Renovating Architectural Copyright: The Case for Protection of Nonhabitable Structures

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I. INTRODUCTION

In 1909, Spokane, Washington, began construction on the Monroe Street Bridge. According to Mayor N.S. Pratt, the concrete bridge would “stand as a model for years to come.” Indeed, when the bridge was completed, its concrete arch was the longest in the country. There was one problem, however: the bridge design was almost a complete replica of the Rocky River Bridge in Cleveland, Ohio—except that Spokane’s central arch was one foot longer. Officials in Cuyahoga County, Ohio, sued Spokane for $15,000 for copying the bridge but lost the case. Despite passage of the Architectural Works Copyright Protection Act of 1990 (AWPCA), Cuyahoga County would fare no better if the facts recited above had happened a century later; the AWCPA and implementing regulations do not apply to nonhabitable architectural structures.

While bridges, dams, and other nonhabitable structures are not frequently copied, it is certainly not an unheard-of phenomenon. Some architects avoid the risk altogether, refraining from constructing innovative bridges for fear that copycats will go unchecked. While the modern architect of a bridge or dam has no legal remedy against such a copycat, the same is not true of the architect of a skyscraper or home, who enjoys protection under the AWCPA. Believing that the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) did not require protection for nonhabitable structures, and fearing that such protection would hinder state highway programs, Congress excluded nonhabitable structures from the ambit of copyright protection. Unfortunately, the result of such exclusion is that architects of nonhabitable structures in the United States lack incentive to create original

1. Amy Cannata, Bridging Generations: Nearly a Century Old, the Monroe Street Bridge Reopens This Weekend, Sturdy Enough to Carry Us for the Next 75 Years, SPOKESMAN REV. (Spokane, Wash.), Sept. 17, 2005, at O1.
2. Id.
3. Id.
4. Id.
5. Id.
10. 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 305 (1994).
nonhabitable structures, and the public is denied the enjoyment of new creations.\textsuperscript{12} Additionally, failure to include nonhabitable architectural works in the AWCPA means the United States potentially does not comply with its obligations under the Berne Convention,\textsuperscript{13} which may result in costly litigation and multi-million dollar penalties imposed upon the United States by the World Trade Organization (WTO).\textsuperscript{14}

This comment advocates congressional action adding protection for nonhabitable structures, extending copyright protection to all three-dimensional works of architecture in order to further the constitutional goal of progress, and ensuring compliance with the United States’ treaty obligations. Part II of this comment reviews existing copyright law regarding architectural works and the prohibition against copyrighting certain nonhabitable structures. Based on a review of scholarly opinions and foreign law, this comment concludes that U.S. law does not comply with the requirements of the Berne Convention regarding copyright protection for architectural work. Part III attempts to resolve the outstanding concerns regarding nonhabitable architecture that led Congress to deny protection to such works. Finally, Part IV analyzes the benefits of, and criticisms levied against, protecting nonhabitable structures, ultimately concluding that Congress should extend copyright protection to all original three-dimensional works of architecture.

II. BERNE COMPLIANCE AND THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT OF 1990

A. Current Architectural Copyright Protection in the United States

Prior to 1990, U.S. copyright law did not protect architectural works.\textsuperscript{15} Though the plans for a building or other structure were protected as graphical works, and thus could not be copied, courts held that the resulting architectural structure was not copyrightable.\textsuperscript{16}

\textsuperscript{12} See infra Part IV.A for a discussion of the purposes of copyright protection as applied to nonhabitable architectural works.

\textsuperscript{13} See infra Part II.B for a full discussion of the Berne Convention’s requirement for copyright protection of architectural works.

\textsuperscript{14} See infra Part IV.B for a discussion of the WTO’s litigation and sanction authority under The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which largely incorporates the requirements of the Berne Convention.

\textsuperscript{15} 17 U.S.C. § 102(a) (1982) (amended 1990). Architectural works were denied protection because, under the Copyright Act, pictorial, graphical, and sculptural works (the category most analogous to architectural works under the 1976 Act) are only protected to the extent they are separable from their utilitarian aspects. Id. § 101. Because architecture is inherently utilitarian, it was denied protection under the 1976 Act. Demetriades v. Kaufman, 680 F. Supp. 658, 667–68 (S.D.N.Y. 1988).

\textsuperscript{16} See, e.g., Demetriades, 680 F. Supp. at 664 (“[A]lthough an owner of copyrighted architectural plans is granted the right to prevent the unauthorized copying of those plans, that individual . . . does not obtain a protectable interest in the useful article depicted by those plans.”).
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The absence of protection for architectural structures appeared to be in direct conflict with the Berne Convention, to which the United States acceded on October 31, 1988 with passage of the Berne Convention Implementation Act of 1988 (Berne Implementation Act). Although Article 2(1) of the Berne Convention requires protection for works of architecture, the Berne Implementation Act contained no express provision extending copyright protection to architectural work.

Not long after enactment of the Berne Implementation Act, Congress returned to the issue of copyright protection for architectural works. On April 27, 1988, Representative Kastenmeier commissioned a Copyright Office report on the need for extending copyright protection to architectural works, and in 1990 he introduced a bill that would have protected “the design of a building or other three-dimensional structure.” Ultimately, however, Congress rejected this broad language.

When Congress passed the AWCPA in 1990, it extended copyright protection only to architectural works, defined as “the design of a building as embodied in any tangible medium of expression.” Copyright Office regulations further define buildings as “humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos, and garden pavilions.” The Copyright Office also limits the scope of architectural subject matter protected by copyright by expressly excluding works not in the form of buildings, such as bridges and dams. While bridges and other three-dimensional works might

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19. Though the Berne Implementation Act amended § 101 of the Copyright Act to define “pictorial, graphical, and sculptural works” to include architectural plans, no reference was made to the actual work of architecture. Berne Implementation Act, 102 Stat. at 2854.
22. 1 PATRY, supra note 10, at 305.
26. Id. § 202.11(d)(1) (“Structures other than buildings, such as bridges, cloverleafs, dams, walkways, tents, recreational vehicles, mobile homes, and boats [cannot be registered].”). However, there appears to be one exception to this exclusion of structures other than buildings. Monumental works, previously considered a subset of sculptural works protected under 17 U.S.C. § 102(a)(5), were intended by Congress to fall under the
otherwise qualify for copyright protection, Congress chose to exclude such works from the AWCPA, believing such protection was not “mandated by the Berne Convention.”

B. The Foundation of Architectural Copyright: Obligations Under the Berne Convention and the TRIPS Agreement

Article 2(1) of the Berne Convention requires member countries to extend copyright protection to, among other things, “works of . . . architecture . . . and three-dimensional works relative to . . . architecture.” Unfortunately, the Berne Convention does not explicitly define what works constitute a “work of architecture” entitled to protection, except that such works may be “incorporated in a building or other structure.” The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) explicitly incorporates the Berne Convention’s mandate for architectural copyright protection without further defining what constitutes a work of architecture. The TRIPS Agreement is particularly relevant because it provides member countries with a forum for resolving intellectual property disputes: the Dispute Settlement Body (DSB) of the World Trade Organization. Thus, should a conflict arise over whether or not the United States is in compliance with its obligations under the Berne Convention, it will be necessary for the WTO to determine what constitutes a “work of architecture” under the Convention.

Because neither the Berne Convention nor TRIPS define “work of architecture,” this section will attempt to give meaning to that phrase, looking to protection afforded architectural works by the AWCPA. H.R. REP. NO. 101–735, at 20 n.43 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6951; 1 PATRY, supra note 10, at 307–08 n.861.

Section 102(a) of the Copyright Act states that a copyright may subsist in “original works of authorship fixed in any tangible medium of expression . . . .” 17 U.S.C. § 102(a). Section 102(b) states that copyright does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . .” Id. § 102(b). Thus, the basic elements for a copyright are (1) copyrightable subject matter, (2) originality, (3) a work of authorship, and (4) fixation in a tangible medium of expression. A great deal of Supreme Court jurisprudence has defined the specific requirements of these elements, but is largely outside the scope of this Comment.

1. PATRY, supra note 10, at 305.
2. Berne Convention, supra note 18, at art. 2(1).
3. Id. at art. 4(b). Such architectural works as incorporated in a building or other structure are entitled to copyright protection despite the fact that construction of an architectural work does not qualify as publication of the work under art. 3(3). Id.
5. Id. at art. 64(1); Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 art. 2(1), 1869 U.N.T.S. 401 [hereafter DSU]. For details on the procedures and powers of the Dispute Resolution Body, see infra Part IV.B.
6. See DSU, supra note 32, at art. 3(2) (stating that the DSB shall “clarify the existing provisions of . . . agreements in accordance with customary rules of interpretation of public international law”).
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the plain meaning of the Convention’s terms and to the implementing legislation of Berne and TRIPS member countries for guidance.

1. The Ordinary Meaning of “Works of Architecture”

Though the Berne Convention does not define the term “works of architecture,” the plain meaning of that phrase would suggest broader subject matter than merely inhabitable buildings. Should a WTO member country allege the United States has not complied with its obligations under TRIPS and the Berne Convention, this plain meaning of “works of architecture” may be dispositive. Under Article 64 of TRIPS, member countries shall resolve disputes in accordance with the Dispute Settlement Understanding, which requires the DSB to “clarify the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law.”

These customary rules of interpretation derive largely from the Vienna Convention on the Law of Treaties, which states in relevant part that “[a] treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In WTO dispute resolution practice, however, ordinary meaning and context are typically afforded much greater weight than the object and purpose of treaty terms. Thus, because dispute resolution panels and the Appellate Body of the WTO Dispute Settlement Body typically interpret treaty terms in accordance with their ordinary meaning, the plain meaning of “works of architecture”—encompassing a variety of structures fixed to the ground—may prove dispositive in the event that a TRIPS member country challenges U.S. noncompliance with the Berne Convention’s architectural copyright obligations. Given that the definition of architectural works in the United States is much more

35. Id. (“In its ordinary meaning, [work or architecture] is not confined to buildings, but extends to other kinds of structure which are fixed to the ground, for example, monuments, arches, fountains, steps, and so on.”).
36. See Introduction to the WTO Dispute Settlement System, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm (last visited Nov. 14, 2011) (on file with the McGeorge Law Review) (emphasizing the importance of giving effect to a term’s ordinary meaning within the dispute resolution process).
37. DSU, supra note 32 at art. 3(2).
40. Introduction to the WTO Dispute Settlement System, supra note 36.
41. 1 RICKETSON & GINSBURG, supra note 34, at § 8.47.
limiting than this plain meaning, applying only to inhabitable buildings, it would appear under the ordinary meaning approach that the protection afforded under U.S. law does not comply with the obligations imposed by the Berne Convention.

2. The History of the Architectural Works Copyright Protection Act

Despite Congress’s conclusory statement in the House Report accompanying the AWCPA that “[p]rotection for bridges and related nonhabitable three-dimensional structures is not required by the Berne Convention,” this conclusion is not so obvious upon inspection of the legislative history. Testifying before a House subcommittee considering the bill, Ralph Oman, Register of Copyrights, stated that “the Berne Convention requires protection for works of architecture, in other words, the built design of a three-dimensional structure serving a utilitarian purpose.” Jeffrey Samuels, Assistant Commissioner for Trademarks of the Patent and Trademark Office, suggested a similarly broad obligation imposed by the Berne Convention.

This broad definition accorded the Berne Convention’s mandate to protect works of architecture suggests an obligation to protect more than merely inhabitable buildings.

Throughout the hearing, Chairman Kastenmeier returned to a question posed by Mr. Oman: whether the AWCPA would protect only buildings, or other structures, such as bridges. Responding to this question, the American Institute of Architects (AIA) suggested that “protection should not be limited to designs of structures having four walls and a roof, since there can be significant creative content in other works of architecture.” Throughout the hearing, no witness suggested that the AWCPA should be restricted to include only inhabitable buildings.

When Congress passed the final version of the AWCPA, limiting protection to inhabitable buildings, at least one intellectual property scholar argued that the Act did not fully implement the Berne Convention. Writing in response to the proposed Copyright Office regulations implementing the AWCPA, University of Baltimore School of Law Professor William Fryer stated that “[t]hese limitations

43. House Hearing on Architectural Design Protection, supra note 8, at 43 (emphasis added). This definition was repeated in Mr. Oman’s written statement, suggesting that the broad definition was deliberate. Id. at 52.
44. Id. at 80 ("[T]he Berne Convention requires protection for the completed designs of three dimensional structures.").
45. Id. at 43.
46. Id. at 123.
47. See generally id. (hearings on proposed H.R. 3990, which would have extended copyright protection not only to buildings but also to “other three-dimensional structure[s]”).
remove from protection a wide range of structures that are architectural works,” and that such limitations fall short of full Berne compliance.49 Based on the legislative history of the AWCPA and the response of scholars, it would appear that even at the time of that Act’s passage, experts in the United States understood the scope of the Berne Convention to require copyright protection beyond just inhabitable buildings.

3. “Works of Architecture” as Defined by Other Berne Member Countries

Given the lack of an authoritative meaning of a “work of architecture” under the Berne Convention, it may be useful to examine the implementing legislation of other Berne member countries to shed light on U.S. obligations under the Convention.50 Because an exhaustive examination of all Berne member countries would be lengthy and impractical, this section will examine the laws of a small number of common law and civil law jurisdictions for guidance in interpreting the Berne Convention.

a. Common Law Countries

In examining common law jurisdictions, the United Kingdom is particularly instructive. The United Kingdom’s approach to implementing the Berne Convention is particularly relevant for two reasons. First, the United Kingdom was among the most vocal critics of protecting architectural works under the Berne Convention when the French and Belgian delegations initially proposed their inclusion in 1896.51 Second, English copyright law has a great deal of influence throughout many common law jurisdictions, including the United States.

United Kingdom copyright law protects architectural works as a sub-category of artistic works.52 Though the statutory definition of a “work of architecture” is limited to “a building or a model for a building,”53 buildings are defined broadly as including “any fixed structure” and any part of a fixed structure.54 Parliament intentionally defined “building” broadly in an effort to afford copyright protection.

49. Id.
50. See COPYRIGHT IN WORKS OF ARCHITECTURE, supra note 20, at 157 (stating that the laws of other Berne member-countries may “shed light on the nature and scope of protection contemplated by the convention for works of architecture”). But see JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 75 (2001) (stating that though interpretation of TRIPS, which incorporates Articles 1–21 of the Berne Convention, “can come from national implementation by other WTO members,” only the WTO’s dispute settlement system can produce an authoritative interpretation).
52. Id.
53. Id.
54. Id. § 4(2).
protection not just to architectural works, but also those created by engineers.\textsuperscript{55} Most other common law countries take a similarly broad approach to copyright protection for architectural works.\textsuperscript{56}

\textit{b. Civil Law Jurisdictions}

France provides a useful starting point for examining civil law approaches to architectural copyright because the French and Belgian delegations to the Berne Convention were the first to call for the protection of architectural works.\textsuperscript{57} Thus, though the French approach to architectural copyright would seem particularly intriguing, perhaps it should come as no surprise that the French copyright statute does not define “works of architecture” any more explicitly than does the Berne Convention. Article L112-2 of France’s Intellectual Property Code protects “works of . . . architecture,”\textsuperscript{58} but French law does not further define what constitutes such a work.\textsuperscript{59}

Unfortunately, France is not unique in this regard; the statutes of most civil law jurisdictions do not explicitly define what constitutes a “work of architecture.”\textsuperscript{60} However, there is anecdotal evidence from courts in some of these jurisdictions—which lack the precedential authority of common law courts—suggesting they take an expansive view of what constitutes a “work of architecture.”

In Greece, for example, the courts appear to take a broad view of what constitutes an architectural work. In \textit{Architecture Studio & Architects Associes Pour L’Environnement v. Organisation of Labour Housing}, for instance, a Greek court explicitly referenced bridges as among the architectural works protected in their “external aspect[s]” under both Greek law and the Berne Convention.\textsuperscript{61} In \textit{Constantinos Papanagiotou v. The Greek State}, an architect sued Greece for copyright infringement of “a cable suspension bridge with superstructure made of

\begin{itemize}
\item \textsuperscript{55} \textsuperscript{1} \textit{Copinger and Skone James on Copyright} § 3-61 (Kevin Garnett, Gillian Davies, & Gwilym Harbottle eds., 15th ed., 2005).
\item \textsuperscript{56} Most other common law countries define architectural works in a similarly broad manner. \textit{See Copyright Act of 1968} § 10(1) (Austl.) (protecting buildings, defined as “a structure of any kind” as a subset of artistic works); \textit{Copyright Act, R.S.C., ch. C–42} § 2 (Can.) (protecting an “architectural work,” defined as “any building or structure”); \textit{Indian Copyright Act, 1957}, No. 14, Acts of Parliament, 1957 § 2(b) (protecting a “work of architecture,” defined as “any building or structure having an artistic character or design”); \textit{Copyright and Related Rights Act, 2000} (Act No. 28/2000) (Ir.) (protecting buildings, defined as “any structure,” as works of architecture).
\item \textsuperscript{57} \textit{Copyright in Works of Architecture, supra} note 20, at 142–43.
\item \textsuperscript{59} \textit{Copyright in Works of Architecture, supra} note 20, at 172.
\item \textsuperscript{60} \textit{See generally id.} at 164–93 (detailing the copyright statutes of each Berne member country).
\item \textsuperscript{61} Polimeles Protodikio Athinon [E.C.D.R.] [Athens Court of First Instance] 276/2001, p. 385, 388 (Greece).
\end{itemize}
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pre-stressed concrete." Although the court did not address the issue of whether bridges may be copyrighted, it appears that the court proceeded under this assumption; though the court denied Papanagiotou’s claim on the ground that the work was not original, the case would have been disposed of much more easily if bridges were not eligible for copyright protection.

A Spanish court shed some light on the scope of protection provided architectural works in that country when famed bridge architect Santiago Calatrava sued the city of Bilbao for violating his moral rights by allowing an extension to be built upon his Campo Volantín footbridge. Though Calatrava lost the lawsuit on public-interest grounds (the footbridge was necessary for fluid pedestrian movement over the river), Judge Edmundo Rodríguez Achútegui of the Mercantile Court of Bilbao explicitly stated in his opinion that intellectual property law protected Calatrava’s footbridge. According to Judge Achútegui, Calatrava would have succeeded on his claims had only private interests been at stake. Thus, in a high-profile case involving one of the most famous contemporary bridge designers, at least one Spanish court has interpreted Spain’s intellectual property laws to encompass bridge designs.

At first glance, the copyright statutes of other Berne member countries seem to shed little light on what is meant by the term “works of architecture” in the Convention. While most common law countries explicitly extend protection to all structures, some protect buildings without defining that term, and most civil law statutes merely repeat the wording of the Berne Convention itself, protecting “works of architecture.” However, it is interesting to note that of all the Berne member countries, the United States is the sole country that explicitly excludes certain works of architecture from copyright protection. Given the inclusive nature of many architectural copyright laws, and the fact that no other Berne nation has felt it necessary to exclude certain works of architecture from copyright protection, it seems likely that most Berne countries afford copyright protection to all architectural structures. Thus, to comply fully with the Berne Convention, the United States must amend its copyright law to protect all three-dimensional works of architecture.

63. Id. at 345.
66. See generally COPYRIGHT IN WORKS OF ARCHITECTURE, supra note 20, at 164–93 (detailing the copyright statutes of each Berne member country).
67. See generally id. (detailing the copyright statutes of each Berne member country).
68. 37 C.F.R. § 202.11(b)(2).
III. RESOLVING CONGRESSIONAL CONCERNS REGARDING NONHABITABLE STRUCTURES

If copyright protection is to be granted to nonhabitable works of architecture, it should be done only upon resolution of those concerns that originally influenced Congress not to grant protection to such structures. First, Congress’s decision to deny protection to nonhabitable structures was in part based on a practical concern relating to construction costs of national highways. Secondly, denial of copyright protection for non-habitable architecture stems from the notion that engineering concerns wholly dictated the overall form of such works. Under this theory, copyright protection was thus unavailable for such works, as they lacked creative expression. These bases for denying copyright protection to nonhabitable architecture will be considered in turn.

A. Application of Existing Copyright Doctrines to Nonhabitable Architecture

As originally introduced, the AWCPA would have protected “the design of a building or other three-dimensional structure.” Though witnesses at a House committee meeting on the bill largely approved of this broad language, the final version of the AWCPA ultimately excised the language, “or other three-dimensional structure,” protecting only habitable structures. The amendment stemmed largely from concerns from state highway commissions that protecting highway bridges, cloverleafs, and pedestrian walkways would result in higher construction costs, presumably because such commissions would have to design around copyrighted structures or pay royalties to copy their construction. The House Subcommittee on Courts, Intellectual Property, and the Administration of Justice agreed with the state highway commissions’ concerns, concluding that many architectural structures “form important elements of [the] nation’s transportation system.” With these considerations in mind, the Subcommittee ultimately determined that copyright protection in such nonhabitable structures...
was unnecessary to stimulate creativity and prevent copying of such architecture.\textsuperscript{76}

Congress need not have concluded, however, that broad architectural copyright protection would imperil state economies and the nation’s transportation system. Were Congress to extend copyright protection to all three-dimensional works of architecture, existing legal doctrines would largely allay the concerns expressed by state highway commissions.\textsuperscript{77}

First, the creativity requirement may bar copyright in many nonhabitable architectural structures. Copyright only “subsists . . . in original works of authorship.”\textsuperscript{78} A work is original “if it was independently created by the author . . . [and] possesses a minimal degree of creativity, no matter how crude [or] humble.”\textsuperscript{79} While the bar for originality is extremely low, “[t]here remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.”\textsuperscript{80} In \textit{Feist Publications, Inc. v. Rural Telephone Service Co.}, the Supreme Court called the alphabetical listing of names in a phone book “an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.”\textsuperscript{81} Because the alphabetical listing lacked a creative spark, it failed the originality requirement, and was not suitable for copyright.\textsuperscript{82}

This same reasoning can be applied to the cloverleafs, highway bridges, and other nonhabitable structures that concerned Congress and highway commissions in 1990. Many features of highway bridges, for instance, are largely standardized,\textsuperscript{83} such that these structures may be too commonplace to be deemed creative and original. To the extent that highway bridges or cloverleafs were to display truly innovative design features, such original features should be protected by copyright. Indeed, copyright may form an incentive to enrich the

\textsuperscript{76} Id.

\textsuperscript{77} One commentator has suggested that government ownership of most cloverleafs, dams, and highway bridges is non-problematic because under 17 U.S.C. § 105, copyright cannot subsist in a work of the federal government. Vanessa N. Scaglione, Note, \textit{Building upon the Architectural Works Protection Copyright Act of 1990}, \textit{61 Fordham L. Rev.} 193, 199 (1992). This assumption, however, proves incorrect. For instance, only one percent of all highway bridges, for instance, are owned by the U.S. government. CONGRESSIONAL RESEARCH SERVICE, \textit{HIGHWAY BRIDGES: CONDITIONS AND THE FEDERAL/STATE ROLE} 1 (2007), available at http://www.fas.org/sgp/crs/homesec/RL34127.pdf (hereinafter \textit{HIGHWAY BRIDGES}) (on file with the McGeorge Law Review). The remaining ninety-nine percent of highway bridges are owned by state and local governments, which can indeed hold copyrights. Id.; 1 PATRY, \textit{ supra} note 10, at 357–58.

\textsuperscript{78} 17 U.S.C. § 102(a) (2006).


\textsuperscript{80} Id. at 359.

\textsuperscript{81} Id. at 363.

\textsuperscript{82} Id.

environment by deviating from standard design. This would not increase construction costs elsewhere, as the unoriginal elements of an otherwise copyrighted work remain in the public domain, and engineers could always fall back on existing standards for such interstate bridge designs.

Second, alleged infringers of nonhabitable architectural works may invoke the independent creation prong of the originality requirement as a defense to infringement. For example, in Muller v. Triborough Bridge Authority, the court found that although defendant’s bridge approach was substantially similar to plaintiff’s copyrighted plans for a bridge approach, the “bridge approach was independently conceived . . . by the engineers . . . based on prior experience” and thus not infringing. Given the prevalence and similarity of such basic structures as highway bridges, dams, and pedestrian walkways, it will be difficult in most circumstances for a copyright holder to prove that a given highway bridge, dam, or walkway was copied rather than independently conceived.

Third, an alleged infringer of basic interstate highway bridges, cloverleafs, dams, and other nonhabitable structures contemplated by Congress and state highway commissions would likely be protected by the merger doctrine. The merger doctrine is a judicial creation resulting from “the idea–expression dichotomy”: copyright does not protect mere ideas, but does protect the expression of those ideas. Under the merger doctrine, when an idea and its expression are inseparable, an expression of that idea will be denied copyright protection because such protection would confer a monopoly on the idea itself. The merger doctrine has also been held to apply when there are a limited number of ways to express a particular idea. Given the safety concerns and other design factors that must be accounted for in designing highway bridges and other nonhabitable structures, as well as the vast number of such “expressions” nationwide, it would appear that unique expressions of such structures are

84. See H.R. REP. No. 101-735, at 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6944 (“Protection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal.”).
85. A valid copyright subsists only in the original elements of a work; some elements of an otherwise copyrighted work may remain in the public domain. 1 PATRY, supra note 10, at 313 (“Section 102(b) . . . cautions that protection for [a copyrighted] work does not extend to any unprotectible components contained therein. . . . [Copyright] covers only those components of the work that meet the standard of originality.”).
86. See Scaglione, supra note 77, at 199–200.
88. Scaglione, supra note 77, at 200 (quoting Erika White, Standing on Shaky Ground: Copyright Protection for Works of Architecture, 6 ART & L. 70, 71 (1981)).
89. See 1 PATRY, supra note 10, at 320–25 (discussing merger as a subset of the idea–expression dichotomy intended to limit the scope of copyright protection).
90. 17 U.S.C. § 102(b) (2006) (“In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . .”).
91. Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).
93. There are over 600,000 public road bridges nationwide. HIGHWAY BRIDGES, supra note 77, at 1.
necessarily limited. Thus, in those instances where the form of nonhabitable architecture is dictated wholly by function, the merger doctrine may preclude copyright protection for such structures.\footnote{Though some jurisdictions view merger as a bar to copyrightability, \textit{Morrissey}, 379 F.2d at 678–79, others view it as a defense to infringement. Kregos \textit{v.} Associated Press, 937 F.2d 700, 705 (2nd Cir. 1991). Finally, other courts view copyright as valid but particularly “thin” where merger is demonstrated, such that only a virtually identical copy is infringing. Johnson Controls, Inc. \textit{v.} Phoenix Control Sys., Inc., 886 F.2d 1173, 1175 (9th Cir. 1989). In jurisdictions adhering to the latter view, copyright protection in nonhabitable structures would still likely pose no significant threat to highway construction crews, as very minor alterations in design would avoid infringement liability.}

Finally, the \textit{scènes à faire} doctrine\footnote{\textit{Scènes à faire} refers to “incidents, characters or settings which are as a practical matter indispensable, or at least standard” in a particular genre or topic. Alexander \textit{v.} Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978). See, e.g., Atari, Inc. \textit{v.} North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 617 (7th Cir. 1982) (finding the mazes, dots, scoring tables, and other standard features of Pac-Man to be \textit{scènes à faire} and thus only worthy of protection against only virtually identical copying); Reyher \textit{v.} Children’s Television Workshop, 533 F.2d 87, 92 (2d Cir. 1976) (deeming as \textit{scènes à faire} a lost child’s belief that her recently-found mother’s face is the most beautiful face in the world).} may provide adequate protection to allay the concerns of Congress and highway commissions if copyright is extended to nonhabitable structures. The \textit{scènes à faire} doctrine limits the scope of copyright where certain expressions, incidents, or settings are indispensable to or standard in a given genre.\footnote{\textit{Id} at 18–19.} Thus, for instance, a highway bridge may be denied protection where its shape, component parts, or other design elements are standard and expected in the field of highway bridge design.

Armed with existing copyright doctrines, courts are well equipped to ensure that copyright in standard cloverleafs, highway bridges, dams, and walkways do not hamstring state economies and the construction of vital interstate highways. While copyright certainly should not—and indeed cannot—subsist in purely functional, standard designs, architects of truly creative nonhabitable structures that enrich their environment should be afforded the protection of copyright law.\footnote{\textit{Id}.}

\subsection*{B. Form Versus Function in Nonhabitable Architecture}

Congress passed the AWCPA with the intent of protecting only what architect Michael Graves deemed “poetic” architectural language—the aspects of architecture which are “responsive to issues external to the building,” and which express societal myths and rituals.\footnote{See H.R. REP. NO. 101–735, at 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6944 (“Protection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal.”).} Congress expressly intended to exclude from protection design features “determined by pragmatic, constructional, and technical requirements,” or what Graves called “internal” language.\footnote{\textit{Id} at 18–19.} Some
commentators have suggested that Congress rightly excluded nonhabitable structures from copyright protection because their form necessarily follows function. As one commentator put it:

The works identified by Congress as unprotectible—bridges, dams, canals, walkways, and similar works—are works whose overall forms are generally dictated by engineering considerations. In this respect, the form of these structures do not embody the creative expression of an author. These designs merely express the laws of physics and structural engineering. . . .

While some nonhabitable structures may have forms entirely dictated by functional concerns (indeed, this may be true of the most basic cloverleafs or highway bridges contemplated by Congress), this is by no means true of all nonhabitable structures. In fact, Congress seems to have believed that absent language excluding such structures, the innovative bridge designs of Santiago Calatrava, for instance, would be eligible for copyright. Bridges and other nonhabitable structures routinely exhibit the poetic architectural language described by Graves, responding to external issues and reflecting social contexts. The two Blue Water Bridges spanning the St. Clair River between Port Huron, Michigan and Point Edward, Ontario provide an example of nonhabitable architecture responding to far more than functional concerns:

With the original bridge—a cantilever truss—constructed in 1938, a second bridge was needed to accommodate traffic, and in the mid-1990s the public was polled on five proposed designs. Among these was a perfect duplicate of the existing bridge . . . rejected on the basis that it would create a false sense of history. Another design . . . was rejected on the basis that it would overshadow the existing bridge. The bridge eventually chosen—a continuous-tied arch design—complements the original, but maintains a unique look of its own. . . . [A]ll manner of

100. Winick, supra note 70, at 1614.
101. Id.
103. 1 PATRY, supra note 10, at 305 n.845. Calatrava is a Spanish-born architect famous for innovative “engineering architecture,” such as the Puente del Alamillo (Alamillo Bridge) in Spain, the Jerusalem Chords Bridge, and the Samuel Beckett Bridge in Dublin, Ireland, among others. See SPIRO N. POLLALIS, WHAT IS A BRIDGE? THE MAKING OF CALATRAVA’S BRIDGE IN SEVILLE 6 (2002).
104. See Hick, supra note 102, at 49 (“Design choices, at least in bridges, are not dictated by function, physics, and context. . . .”)

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factors weighed on the decision, including political, economic, environmental, and aesthetic.  

Where the form of an architectural structure is wholly determined by its function, it should not be protected by copyright. However, where an architect has responded to social and environmental forces to produce an original work of authorship, copyright laws should encourage such progress by prohibiting copies of such structures.

C. Taking Action to Protect Nonhabitable Structures

When Congress omitted nonhabitable structures from copyright protection, it did not foreclose the possibility that it might reconsider extending protection to bridges and other nonhabitable structures at a later date. In the meantime, some commentators have suggested that the court system is the appropriate body for extending copyright protection to nonhabitable structures, citing the lack of a definition of “building” in the AWCPA itself. However, given the express language of the AWCPA’s implementing regulations and the extensive body of legislative history explicitly denying copyright protection for such nonhabitable structures, courts are ill-suited to provide such a remedy. Rather, Congress must rectify the problem and include nonhabitable structures within the ambit of copyright law by passing a law substantially similar to that originally considered in 1990, extending protection to “the design of a building or other three-dimensional structure, as embodied in that building or structure.”

IV. RATIONALES FOR BROADER PROTECTION

A. Broadening the Scope of Architectural Copyright Further Promotes Progress

The Constitutional purpose of copyright protection is “[t]o promote the Progress of Science and useful Arts.” Copyright achieves this purpose in two ways. First, it incentivizes creation by extending to authors the exclusive rights to reproduce, distribute, perform, display, and prepare derivative works based on their creations, permitting them to recoup their investment and reap financial benefits.
and other benefits from their creations.112 Secondly, by removing the fear of unchecked copying—a disincentive to dissemination of works of authorship—copyright serves to inform and enrich the public.113

When Congress enacted the AWCPA in 1990, it may have actually narrowed the scope of architectural copyright protection envisioned by the Copyright Act, thus disincentivizing creation and dissemination of certain original works of authorship, such as bridges, dams, or walkways.114 According to some in the Copyright Office at the time, most notably copyright scholar William Patry, architecture was fully protected under the 1976 Copyright Act as a subspecies of pictorial, graphical, and sculptural works.115 Thus, under the physical and conceptual separability analyses as applied to pictorial, graphical, and sculptural works, elements of an architectural work’s form not strictly dictated by its function would have been capable of copyright protection.116 If Patry’s assumption is correct, then the AWCPA’s limitation of architectural protection to inhabitable buildings may have actually removed from copyright protection works of architecture that would have been protectable under a pre-AWCPA separability analysis.

This disincentive to create and disseminate is not merely theoretical. In 1988, as Congress considered adoption of legislation that would have protected “the design of a building or other three-dimensional structure,”117 a representative of the Frank Lloyd Wright Foundation, Richard Carney, spoke on the necessity of extending architectural protection to architectural works such as bridges.118 One bridge, a butterfly bridge intended to span the width of the Wisconsin River, had never been built in part because of the ease with which “[s]omeone visually looking at it could go home and practically make a copy.”119 Another, intended for the San Francisco Bay, was not built for 40 years because it took that long for “technology [to catch] up with the architectural genius of Frank Lloyd Wright.”120 Mr. Carney believed copyright protection was a valuable incentive for architects

112. See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).
113. See, e.g., Twentieth Century Music Corp. v Aiken, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts . . . . the ultimate aim is . . . to stimulate artistic creativity for the general public good.”).
114. See 1 PATRY, supra note 10, at 303 n.829 (“The author is strongly of the opinion that the 1976 Act, as passed, protects architectural works.”); 37 C.F.R. § 202.11(d)(1) (2010) (detailing specific architectural works not afforded copyright protection under the AWCPA).
115. 1 PATRY, supra note 10, at 303 n.829; COPYRIGHT IN WORKS OF ARCHITECTURE, supra note 20, at 208–13.
118. House Hearing on Architectural Design Protection, supra note 8, at 129.
119. Id.
120. Id.
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of bridges because of the prominence of such structures in the public eye and the ease with which bridges that represented true works of art could be copied. Absent such copyright protection for bridges and other structures, architects have little incentive to create innovative designs and enrich the body of architectural work. However, as the language “or other three-dimensional structure” was dropped from the AWCPA prior to its adoption, Wright’s bridge designs remain unprotected, removing incentive for their erection by the Foundation and disclosure to the public.

However, were copyright protection to be extended to all original works of architecture fixed in a tangible medium of expression, architects would be provided an incentive to create original bridges, dams, landscape architecture, and other structures from which the author and the public might both reap benefits.

B. Avoiding WTO Litigation and Sanction

Should a TRIPS member country believe U.S. architectural copyright protection to be insufficient under the Berne Convention, the WTO’s Dispute Settlement Body (DSB) would resolve such a dispute. One benefit of extending architectural copyright to all original works of architecture, rather than just the present scope of inhabitable buildings, is that the United States would eliminate the risk of being brought before the DSB by an aggrieved nation. To fully understand the benefits of avoiding dispute resolution under the authority of the WTO, however, it is first necessary to understand the procedures employed by the DRB.

The first step in the WTO’s dispute resolution process is for the complaining party and the responding party to undergo good faith consultation with an eye toward a mutually agreeable solution. If such a solution is not achieved within sixty days, the complaining party may request the creation of a panel by the DSB. A panel will usually be composed of three well-qualified representatives of WTO member countries not parties to the dispute to be resolved, with the panelists serving in their individual capacities rather than as government representatives. The function of the panel is to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case.

121. Id.
122. See id. (describing the ease with which some of Wright’s bridges could be copied, and concluding “[t]his is the type of thing that needs to be protected by copyright.”).
123. 1 PATRY, supra note 10, at 305.
124. See discussion supra Part II.B (describing the powers of the WTO Dispute Settlement Body).
125. DSU, supra note 32, at art. 4(3).
126. Id. at 2 art. 4(7).
127. Id. at 2 art. 8(1), (3) and (5).
128. Id. at 2 art. 8(9).
and the applicability of and conformity with the relevant covered agreements.” 129

In practice, a panel report is usually conclusive in forming the DSB’s rulings and recommendations 130 because the report can only be rejected by a consensus vote.131

After the DSB adopts a panel’s report, either party may appeal the report to the Appellate Body of the DSB, limited to the issues of law and the legal interpretations formed by the panel.132 Again, the final report of the Appellate Body will be adopted by the DSB unless a consensus votes to reject the report.133

If the DSB deems a member country’s law in noncompliance with a WTO agreement, the member must bring the noncompliant measure into compliance with the ruling of the DSB within a reasonable period of time.134 Failing this, the member may undertake negotiations with the complaining member in order to achieve mutually acceptable compensation.135 Finally, and most severely, if the member country fails to comply with the DSB ruling and cannot negotiate an acceptable level of compensation with the complainant, the complainant may request, and the DSB may authorize, the suspension of concessions and other obligations under the covered agreements (here, TRIPS).136 Such suspension of concessions and other obligations must typically relate to the same sector in which the DSB has found a violation;137 thus, in the case of a dispute over architectural copyrights, foreign protection of American copyrights or intellectual property generally may be suspended in the event of noncompliance.138

Thus, one benefit of extending U.S. architectural copyright protection is that by protecting all architectural structures rather than just inhabitable buildings, the United States might wholly avoid the time and expense associated with litigation in front of the DSB. Regardless of whether or not the DSB determined the Copyright Act to be noncompliant with the Berne Convention’s mandate to fully protect “works of architecture,” the mere existence of a dispute over the matter could prove costly.139 A case of average complexity that goes to a DSB panel can

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129. Id. at 2 art. 11.
131. DSU, supra note 32, at art. 16(4).
132. Id. at art. 17(1), (6).
133. Id. at art. 17(14).
134. Id. at art. 22(2).
135. Id.
136. Id.
137. Id. at art. 22(3)(a).
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cost upwards of $420,000, and member countries can expect another $135,000 in legal fees should they decide to appeal a panel decision.\footnote{Id. While these represent average costs, WTO litigation cost varies widely based on a number of variables. \textit{Id.}} Bringing U.S. law into conformity with the broad protections afforded all architectural works in other TRIPS member countries, such as the United Kingdom, would remove the threat of such a dispute arising and foreclose the possibility of such costly litigation.

The ramifications for the United States would be much worse in the event that Congress failed to act upon a finding of noncompliance by not amending the Copyright Act to protect all architectural structures.\footnote{See DSU, \textit{supra} note 32, at art. 22 (describing the compensation negotiations member countries may engage in given noncompliance, as well as the punitive suspension of concessions the WTO may authorize in the event no compensation can be established).} The first step should the United States opt not to comply with a WTO mandate to broaden architectural subject-matter protection would be for the United States and any aggrieved member country to undergo negotiations to establish satisfactory compensation.\footnote{\textit{Id.}} This compensation can be quite costly. For example, in 2001, when the United States refused to comply with a decision regarding liability for public performances of musical works under § 110(5)(B) of the Copyright Act, the United States and European Union entered into an agreement whereby the United States would pay $3.3 million to the EU.\footnote{\textit{Julie E. Cohen et al., Copyright in a Global Information Economy} 459 (3d ed. 2010).}

If the United States should fail to agree to a satisfactory compensation level, a complaining member country could petition the WTO to suspend U.S. concessions and obligations under TRIPS.\footnote{DSU, \textit{supra} note 32, at art. 22(2).} Such suspension of concessions can also be quite costly: in 2004, the WTO permitted Antigua and Barbuda to violate American copyrights after the United States failed to comply with a WTO decision regarding a law barring online gambling,\footnote{Williams, \textit{supra} note 32, at art. 22(2).} and in 2009, Brazil was permitted to copy up to $409.7 million worth of American intellectual property when the United States again refused to comply with a WTO decision.\footnote{\textit{Id.} at 504.}

Thus, the United States, as a member of the WTO, has an interest in amending its copyright law to more broadly protect architectural works. First, it would prevent possible complaint by another member country to the WTO’s DSB, saving the United States the potential costs of expensive litigation. Secondly, it would allow the United States to avoid the possibility of the WTO deeming as untimely any remedial U.S. compliance, and thus avoid the possibility of large compensations to foreign governments or the suspension of concessions under TRIPS.

\begin{thebibliography}{10}
\footnote{140. \textit{Id.} While these represent average costs, WTO litigation cost varies widely based on a number of variables. \textit{Id.}}
\footnote{141. \textit{See DSU, \textit{supra} note 32, at art. 22 (describing the compensation negotiations member countries may engage in given noncompliance, as well as the punitive suspension of concessions the WTO may authorize in the event no compensation can be established).}}
\footnote{142. \textit{Id.}}
\footnote{143. \textit{Julie E. Cohen et al., Copyright in a Global Information Economy} 459 (3d ed. 2010).}
\footnote{144. DSU, \textit{supra} note 32, at art. 22(2).}
\footnote{145. Williams, \textit{supra} note 32, at 503.}
\footnote{146. \textit{Id.} at 504.}
\end{thebibliography}
C. **Striking the Appropriate Balance of Protection**

1. **The Risk of Overprotection**

Copyright law serves a dual function: it provides an incentive for authors to create while advancing social progress through the dissemination of such creations.\(^{147}\) According to some copyright scholars, however, Congress and the courts have neglected this Constitutional balancing act, favoring author protection over the public’s right to access works.\(^{148}\) Though much of the concerns regarding overprotection relate specifically to emerging technology and special interests, such as the Internet and the music industry,\(^ {149}\) such concerns stem broadly from the unconditional, formality-free nature of the current U.S. copyright regime.\(^ {150}\)

One risk of overprotection is “rights accretion,” a phenomenon in which licensing markets and consumer understanding of copyright expand intellectual property rights.\(^ {151}\) The threat is that ambiguities relating to copyright doctrines, such as fair use and the idea-expression dichotomy, as well as the high cost of potential litigation, cause risk-averse users to pay unnecessary licensing fees or avoid otherwise-legitimate fair uses of copyrighted works.\(^ {152}\)

At first glance, protection of nonhabitable structures would exacerbate this imbalance, protecting some architects and carving out of the vast public domain certain dams, bridges, walkways, and other works. However, the dangers of overprotection are relatively slight where copyright for nonhabitable structures is concerned. First, if copyright is extended to nonhabitable architecture, such architecture will remain limited in protection by the statutory definition of an “architectural work:” “The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”\(^ {153}\) Thus, while a copyright law protecting all three-dimensional structures would protect the overall structure of Santiago

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148. Kemp, supra note 147, at 797.

149. See id. at 800–01 (citing a lawsuit by the American Society of Composers, Authors, & Publishers against the Girl Scouts of America “for singing copyrighted songs around campfires” and by the Recording Industry Association of America against a student who created a “Google-like” search engine, one-quarter of the files of which were copyrighted music files).

150. Rosloff, supra note 147, at 44–45.

151. Id.

152. Id. at 45 (stating that these ambiguities cause users to pay unnecessary licensing fees); Kemp, supra note 147, at 801, 837 (stating that the prohibitive cost of litigation makes it difficult to defend an alleged copyright infringement, and recounting the author’s own avoidance of copyrighted works in the classroom in light of such overprotection).

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Calatrava’s Sundial Bridge in Redding, California, it would not protect individual features. Calatrava could not sue for infringement merely because another architect employed the cantilever spar cable-stayed style in constructing a bridge or used the same materials as another architect’s design. Rather, to receive protection, the two bridges would have to be substantially similar in overall form.

Second, whereas the music industry has been particularly tenacious in its copyright litigation, there is evidence that architects would not be overly litigious in enforcing copyrights. As former Frank Lloyd Wright Foundation CEO Richard Carney told Congress during consideration of the broader version of the AWCPA, there is a legitimate need to borrow elements, themes and even features of what has gone before, as part of the effort to move forward. . . . We all have a debt to those who have gone before. We all hope to build on that legacy and not merely perpetuate it. . . . [T]here clearly is a difference between the flattery and tribute of borrowing only elements or themes that were presented before, and the harm of having an unauthorized, substantially similar copy of a particular original work taken as a whole.

Given the universal and widely understood necessity of following architectural precedent, it is unlikely that architects would resort to litigation where substantial similarity to an overall work was not apparent. Further, while critics tend to focus on the public access half of the Constitutional balancing act, the public’s right of access must be gauged with reference to creative incentive. Some architects, such as the Frank Lloyd Wright Foundation, have designed innovative bridge designs without constructing them, and fear that if these innovative bridges are built they could be too easily reproduced by less-imaginative builders. While architecture students and enthusiasts can learn from published drawings of the proposed bridges, which are protected under the Copyright Act, the broader public is denied the

154. Id.
156. House Hearing on Architectural Design Protection, supra note 8, at 141 (statement of Richard Carney).
157. Id. at 129 (discussing a butterfly bridge intended for construction on the Wisconsin River and not built because of the ease with which “[s]omeone visually looking at it could go home and practically make a copy”).
158. Many of Frank Lloyd Wright’s unconstructed designs are published in TREASURES OF TALIESIN, including “‘Butterfly Bridge’ near Spring Green, Wisconsin, 1947.” BRUCE BROOKS PFEIFFER, TREASURES OF TALIESIN: SEVENTY-SIX UNBUILT DESIGNS 98 (1985).
159. Such works qualify as “pictorial, graphic, and sculptural works” under 17 U.S.C. § 102(a)(5) and are thus protectable even if their three-dimensional counterparts are not. A bridge constructed from such
privilege of experiencing these designs because of their lack of protection. Thus, extending copyright protection to nonhabitable structures actually furthered both sides of the equation, author incentive and public access, striking a Constitutional balance where such architecture is concerned.

2. Insufficiency of Alternative Intellectual Property Regimes

The issue of whether copyright law was the appropriate regime for protecting architectural works was thoroughly fleshed out prior to passage of the AWCPA.\(^{160}\) However, given the clear applicability of these arguments to the nonhabitable building subset of architectural works, it is necessary to dispense with these arguments in the narrower context.

During consideration of the AWCPA, Congress and the Copyright Office identified three alternative legal regimes for protecting copyright works: design patent, trademark, and contract.\(^{161}\) Contract was quickly deemed an insufficient protection; while those in privity are bound by the contractual agreement, it provides no protection against a third party infringer of an architectural work.\(^{162}\) Trademark protection is also out of the question, as obtaining trademark protection for a nonhabitable structure will generally be impossible.\(^{163}\) As explained by the Copyright Office:

[S]ignificant obstacles exist for architects who create . . . distinctive architecturally related designs. . . . [F]irst the architect must prove that the design is a “good” within the meaning of the [Lanham Act]. Then, for federal protection, the architect must show that the trademark has been used in interstate commerce, an impossibility, generally, for one of a kind structures, or indeed, perhaps for any structures besides mobile homes.\(^{164}\)

Even if an architect overcomes the seemingly insurmountable hurdle of proving that his or her work is a good in interstate commerce, he or she will likely still lack any meaningful protection. Trademark law requires the “use in commerce” of a mark.\(^{165}\) Because the party with whom the architect contracts, not the architect, uses the mark (here a bridge, dam, walkway, or other nonhabitable

\(^{160}\) See generally COPYRIGHT IN WORKS OF ARCHITECTURE, supra note 20, at 63–67 (examining the availability of protection under contract as well as federal and state intellectual property regimes).

\(^{161}\) Id.

\(^{162}\) Id. at 63.

\(^{163}\) Id. at 66.

\(^{164}\) Id. (internal citations omitted).

structure), the client would hold the trademark.\textsuperscript{166} Thus, trademark is an untenable avenue for protecting architects’ intellectual property rights in nonhabitable structures.

What remains is to determine whether design patent or copyright is the proper form of protection for nonhabitable architecture. The question is important for at least two reasons. First, in protecting inhabitable buildings under the AWCPA, Representative Kastenemeier expressed the legislative intent that “[w]e are not, frankly, looking for another computer software problem where we have patents and copyright and everything else used simultaneously almost without discrimination in terms of which intellectual property law should apply.”\textsuperscript{167} Second, given the different goals and requirements behind patents and copyrights, protection under one regime ought not to be used to subvert the doctrines designed to limit protection under another.\textsuperscript{168}

The House’s consideration of the AWCPA largely addressed Representative Kastenmeier’s concern that design patent and copyright might both be invoked to ensure greater protection—and create greater legal confusion—than could either legal regime on its own.\textsuperscript{169} Because the vast majority of architectural firms do not retain counsel, instances in which an architect seeks to obtain design patents on a structure would be minimal.\textsuperscript{170} Furthermore, because design patents can take eighteen months to obtain, are costly to prosecute, and last only fourteen years,\textsuperscript{171} architects will prefer copyright protection,\textsuperscript{172} which obtains at the moment of fixation and lasts seventy years beyond the life of the author.\textsuperscript{173} Thus, the likelihood of dual-regime protection seems unlikely, reducing confusion and the risk that an architect will employ one intellectual property regime to subvert the intent of another. Given the inadequacy of these alternative regimes, the ease with which an architect or firm can obtain a copyright in a fixed structure, and the existence of analogous protection for habitable structures, copyright is clearly the most attractive avenue for protecting nonhabitable structures.

V. CONCLUSION

When Congress chose to deny copyright protection to nonhabitable structures, it did so on the basis of faulty assumptions. Congress assumed that the

\textsuperscript{166} COPYRIGHT IN WORKS OF ARCHITECTURE, supra note 20, at 65.
\textsuperscript{167} House Hearing on Architectural Design Protection, supra note 8, at 107.
\textsuperscript{169} House Hearing on Architectural Design Protection, supra note 8, at 107–08, 127–28 (discussing the issue of dual protection under design patent and copyright with various witnesses before the Subcommittee).
\textsuperscript{170} Id. at 128.
\textsuperscript{172} House Hearing on Architectural Design Protection, supra note 8, at 127–28.
Berne Convention did not require such protection, though the plain language of the Convention and the practices of other member countries suggest that all three-dimensional architectural structures ought to be protected. Congress appears to have acted largely out of fear that copyrighting bridges, dams, and other nonhabitable structures might hamstring construction efforts by states. Again, however, this fear was based on faulty reasoning, as existing copyright doctrines provide ample protection against unscrupulous architects who might try to copyright a structure as basic as a standard highway bridge. Bridges, dams, and other nonhabitable structures are no less worthy of protection than habitable buildings. Just as Spokane’s Monroe Street Bridge “has inspired artists and lovers, served as a dramatic backdrop for public declarations and private whispers, [and] seen much death and even new life,” 174 so too do many other nonhabitable structures enrich our lives and promote progress. As such, they should be protected to the same extent as buildings.