL ARCHITECTURE* 168 (1919).

Upon the epistyle rests the frieze. This member is essentially a piece of wall. It is not a structurally necessary member of an order. It may be, and it often is, omitted, when the scale or proportion of the structure demands. It is usual, because in most cases it is necessary to give adequate height to the entablature without too great coarsening of its parts. As a piece of wall its function is to enclose and to support. Like the wall it may be either continuous, as it is in the Ionic order, or it may appear to be resolved into points of support.

These modes of support were further divided into triglyphs and metopes. *Id.* The metopes were often painted. *Id.* at 170.

296. See *id.* (describing examples of necessary two-dimensional embellishments).

297. ALEXANDER TZONIS AND LIANE LEFAIVRE, *CLASSICAL ARCHITECTURE: THE POETICS OF ORDER* 43, 53 (1986).

298. See *supra* note 136 and accompanying text.

299. In the frieze example, a painted metope within a frieze would satisfy the first three factors of *Leicester*. See *supra* note 293 and accompanying text.

300. If the frieze did not satisfy the *Leicester* factors, then its two-dimensional and non-functional characteristics would be enough to warrant independent copyright protection, even if it failed the threshold requirement of non-contemporaneous creation.

2. *Two-Dimensionality Requirement*

The PGS category includes “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”³⁰¹ Clearly, there is no differentiation made within the statute based on whether a work is a two-dimensional mural or a three-dimensional structure.³⁰² However, a distinction should be created between the two types of PGS works to avoid the mischaracterization made in *Lewis*.³⁰³ For example, many of the *Leicester* elements identified by *Falkner* offer little clarity when applied to a two-dimensional PGS work.³⁰⁴ The solution is simple: any three-dimensional PGS work should be analyzed under *Leicester*, while two-dimensional works should follow the inquiry proposed here.³⁰⁵

301. 17 U.S.C. § 101.

302. *Id.*

303. Mercedes Benz, USA v. Lewis, Nos. 19-10948, -10949, -10951, 2019 WL 4302769, at *1 (E.D. Mich. Sept. 11, 2019) (describing each artist’s mural as “integrated into [the] building” and “a permanent fixture of the . . . cityscape”).

304. See *supra* Part IV.D. For example, it is highly unlikely that a two-dimensional work would be considered on its own an architectural feature.

305. The possibility of a mixed-media work complicates the test. In this case, the inquiry should be whether the work is predominantly three-dimensional or predominantly two-dimensional, according to the viewer. In other words, is it more akin to painting (or a comparable medium such as an etching or chalk work) or closer to sculpture? An illustration from the famous Paragone debate that ranged throughout the Renaissance may offer some guidance here on the difference between painting and sculpture: “Even a blind man could recognize and enumerate the details of a statue though his sense of touch, ergo it was more real than a painting which the blind man would experience as an incomprehensible, flat object.” Peter Hecht, *The Paragone Debate: Ten Illustrations and a Comment*, 14 NETH. Q. FOR HIS. ART 125, 127 (1984). In addition, if three-dimensional elements of the work can be assessed *separately* from its two-dimensional elements, there is also the possibility of using separate tests for the work’s constituent parts.

3. “Non-functional” Defined

Works of authorship must be non-functional to qualify for PGS copyright protection.³⁰⁶ This requirement may eliminate some forms of street art, but should be considered separately from the analysis triggered by the possible application of § 120(a).³⁰⁷ For example, a mural representing a map displays functional qualities.³⁰⁸ However, this type of functionality should be analyzed under an applicable conceptual separability test, because the functional elements at issue exist solely within the PGS work.³⁰⁹ Ultimately, if a work loses copyright protection on these grounds, there is no need to inquire as to the effects of § 120(a). Because the inquiry goes directly to whether a work is eligible for PGS copyright protection in the first place, this type of functionality is unnecessary to explore under a § 120(a) application analysis.³¹⁰

However, some PGS works may also exhibit functional aspects when conceptualized with architecture.³¹¹ In *Leicester*,

306. See 17 U.S.C. § 101 (“[PGS] works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned . . .”). Ostensibly, no such functionality bar exists for architectural works. See *id.* (defining architectural works).

307. See Fowles, *supra* note 69, at 210 (describing conceptual separability for PGS works).

308. See 17 U.S.C. § 101 (using “map” as an example of visual art but limiting its protection by functionality).

309. *Leicester* abrogated any conceptual separability inquiry in the context of separating a PGS work from architecture, not conceptual separability for the PGS work itself. See *Leicester v. Warner Bros.*, 232 F.3d 1212, 1218 (9th Cir. 2000) (considering conceptual separability in the context of PGS works *and* architecture).

310. Instead, the inquiry would follow a conceptual separability test, the most recent example being the Supreme Court’s holding in *Star Athletica*:

[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three- dimensional work of art separate from the useful article and (2) would qualify as a protectable [PGS] work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.

Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017).

311. This phenomenon precluded *Leicester*’s claim against Warner Brothers. See *Leicester*, 232 F.3d at 1218 (identifying various functional roles of the sculpture).

the court explored this form of symbiotic functionality and ultimately concluded that this characteristic barred the artist's claim.³¹² Thus, the proper inquiry under this element would follow the reasoning of *Leicester*.³¹³ There, the court disagreed with Leicester's contention "that visual effects cannot impart usefulness."³¹⁴ Reasoning that "'building' includes structures 'that are used, but not inhabited by human beings,'"³¹⁵ the majority concluded that "[S]ection 101's protection of an 'architectural work' extends to the 'overall form as well as the arrangement and composition of spaces and elements in the design' of a building."³¹⁶ Accordingly, if a PGS work possesses characteristics that converge with the overall functionality of the architectural work, then visual effects *may* in fact impart usefulness.

In *Falkner*, the court examined the imbued functionality of a painted mural by looking at whether the mural had any functional purpose related to the building.³¹⁷ From *Leicester*, *Falkner* distilled two indicia of functional purpose: (1) whether the mural matched design elements of the architectural structure and (2) whether the artist was instructed to fulfill a functional design scheme.³¹⁸ Under the first indicator, *Leicester* looked at material, height, positioning, and resemblance to architectural features of the structure.³¹⁹ In addition, the court looked at the functional purpose of the work, which served "the architecture and urban design purpose of designing the street frontage and enhancing the pedestrian level of the complex."³²⁰ The court noted that this function "was not a creative aspect of Leicester's work; it was an architectural element mandated by the Los Angeles CRA, which required structure with sufficient

312. *See id.* at 1219 (considering "powerful evidence that [the work is] part of the functional and architectural vocabulary of the building").

313. *See id.* at 1217–19 (reviewing the reasoning of the district court).

314. *Id.* at 1218.

315. *Id.* (quoting H.R. Rep. No. 101-735, at 6952 (1990)).

316. *Id.* (quoting 17 U.S.C. § 101).

317. *See Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (examining the relationship between the mural and the parking garage).

318. *Id.*

319. *Leicester*, 232 F.3d at 1218.

320. *Id.*

mass to establish the street edge and be no higher than three stories.”³²¹

Derivative functionality—i.e., functional qualities that only appear as a result of the PGS work’s proximity to architecture—is a product of these attributes.³²² However, examining the list, it is unlikely that any of these qualities would be present in a PGS work that fits the parameters of this Note.³²³ This form of functionality is not inherent in two-dimensional works, and will most likely be satisfied by a sufficient showing under the second element of the test.³²⁴ It is more probable that functionality manifests in a manner that removes the work from PGS classification altogether.³²⁵ If that is the case, the inquiry should be conducted separately from this test.³²⁶

The object of the test is to demonstrate that certain PGS and architectural works are not unified.³²⁷ As such, the test reveals whether there are two separate creations, rather than a work conceived as a whole.³²⁸ *Leicester* suggests that PGS works cannot be separated once found to be unitary.³²⁹ As such, any “separation” of a PGS work from its architectural surroundings must take place before this designation.³³⁰ This test performs

321. *Id.*

322. *See Leicester v. Warner Bros.*, 232 F.3d 1212, 1216 (9th Cir. 2000) (rejecting *Leicester*’s contention that his work “can’t become ‘functional’ simply because it is physically or aesthetically oriented to the 801 Tower”).

323. *See supra* note 319 and accompanying text. A two-dimensional work could perhaps consist of similar material, but that fact alone would be insufficient without other indicia.

324. *See supra* Part V.A (describing the narrow applicability of the test to PGS works).

325. *See supra* notes 303–305 and accompanying text.

326. *Id.*

327. *See supra* note 161 and accompanying text.

328. *See generally Leicester*, 232 F.3d 1212 (emphasizing the concurrent conceptualization of *Leicester*’s sculpture with Hayes’ architectural work).

329. *See id.* at 1219 (declining to apply a conceptual separability test).

330. *See id.* (rejecting *Leicester*’s contention that conceptual separability is available to a unitary architectural work).

this function, but tailors the inquiry to a specific subclass of PGS works.³³¹

Moreover, creating a subclass within the greater PGS category is compatible with copyright law.³³² Within the eight enumerated categories of copyrightable subject matter, there are distinct tests, even within a specific category.³³³ For example, courts have protected different types of written materials with different tests.³³⁴ This test separating PGS works is no different.

In addition, this test harmonizes with principles of copyright law discussed previously.³³⁵ First, it aids courts in drawing the proper distinction within the PGS category that follows *Leicester*, while preserving proper copyright protection for non-functional PGS works.³³⁶ Drawing this division helps courts avoid aesthetic judgments on the blurred lines between artistic mediums.³³⁷ These judgments affect the uniformity of copyright and result in ad hoc determinations of what should be a federally standardized scheme.³³⁸ In addition, copyright is a form of economic subsidy.³³⁹ The misapplication of *Leicester* carries with it the risk of diminishing public art.³⁴⁰ That is, artists who know they will receive curtailed copyright protection solely due to their chosen canvas may take their work elsewhere. Copyright law is meant to foster a rich public

331. See *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (correctly identifying a PGS candidate distinct from *Leicester's* sculpture).

332. See *supra* Part IV.C (discussing whether *Falkner's* exception comports with copyright law).

333. See generally *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (considering copyright for plays); *Comput. Assocs. Int'l v. Altai*, 982 F.2d 693 (2d Cir. 1992) (discussing copyright for computer programming under written material).

334. See *supra* note 333 and accompanying text.

335. See *supra* Part II.A. (discussing aesthetic objectivity, moral rights, and economic subsidization).

336. See *supra* notes 327–331 and accompanying text.

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

338. See 17 U.S.C. § 102(a)(5) (including pictorial, graphic, and sculptural works as enumerated, copyrightable subject matter).

339. See *supra* note 78 and accompanying text.

340. See *Orlandi*, *supra* note 142 at 641–42 (“Our system of intellectual property has long been based on sound economic theory . . .”).

domain: too broad an application of *Leicester* will have a literal impact on the public forum and the paintings within it.³⁴¹

VI. Conclusion

Street art is a commodified form of authorship, with a significant portion of its value realized through visual reproduction. Because of street art's particularized canvas, i.e., the frequent association between street art and architecture, an otherwise protected work of authorship will be (and in two notable cases has already been) exploited because of the pictorial representation exemption. Recent litigation in two geographically distinct courts suggests that *Leicester*, litigated more than twenty years ago, may be too broadly applied to works whose copyright protection should not be curtailed by architecture's incongruous copyright eligibility. While *Falkner* steered the inquiry in the right direction, *Lewis* demonstrates a need for clarity. Courts should consider elucidating the contours of *Leicester* to avoid encouraging the appropriation of another's creative efforts.

341. See *supra* note 77 and accompanying text.