Complexity, Contradiction, and Copyright: Evolving Intellectual Property Doctrine and the Practice of Architecture in the United States

Robert E. Saarnio
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COMPLEXITY, CONTRADICTION AND COPYRIGHT:

EVOLVING INTELLECTUAL PROPERTY DOCTRINE AND THE
PRACTICE OF ARCHITECTURE IN THE UNITED STATES

Robert E. Saarnio

A THESIS in
Historic Preservation

Presented to the Faculties of the University of Pennsylvania in
Partial Fulfillment of the Requirements for the Degree of

MASTER OF SCIENCE
1994

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Acknowledgements

Without the magnanimous and thoughtful participation of a number of extraordinary people, this study would be significantly diminished. For the generous contributions of their time, thoughts, assistance, and support, and for their considerable kindness, I would like to acknowledge and thank the following individuals.

A very large measure of appreciation must first be extended to my advisor, Professor David G. DeLong, and to the reader of this thesis, Carl M. Sapers, Esq. Professor DeLong is Professor of Architecture and Chair of the Graduate Program in Historic Preservation at the University of Pennsylvania. He is also Associate Dean of the Graduate School of Fine Arts. Mr. Sapers is an attorney in practice with the firm of Hill & Barlow in Boston, Massachusetts, and is an Adjunct Professor at the Harvard University Graduate School of Design. Their contributions and support have been of inestimable value, and have enriched not only the final outcome but also the experience of this thesis project. Each has been a true source of inspiration, and it is an honor to have been associated with them.

My fellow classmates and the faculty of the Graduate Program in Historic Preservation are here joyfully acknowledged. The collaborative spirit, intellectual challenge, and curricular diversity which characterize this exceptional graduate program have sustained
and informed my two years at the University. I am deeply fond of, and indebted to, this wonderful and talented group of colleagues.

Among architectural educators, the comments of Professors Robert C. Greenstreet, Dean of the School of Architecture at the University of Wisconsin-Milwaukee, and David S. Haviland, Professor of Architecture at Rensselaer Polytechnic Institute, Troy, New York, were of particular value. At the University of Pennsylvania, Professor David B. Brownlee of the Department of Art History and Professor John Keene of the Department of City & Regional Planning were instrumental in preparing me for this undertaking. To Eduard F. Sekler and James F. O'Gorman are due perhaps the most profound gratitude -- they lit the spark.

At the Committee on the Judiciary of the United States House of Representatives, the assistance of William F. Patry, Esq., Counsel to the Subcommittee on Intellectual Property and Judicial Administration, was literally irreplaceable. Mr. Patry's generosity in patiently fielding the many questions of an enthusiastic graduate student is very deeply appreciated. Bill Briganti, Examiner in the Office of the Register of Copyrights at the Library of Congress, provided valuable information regarding current copyright registration of works of architecture.

The following attorneys all gave generously of their time -- their thoughts and advice have substantially enriched the project: Ava Abramowitz, Esq., of Victor O. Schinnerer Co., Baltimore, Maryland; Mary Di Crescenzo, Esq., Assistant Director of the Legal Department of

The assistance of a number of prominent attorneys in the home building industry greatly enhanced the preparation of Chapter Eight. They are noted within the pages of that chapter. Further thanks must be extended to Professor Robert A. Gorman of the University of Pennsylvania School of Law for his early encouragement and advice.

Julia Moore Converse, Director of the Architectural Archives of the University of Pennsylvania, Alan K. Lathrop, Curator of the Northwest Architectural Archives, Manuscripts Division of the University of Minnesota Libraries, and Roger Moss, Director of the Athenaeum of Philadelphia all offered insight into the particular nature of copyright as it affects archival collections management.

My deepest gratitude is here extended to all of the members of my family, and to Robert Venturi and Denise Scott-Brown - - in every case for their unfailing personal support and enduring interest in my work.

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Preface

The provision of copyright in the United States to the creative end products of the professional practice of architecture -- models, two-dimensional plans, drawings, and specifications, and the buildings constructed from them -- is the core focus of this study. The latter category of subject matter, the built structure, has presented particular theoretical and practical difficulties for the legal doctrine of copyright in the United States. Indeed, architecture has been, for reasons which will be identified and examined in the pages which follow, a square peg in the round hole of intellectual property theory and application.

Beginning in 1988, pursuant to a widespread consensus that the United States must implement newly-acknowledged international copyright treaty obligations, Congress was forced to consider exactly how to make the square peg of architecture fit that round hole. This study proposes to investigate that act of legislative hammering -- and the concurrent poundings upon the peg by courts of law, legal scholars, and design professionals -- in order to understand why the effort was undertaken, and to examine the splinters that flew and the cracks that developed.

In the course of such a narrative, considerable light can be cast upon the nature of architecture and the professional practice thereof. The most enduring and hallowed traditions of this design art, its

1
practice under actual conditions in the real world, and the tangible products of its creative expression, have all contributed to the enigma that architecture has presented to intellectual property doctrine.

The challenge of crafting an effective and appropriately inclusive degree of copyright protection for the creative works of architects in this country comprises a history replete with legislative, judicial, scholarly, and professional discord. A fundamental contributing factor to the enduring conundrum which courts of law and Congress have experienced in applying copyright doctrine to buildings has been the traditional exclusion of 'useful articles' - - objects with 'an intrinsic utilitarian function' - - from the protections enumerated in Title 17 of the United States Code, the federal copyright statute.

Distinctions with profound implications for copyright eligibility are made between those elements of a useful article that are functionally dictated and those that find their genesis in the artistic expression of their creator. Copyrightable work can include an original compilation, arrangement, or reconfiguration of design elements derived from prior works - - components previously utilized which have remained in the public domain, and which thus form a part of the palette of precedent from which all may draw.

In the spirit of its subject matter, therefore, this study will combine utilitarian elements, a synthesis of prior material, and de novo creative expression. In the former category, the goal shall be to provide a document which can function both as an introduction to
the topic and as a useful reference for the reader who seeks a
familiarity with specific aspects of the subject - - toward that end
the individual chapters may be seen as severable, and capable of
standing alone as essays for the purpose of topic-specific reference.

The body of prior consideration of this subject is substantial, a fact
reflected in the sheer length of the bibliography and the
organizational preface which accompanies it. Legal scholarship and
government publications each embody an extensive written corpus.
Architectural and other professional journals, and the popular press,
constitute further source material. The avoidance of duplication of
prior discussion presents a considerable challenge to anyone
approaching the subject of copyright in architecture. Every effort
has therefore been made to synthesize prior scholarship without
plowing identical terrain. Where a previous author has
comprehensively examined a component aspect of the subject,
reference is made in the text to that work.

A final element of this study consists of subject matter examined
in these pages which has received markedly less consideration in
prior writing, or which is here approached from a different direction.
Most prominent in this regard is the attempt to include the voices of
architects, their attorneys, and professionals in the home building
industry - - an element of the study undertaken specifically to inject
a strong component of the real world of custom and professional
practice. This approach seeks to consider the extent to which the
most recent U.S. legislation in this domain, the Architectural Works
Copyright Protection Act of 1990,\textsuperscript{1} and the larger realm of intellectual property doctrine, actually affect (or do not affect) professional practice in the fields of architecture and home building.

Inherent in a study of this nature is the challenge presented by a disparate readership. Neither the reader well-versed in the law nor the design professional practicing on the front lines can be readily accommodated by the same exposition. As one example, elements of legal theory or case law critical to an understanding of the topic which present as oversimplified to the former may well seem hopelessly arcane to the latter.

Nonetheless, this report is intended to be useful to both readers. In the course of discussions with both legal and design professionals undertaken during the research phase of this study, the extent of apparent non-congruity of assumptions and beliefs among the practitioners of these two fields of endeavor has been striking. Indeed, a consideration of the reasons which underlie such divergent world views will form a part of the narrative.

It is my belief, as one trained neither in architecture nor the law, that the perspective of an informed outsider affords an opportune vantage from which to assess the perceived gap noted above, and from which to attempt a bridging expository treatment of the subject. The attempt to straddle such a fence holds inherent potential for slippage -- such a possibility is fully acknowledged, and

\textsuperscript{1}The Architectural Works Copyright Protection Act of 1990 (Public Law Number 101-650, Title VII, 104 Stat. 5133), and the events leading to its passage, are discussed in full in Chapter Five.
the responsibility for flaws which result must lie fully with the author.

* * * *

As a final word of preface it is noted that the subject matter here under review entails engagement with a complex fabric of legal theory, international treaty law, Constitutional and statutory interpretation, legislative history, and the nature of American architectural practice. In order to effectively introduce the topic and establish the judicial and legislative background to the 1990 Architectural Works Copyright Protection Act, and to assess its subsequent effect upon architectural practice, a broad net must be cast over diverse waters.

A decision was thus made to consider a wide spectrum of critical subject matter. An alternative approach, comprehensive and in-depth examination of one particular facet of the subject, was specifically avoided for purposes of thoroughness and breadth of narrative. As one such example, an effective comparison of U.S. and foreign experience in the provision of copyright protection to architecture would, by itself, run to substantial length.

To the extent that this chosen course leads the reader to seek a more substantive consideration of any specific issue, he or she is referred to footnote citations and the bibliography which accompanies the study. The author is rather painfully aware that complexities of interpretation and layers of historical accounting seemed possible at nearly every turn - - in the interest of conveying
an effective history within reasonable bounds, it is hoped that a broad sweep rather than a fixed excavation has better served this subject, and the narrative which follows.
Chapter One

Copyright and Architecture in the United States, An Historical Overview:

Anglo-American Traditions to the Twentieth Century

"A copyright endows the creator of an artistic or literary work with the exclusive rights to make and distribute copies of the work, prepare derivative works based on the copyrighted work, and publicly perform or display the work. Infringement occurs when one of these exclusive rights is violated." ²

Thus does one contemporary commentator describe the essence of copyright protection. In the late twentieth century in this country, the legal basis of copyright protection is derived from three sources: past judicial decisions, including interpretations of the Copyright Clause of the Constitution;³ Title 17 of the United States Code; and regulations promulgated by the Office of the Register of Copyrights of the Library of Congress.

Modern copyright law traces its roots to the Statute of Anne, enacted by the English Parliament in 1710.⁴ This represented the first statutory recognition of the rights of authors, and established an exclusive right of publication of fourteen years for new works, and


³U. S. Constitution, Article 1, Section 8, clause 8.
⁴Anne c. 19, 1710 (UK)
twenty-one years for existing works. Requirements of printed notice on each copy of the work, and provision for remedies ("Offenders shall forfeit one Penny for every Sheet which shall be found in . . . their Custody") can also be found to have their origin in this English statute.

Article One of the United States Constitution established federal copyright protection in this country. Section Eight of Article One incorporates Clause Eight, known as the Copyright Clause. This provision was established,

To 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.

The framers of the Constitution intended the ensuing limited monopoly of "intellectual property" to benefit both the author and the rest of society, with the balance tilted toward the latter. Unlike European precedent, copyright in this country was not viewed as an inherent, natural right of authors in their works, but as a right to be affirmatively granted by statute. As with patents, these statutorily granted copyrights are privileges established to serve the interests of the public in encouraging artistic and scientific advancement. The powers of control over creative works are granted to authors and inventors to provide an incentive for further creativity. A 1984 Supreme Court decision in *Sony Corp. of America v. Universal City Studios, Inc.* summarizes the concept:

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5Copyright Clause, *supra* note 3.
The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.\textsuperscript{6}

The interests and rights of the public have been accorded priority in this country over the lesser concerns of creators, for, "It is necessary to recognize that if the scope of protection is too broad, creative efforts by others may be discouraged. Accordingly, a tension in copyright law results from the attempt to balance two competing policies, providing incentives for authors to create, and protecting the public's interest in access to and use of intellectual creations."\textsuperscript{7}

To effect the framers' intent Congress enacted the first federal copyright act in 1790.\textsuperscript{8} Similar to the Statute of Anne in its narrowness of protectible subject matter, it provided protection to the authors of any "book, map, or chart" for fourteen years, with the possibility of extension if requirements of registration, deposit, and

\textsuperscript{7}David E. Shipley, "Copyright Protection for Architectural Works," \textit{South Carolina Law Review} 37 (Spring, 1986): 396, note 9. It should be noted that the attempt to strike a balance between these competing interests has been marked by shifts in emphasis over time. Some contemporary commentators assert that the pendulum has now swung too far in favor of authors. See, for example, the compelling case made by L. Ray Patterson and Stanley W. Lindberg in \textit{The Nature of Copyright} (Athens, Ga.: The University of Georgia Press, 1991) - - a work whose stance is made explicit in its subtitle, "A Law of Users' Rights."

\textsuperscript{8}Copyright Act of 1790, 1 Stat. 124.
notice were met. Works of architecture were not mentioned in the Act- - indeed, the architectural profession did not establish itself as an organized entity distinct from the master builder and carpenter until the middle of the nineteenth century.

Subsequent to the original 1790 Act, Congress has enacted substantive copyright legislation four times: in 1909, 1976, 1988, and 1990. A brief summary of the evolution of American statutory and case law prior to the 1988 and 1990 revisions, as these have addressed the field of architecture, will be the subject of the following paragraphs. Later chapters will specifically address the more recent developments which have explicitly added completed works of architecture to the body of protectible works.

The first major Supreme Court copyright case to have an enduring effect upon the subject here under review involved the issue of protection for ideas, systems, and concepts - - as distinguished from the protection of the specific expression of the ideas: *Baker v. Selden*, 101 U.S. 99 (1879). This landmark decision established one of the fundamental principles of American copyright law, the dichotomy between ideas and expression. The plaintiff asserted a cause of action for infringement, maintaining that the defendant's treatise copied methods of accounting (blank bookkeeping forms) found in the plaintiff's book. Despite allegations that the forms found in the defendant's book were very similar to those created by the plaintiff, and that the defendant's book described a similar system, the Supreme Court found for the defendant, ruling that copyright does
not give an author exclusive rights to the art, ideas, or system explained in a work - it merely protects the tangible expression of the idea:

Having found no substantial similarity and thus no copyright infringement, the Court could have ended its opinion. However [it] further explained in dicta that . . . the defendant had not copied plaintiff's expression of an idea [the ledger forms], but only used plaintiff's idea [the bookkeeping system] . . . In short, there was no infringement because the copyright protected only the expression of an accounting method or system, not the accounting method or system itself.9

The principle thus established has subsequently been interpreted and expanded to find that where copyright exists in a work depicting a useful object, the exclusive right of reproduction -- one of the bundle of rights reserved to holders of any copyright -- does not include the exclusive right to make the useful object itself.

Herein lies the profound and far-reaching impact of Baker v. Selden on works of architecture. The original expression of a building, in plans or drawings, was by this doctrine entitled to copyright protection, but the underlying idea -- the represented structure -- was not. The practical outcome of the Baker ruling was that for the following one hundred years, a person was explicitly forbidden from copying, without authorization, original architectural plans (the author's 'expression'), but in most situations was free to use observation, measurement, photography, or even the actual

original plans themselves (if uncopied) to build the represented structure (the underlying 'idea').

Among the courts which have thus denied to architects the exclusive right to authorize construction from their plans were those of Scholz Homes, Inc. v. Maddox 10 in 1967, and Imperial Homes Corp. v. Lamont 11 in 1972. The slightly varying bases for determination in these cases is indicative of an uncertainty regarding the post-Baker nature of architectural protection. In Scholz Homes the 6th Circuit Court of Appeals affirmed the district court finding that a builder had not infringed by using another's plans to construct a replica split-level house, in the absence of conclusive evidence that the plans had actually been copied. The plans had existed in a promotional booklet, distributed as an advertising medium, but the court found that their copyright did not give Scholz exclusive rights to build from the plans depicted in such a brochure. Further, the District Court had relied on cases indicating that no infringement exists if the defendant had used plans to construct a building rather than to communicate to others how that building might be constructed.

The 5th Circuit Court of Appeals in Imperial Homes decreed that copyright registration granted an author of architectural plans no exclusive rights to the idea of constructing a home with 2 X 4s, a pitched roof, and a slab foundation. "No copyrighted architectural

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10 379 F. 2d 84,86 (6th Cir., 1967).
11 458 F. 2d 895, 899 (5th Cir., 1972).
plans... may clothe their author with the exclusive right to reproduce the dwelling pictured," but they do establish the exclusive right to reproduce those plans to instruct a builder on how to proceed. "All we hold is that if copyrighted architectural drawings of the originator of such plans are imitated or transcribed in whole or in part, infringement occurs."12

One result of this reliance upon Baker was the implicit sanction of what has come to be known as "reverse engineering". Reproducing an existing building by observing, measuring, drawing, or photographing it, without using copyrighted plans, was determined to be non-infringing -- reproduction having been accomplished without copying the protected original expression. Further concepts derived from Baker ultimately found their way into the 1976 Copyright Act:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.13

Architectural plans, drawings, and models were accorded direct statutory protection in the 1976 Act, though by inference and legislative intent rather than explicit mention. The 1976 legislation listed the following as illustrative of "works of authorship" subject to copyright protection: "pictorial, graphic, and sculptural works," a class

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12 Id.
that included "technical drawings, diagrams, and models." With the intent of clarifying any ambiguity regarding two-dimensional works of architecture, the House of Representatives Report accompanying the Act explicitly stated, "An architect's plans and drawings would, of course, be protected by copyright."

A consolidation in the 1976 Act of prior case law regarding critical distinctions between artistic and utilitarian elements strictly limited architectural eligibility to drawings, plans, and models, however, by sharply proscribing the copyright eligibility of 'useful articles.' The statutory definition in 1976 of eligible "pictorial, graphic, and sculptural works" raised a significant barrier to the inclusion of built architectural works within that category:

The design of a useful article as defined in this section, shall be considered a pictorial, graphic, or sculptural work 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.

This clause represents what has come to be known as the theory of "separability." The profusion of interpretations and ramifications which have issued from the separability doctrine have occupied numerous legal scholars, in written considerations of extraordinary extent and diversity of treatment. Only the briefest of reviews of the

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14Id., sec 101. Not until the Berne Convention Implementation Act of 1988 would "architectural plans" be added to the Copyright Act as an explicitly protected class of subject matter.
1617 U.S.C. 201 (1954)
concept is possible within the current study. Its essence is perhaps most succinctly considered by author Raphael Winick in his 1992 Duke Law Journal note:

Works having dual artistic and utilitarian roles present conceptual difficulties for an intellectual property regime that draws many of its substantive distinctions between artistic expression and utilitarian function. The "separability test" is the tool used to shape coherent copyright doctrine in the field of useful articles. The Copyright Act of 1976 codified the separability test, which states that if a pictorial, graphic, or sculptural work is of primarily utilitarian function, only its nonfunctional elements are eligible for copyright protection.17

The nature of the resulting conundrum, as applied to constructed works of architecture, is apparent. Other than mere applied ornamental elements, exactly how does one distinguish which components of a building are not serving a 'functional' role? As one example, what is the interpretation under the separability doctrine of the distinctive cross-bracing of the John Hancock tower in Chicago - - a building whose facade is marked by an X-pattern which both embellishes ornamentally and braces structurally against the punishing wind loads which challenge the engineer of the tall office tower? Or the Centre Pompidou in Paris, where architects Piano and Rogers have expressed heating, ventilation, air conditioning, and circulation elements on the exterior of the building, in a joyously inventive, multi-hued celebration of mechanical systems? The very

nature of an architectural work confounds the notion of conceptual or physical separability of functional from aesthetic elements.

Many commentators have noted the related problem of interpretation of modern 'functionalist' architecture, wherein a striving toward form as dictated purely by function represented a hallowed tenet of International Style architectural design. Walter Gropius' skillfully composed complex of pristine boxes, realized in 1926 to accommodate the many functions of the Bauhaus at Dessau, Germany, illustrates the inherent inadequacy of a doctrine of protectibility which dictates that,

Where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design will not be available.¹⁸

Given the stringent limitations thus placed upon "useful articles," the post-1976 result was a vast array of ineligible well-designed buildings, often standing adjacent to 'nonfunctional' or monumental structures (memorials, cemetery monuments, etc.) which were fully eligible for complete copyright protection. "Artistic sculpture or . . . embellishment added to a structure" was also fully protectible. However, many of the most original buildings of our era stood outside the shelter of the 1976 Act.¹⁹

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¹⁹It should be noted that the separability doctrine denied eligibility for copyright to buildings, but did not prevent the architect from copyrighting plans, drawings, or models. Statutory language removed the latter from the category of useful articles, since they were deemed to serve a "function that is . . . merely to portray the appearance of the article." To the extent that the prevention of copying of plans and drawings represented a substantive
The House Report accompanying the 1976 Act, quoted above, indicated that the language defining the scope of protection for useful articles was intended to give statutory standing to the decision of the Supreme Court in *Mazer v. Stein*\(^{20}\). In that 1954 case, the Court was itself endorsing prior regulations of the Copyright Office. In *Mazer*, the plaintiff sought copyright protection for the design of a lamp which incorporated an artistic statuette in its base. The Court held that copyright protection extends to works of art incorporated within a useful article, only to the extent that they are separately identifiable as artistic expression 'conceptually or physically' independent of the useful article.

Courts have experienced difficulty in determining whether creative works are useful articles, given that many objects (as the buildings discussed above) have aesthetic as well as utilitarian features. A frequently noted case in this area is that of *Kieselstein-Cord v. Accessories by Pearl, Inc.*\(^{21}\) Here, the Second Circuit court in 1980 held that the primary ornamental aspect of the plaintiff's belt buckles, which could also function as jewelry, was conceptually (but not physically) separable from their secondary utilitarian function, hence entitling the whole of the design to protection. The literature on copyrights, though, was reporting in 1990 that there was yet to be

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\(^{21}\)632 F 2d 989 (2d Cir., 1980).
a case applying the theory of separability to grant protection to a constructed work of architecture.

That most buildings were considered uncopyrightable "useful articles" whose common functions were habitability and shelter, came to represent more than just a problem of case law interpretation and anomalous quirks of copyright eligibility, however. It also put the United States outside the pale of international copyright practice. This state of affairs was wholly incompatible with the Berne Convention for the Protection of Literary and Artistic Works.22

The Berne Convention is the most widely-observed and significant international copyright treaty. Originally adopted in Switzerland in 1886, more than eighty nations were signatories by 1988, including all major industrialized countries except the United States, China, and the Soviet Union. Fundamental differences in underlying principles between American copyright doctrine and that of the European nations, as noted above, had contributed to U.S. refusal to accede to the Treaty:

By basing their laws on an inherent natural right of authors to claim authorship and to control exploitation of the works that they create, the intellectual property laws of most European and many other nations are broader in scope than American intellectual property laws. For example, the Berne nations recognize the rights of paternity and integrity for copyrighted works ["moral rights"], regardless of the effect of

these rights on society. This contrasts with American copyright laws which subordinated the needs of artists to the needs of society.\textsuperscript{23}

Following a review in 1908 of the Berne convention, held in Berlin, all of the member nations (except Norway) enacted legislation giving constructed works of architecture copyright protection. While the Treaty does not require uniformity of implementing legislation among member nations, its Article 2(1) unambiguously mandates protection for completed works of architecture.

By the mid 1980s, continued U. S. non-participation in the Berne Convention was beginning to present a variety of problems, not the least of which were economic. The United States is the largest exporter of intellectual property in the world:

In 1984 United States copyright industries lost as much as $1.3 billion to piracy of books, films, computer software, and video and phono recording in ten foreign countries. Thus the United States has an important stake in strong international copyright... The primary benefit of joining Berne is expanded and more certain protection for United States copyright owners in signatory nations.\textsuperscript{24}

Amending U. S. copyright law to comply with Berne would clearly be a means of strengthening the nation's bargaining power in negotiating more stringent enforcement and remedies for violations of American overseas copyrights. In a climate of growing fiscal

\textsuperscript{23}Winick, supra note 17: 1601, at note 18.

disadvantage from continuing U.S. non-compliance with Berne, the
time was ripe for a reconsideration of U.S. accession to the Treaty.
Hearings were held beginning in June, 1987 and continuing
intermittently through March, 1988 before the Subcommittee on
Courts, Civil Liberties, and the Administration of Justice of the House
Committee on the Judiciary, and the Subcommittee on Patents,
Copyrights, and Trademarks of the Senate Committee on the
Judiciary, for the purpose of receiving testimony regarding the
The story of U.S. adherence to the Berne Convention, and the
consideration given to copyright of architecture in that legislative
process, will be considered fully in Chapter Four.

Concurrent with these fiscal considerations was a growing body of
legal scholarship challenging the inconsistencies and perceived
illogicality of American copyright protection of architecture. Barry
LePatner, a New York attorney specializing in the representation of
architects, was reporting to the New York Times as early as 1983, "a
decided increase in the number of [architectural] cases involving
infringement." In 1989, one New York case in particular received
widespread publicity, and appears to have substantially heightened
interest in the issue.

25New York Times, March 17, 1983, Section C, p. 1, col. 2. It should be noted,
however, that most such copyright infringement suits were, and continue to
be, asserted in the realm of the home-building industry. Typically, the
plaintiff is a builder or developer who files suit against a perceived
infringing competitor. Actual infringement cases brought by licensed
architects against other architects are quite uncommon. Some of the
possible reasons for this paucity of architect-initiated legal action will be
examined in later sections of this study.
Frequently dubbed the "Copycat Case," *Demetrides v. Kaufmann* involved the blatant and admitted copying of an expensive custom-built home in Scarsdale, New York. In 1987, one year after architect Kenneth Nadler had completed his home design for upscale housing developer Chris Demetriades, a builder constructed a nearly identical house on the same block - - at the specific behest of defendant homeowners the Kaufmanns. The copying builder obtained and relied upon the original architect's plans and drawings. Drawing upon *Baker v. Selden*, the Demetriades court held that although the law grants an owner of copyrighted architectural plans the right to prevent unauthorized copying of those plans, no protectible interest in the useful article which those plans depict is held. Consequently, the court enjoined the defendants from using the copyrighted plans, but refused to prevent the defendants from completing the house.

The Demetriades case will be examined in greater detail in Chapter Three.

Pictures of the two houses, accompanied by accounts of the seemingly permissible copying, appeared in major newspapers and architectural periodicals. The case fell close upon another 1988 decision, *Robert R. Jones Associates, Inc. v. Nino Homes* in which

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26 "Seemingly permissible," because, as will be seen in Chapter Three, the court-ordered injunction against further reliance upon the infringing plans had the effect of severely inhibiting the conduct of the copying Kaufmanns. That a substantial monetary settlement also was achieved by developer Demetriades tends to further diminish the surface appearance of the case as one of permissible copying.

27 858 F 2d 274, 280 (6th Cir., 1988)
the Sixth Circuit court similarly refused to extend to the copyright owner an exclusive right to build:

One may build a house which is identical to a house depicted in copyrighted architectural plans, but may not directly copy those plans and use the infringing copy to construct the house.28

* * * *

Given the perceived difficulties experienced by design professionals in obtaining an exclusive right to execute, or authorize construction, of their copyrighted creative works -- as seemingly evidenced in the cases discussed above -- other avenues of defense against unauthorized use have been discussed in the literature, and have been recommended to design professionals.29 Three methods which have been advised for this latter purpose are contracts, trademark, and patent protection. Though each of these protective realms has held appeal for different practitioners under different circumstances, each also remains circumscribed in the range of protection offered. The following paragraphs briefly summarize the three methods:

Contracts and Written Agreements - - The single most frequently employed tool used by architects to protect their work is the Standard Form Contract of the American Institute of Architects,

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28Id. The right to build is also known as the “right of execution.”
29Whether architects were in fact as defenseless against unauthorized execution of their plans and drawings under the 1976 Copyright Act and subsequent case law as the preponderance of legal scholarship indicated will be considered in the discussion of contracts below.
Document B 141. This document includes the following language in Article 5.1:

Drawings and Specifications as instruments of service are and shall remain the property of the Architect whether the project for which they are made is executed or not. The Owners shall be permitted to retain copies, including reproducible copies, of Drawings and Specifications for information and reference in connection with the Owner's use and occupancy of the Project.

The Drawings and Specifications shall not be used by the owner on other projects, for additions to this project, or for completion of this Project by others provided the Architect is not in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.

Though individual, non-standard contracts can of course be structured such that otherwise reserved rights are retained by either party, the obvious primary limitation of this approach to protection is the restriction of its reach to the contracting parties. As noted by one commentator,

An architect who feels strongly that he must retain the rights to approve alterations in his work may still reserve that right as a matter of contract law... In fact it is chiefly due to the effectiveness of the parties in ordering their rights through enforceable contracts that copyright claims regarding architectural works have not arisen frequently in federal court... The major drawback of relying on contract law to order rights is that contract provisions only extend to parties in privity. Third parties remain unaffected by an allocation of rights in a contract...  

31 Winick, supra note 17: 1611, 1623-1624.
Another inadequacy of exclusive reliance on contract occurs when plans are revealed prior to execution of contract, as often occurs during early stages of schematic design development. Distribution of design documents to contractors and subcontractors is another stage at which vulnerability is high. Alan B. Stover, a former counsel of the American Institute of Architects, discusses this phase of the design process in particular detail in a 1983 essay:

Misappropriation by third parties is of special concern because there will be no agreement with them governing the terms of any reuse or providing any indemnity . . . When the architect or engineer is involved during bidding and construction, he not only controls any modifications to the documents, but he also controls their use and distribution to a large extent . . .

A restrictive legend on the drawings themselves will follow them to parties who are not bound by any contractual limitations in the Instructions to Bidders or the General Conditions [AIA standard forms] on the use of documents . . . Contract provisions in the General Conditions do not come into play until after the bidding period, bidding documents are not always returned, and a contractor may separate the documents or copy portions of them for sub-bidders; also, plan depositories or bidding information systems may reproduce and disseminate the documents . . .

The primary concerns of the design professional and the client in the ownership and use of documents should be set forth in their written agreement, and should be implemented through copyright, restrictive legends placed on the documents, provisions in instructions to bidders and in construction contracts, and by conscientious control over distribution, use and return of the documents.32

It must be noted, however, that contract language can provide very effective protection to the architect in one important realm of professional practice. An architect who occupies a position of leverage and bargaining power in relation to the client owner sufficient to retain the copyright in the plans and drawings within a written agreement, stands well-protected in the event of discharge or unauthorized re-use on a second project.

The 1976 Copyright Act vests initial ownership of copyright in the author. By retaining those rights, and by asserting the exclusive right of reproduction which forms the core of copyright, the copyright owner is in a position to,

Prevent the owner from discharging the architect part way through the project and then using the architect’s design. This has become the habit of unscrupulous developers who call in a creative architect to solve a design problem, discharge the architect, and have the project then built without the architect being compensated for construction phase services.

As a variant, the developer often discharges the architect after design development and turns the work over to a construction documents production house. In both cases, the copyright law has given the architect considerable leverage.

Essentially, the argument proceeds that if I am discharged, the owner no longer has the right to copy the design. This is the case even if the architect has been fully paid for the services performed to the date of discharge.

The foregoing is far and away the most valuable aspect of copyright protection for most American architects.33

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Thus does Boston attorney Carl M. Sapers characterize the very significant leverage which retained copyright and effective contract language can provide to the architect. Mr. Sapers notes that along with developer-client replication of an initial design without additional compensation to the architect, the circumstances described above represent the most frequent type of architect-client dispute over use of documents, and that the degree of protection thus afforded the prudent architect under the 1976 Copyright Act was substantial.34

Most of the legal scholarship which considers the failure of the 1976 Act and numerous judicial decisions to grant the architect-copyright owner an exclusive right to execute his or her designs, prominently highlights the commentators' perception that anyone coming into legal possession of an architect's plans and drawings could build the structure with impunity - - if no unauthorized, and hence infringing, copying of the plans occurs. What these scholars failed to consider is the virtual impossibility of constructing a building of any significant size or complexity with one, two, or even a limited number of sets of plans. Authorized possession of a set of architectural plans, which were indeed 'usable' under most case law decided subsequent to the 1976 Act, rarely provides sufficient documentation with which to commence any meaningful construction. By vesting the component of copyright known as the right of reproduction in the original author, the law provided the

34Id.
architect able to assert ongoing copyright ownership with a powerful tool to protect against unauthorized construction.35

Trademark - Trademark law offers only limited protection to the unique designs of buildings housing commercial and retail operations - designs which have acquired "secondary meaning," or an enhanced level of association and identification with the products or services offered. Trademark protection typically devolves to the owner of the business rather than the architect. Under a dual test of "distinctive character" and "secondary meaning," for example, plaintiff litigants White Tower Systems (90 F 2d at 67) and Fotomat Corporation (v. Cochran, 437 F. Supp. 1231) have both successfully protected their commonly recognizable building profiles.

Under this doctrine, only those works of a widely-known architect who had actively promulgated a "signature style" might conceivably be eligible for protection from unfair competition, deception, or the confusion of identifying symbols, the primary targets of trade dress (trademark) regulation. "Designs that tend to confuse the relevant marketplace" are infringing, asserts Duke University commentator

35"Most [architectural] firms (62 percent) have fewer than five employees; 84 percent have fewer than ten employees." These figures, extracted from The Report of the Register of Copyrights on Works of Architecture (U.S. Copyright Office, June, 1989), would appear to indicate caution regarding assertions of sufficiency of contract retention of copyright, however. Does the smaller firm or the solo practitioner in fact possess sufficient bargaining power to assert copyright ownership in the face of a determined owner-client? If copyright cannot be retained by the architect, none of the protections regarding client re-use considered above will in fact apply.
Winick:

Courts should realize that architecture is itself a service business, and that in some limited situations, a building design may take on secondary meaning and become a means of identification of origin susceptible to confusion and deception.\textsuperscript{36}

\textbf{Patent} - - Utility and functionality represent the most significant hurdles to trademark protection of architectural elements. Trade dress features are not eligible for trademark regulation if they are primarily functional. Functional elements are more properly protected by patent law, but here also there are significant obstacles to effective application to works of architecture.

Patent law recognizes two types of patents: "design patents" and "utility patents". Architects have received utility patents for new materials, processes, machines, methods of construction, or other utilitarian innovations. Design patents apply to the ornamental aspects of articles of manufacture. Both categories of patent are subject to tests of novelty, originality, and non-obviousness.

Design patent rulings have protected, among other building elements, lighting fixtures, handrails, patterned floor tiles, and settings of plate glass in store fronts. Buildings of sufficient novelty, originality, and non-obviousness such as Frank Lloyd Wright's Guggenheum Museum in New York City may also qualify for design patent protection in their entirety.

\textsuperscript{36}Winick, \textit{supra} note 17: 1635.
All commentators have noted the same set of drawbacks to patent protection for architecture. A lengthy application process results from the mandated patent office search and comparison of all prior art in the field. The established standards of novelty, originality, and non-obviousness are stringent, and the costs associated with patent applications are substantial. Patent law is a highly specialized field - an architectural firm seeking patent protection might not be able to rely on its regular counsel. Finally, the term of protection afforded design patents extends only for a fourteen-year period, as compared to the standard life-of-the-author plus fifty years afforded under copyright law.
Chapter Two

Complexity, Contradiction and Copyright

The American Institute of Architects . . . noted that, notwithstanding its opposition as a professional association, a number of its members were in favor of copyright protection for works of architecture . . . In meetings with the AIA representatives, Copyright Office staff were informed that part of the basis for the AIA's position was the willingness, even wish, of some architects to have their works copied.

Copyright in Works of Architecture
The Report of the Register of Copyrights, June, 1989

As long as the source is good I steal. Not in the sense of taking away from another architect -- he is not poorer because of a theft but is in fact more influential. We copy, borrow, and derive motifs from other architects. Artists have always quoted other artists.

Architect Robert A. M. Stern, 1983

Underneath it all is the knowledge that you yourself have also stood on the shoulders of others.

Denise Scott-Brown, interview, January, 1994
Copying, quoting, borrowing, referring .... stealing -- in his frank acknowledgement of the derivative nature of the customs of architectural design, Robert A. M. Stern highlights the single most salient and confounding aspect of architecture for the establishment of a regime of intellectual property protection. In the months that followed the consultations between the AIA and the Copyright Office staff noted above, the subject of copyright of built architectural works became a conundrum for those staff members -- as it had on every occasion in this century in which courts of law and Congressional committees had considered the application of copyright to this particular form of creative endeavor. So troublesome was this proposed new subject matter for his staff that Register of Copyrights Ralph Oman was later to write, "I know of no other issue to arise in the Copyright Office that has engendered such deep and bitterly fought professional disagreements." 37

Why has architecture proven so persistently problematic to fit under the umbrella of intellectual property doctrine? It is the conclusion of this study that there are enduring and fundamental traditions of the professional practice of architecture, and the education of architects, that mitigate against a fluent and straightforward provision of copyright eligibility to architecture. Further, there are equally fundamental basic tenets of U.S. copyright law that present particular problems for creative works that contain both artistic and utilitarian features. Indeed, architectural works

have specifically been excluded from the category of "works of art" under traditional interpretations of Title 17 of the United States Code, the copyright statute.

Foremost among the customs of architecture which make complex the application of copyright are the traditions of quoting, and the derivative, incremental nature of advance in this art form. Former New York Times architecture critic Paul Goldberger describes the phenomenon:

Where do architects get their ideas? Mainly from other architects. There's nothing so wrong with that -- after all, they've been doing it this way since the Romans invented an architecture based on Greek temples. The truth is that for all the pretense most architects make about originality, the major inspiration for almost all architecture has always been other architecture. The Romans took from the Greeks, Renaissance builders took from the Romans and the Greeks, and nineteenth century architects took from everybody.

Styles are more evolutionary than revolutionary, and even the greatest and most profound of buildings have, more often than not, been variations on themes that existed before -- new poetry created with existing words, we might say ....

[Is there] nothing new under the sun, [are] there no real ideas in architecture, only copies? Absolutely not. Every great building -- indeed every good building -- has within it something new, something special, some element that makes us see and feel form and space in a fresh way .... The creative act in architecture does not come from merely repeating what has come before -- it comes from synthesizing and making of it a new, richer whole. This is not copying any more than Mozart can be described as copying Haydn. It is rather, the evolution of art.38

As Goldberger noted, architects rarely create completely new and uniquely original forms. Rather, the essence of the design process is in the recombination of an existing 'vocabulary' of elements into a coherent new whole: patterns of arrangement, spatial devices, and individual building elements are rearranged and reconfigured. Indeed, the analogy of architecture to literature and music has been utilized with a compelling logic by many commentators in their advocacy of expanded copyright protection for architecture:

-- "Novels are composed of uncopyrightable words, songs of uncopyrightable notes, and paintings of uncopyrightable brush strokes. While most [individual building] elements, taken alone, may not receive copyright protection, their original arrangement by an architect results in an original work of authorship."39

-- "It is precisely in the selection from these options that works of architecture, like music (sequence and arrangement of notes), painting (choice and arrangement of colors, line), and poetry (use of words as symbols) is created. Like composers, painters, and poets, an architect's choices reflect subjective aesthetic judgment that constitutes the essence of creativity."40

-- "Works related to architecture consist largely of arrangements, compilations, or modifications of previously existing components of other such works. While certain buildings may be striking in appearance, or even 'novel' -- in the sense that they have no

39Larsen, supra note 24: 170.
401989 Copyright Office Report, supra note 37: 211
demonstrable antecedents - - their designs may be seen to consist substantially of the collocation of traditional elements. While none of these elements taken alone may be eligible for copyright protection, their original arrangement .... by an architect results in a work of authorship, just as the arrangement of individually uncopyrightable words results in the production of a copyrightable literary work or the arrangement of uncopyrightable musical notes results in a copyrightable musical composition."41

A range of opinion exists regarding the extent to which quoting and borrowing in architecture is more extensive than in literature and the other fine arts, but all agree that reliance on the works of the past, and of contemporaries, is part of the custom and tradition in most fields of creative endeavor - - and in the education of most artists and authors. The value of copying the canvases and sculpture of the masters in schools of fine art is an enduring, if not universally endorsed, tradition. Painters in particular have for centuries continued to make copies for their own instruction. Art history is replete with tales of the wondrous, and occasionally vexatious, verisimilitude of skillfully executed copies to their originals. Influence and derivative individuality in painting is well illustrated by the example of Manet's Olympia, which was inspired by Titian's

41Christopher A. Meyer, Jon A. Baumgarten, Robert A. Gorman, Letter in Response to Notice of Inquiry, Sent on behalf of the American Institute of Architects to the Register of Copyrights, in 1989 Copyright Office Report, supra note 37: Appendix C.
Venus of Urbino and Goya's Naked Maja, but was made the artists's own work by the creative interpretation of pre-existing themes.42

Perhaps it is not the extent of the derivative tradition that sets architecture apart from the other creative arts so much as it is the unabashed acknowledgement of the phenomenon by its practitioners. "I try to pick up what I like throughout history," admits architect Philip Johnson.43 Philadelphia architect Robert Venturi acknowledges, a bit more delicately, "I try to be guided . . . . by a conscious sense of the past - - by precedent, thoughtfully considered."44

Architect and critic Joseph Giovannini has captured the essence of the issue of design influence and precedent within his profession with compelling elegance:

Very few architects started their careers as intellectual orphans . . . . The body of architecture, like literature, is large and weighs heavily on anyone joining the profession. An architect cannot but be influenced by images seen and remembered.

Because architects work both under the influence of other architects, and under the onus of having to be original, there is in their minds, and in the profession, an uneasy balance between influence and originality: balancing the two is perhaps where the architect's art lies.45

42 A. Hanson, Manet and the Modern Tradition (1977): 96, 98.
44 Ibid.: 297.
The architects themselves are well aware of the challenges that this presents. In a profession where a substantial portion of the practitioner's career oeuvre may never be completed (i.e., built), there is a heightened reliance upon the opinions of one's peers, and a hypersensitivity to the judgments of the critic and the historian. Unique among the arts in this respect, the history of architecture is replete with moments of high artistry, significant advance, and enduring influence that have never been constructed. For lack of a client, money, a site, or a conducive societal milieu, or because the original intent was purely visionary, these unbuilt projects exist in drawings, renderings, plans, sections, elevations, and models. They are seen by other architects, and form as significant a body of precedent as that which was realized.

Discussion of influence is indeed open, and explicit. Architect Frank Gehry acknowledges that, "At first I did Rafael Soriano and Harwell Harris. You've got to have a role model, then move on." Robert Venturi, whose significance within recent architectural theory is based in part upon his 1962 clarion call to the profession to reconsider the enriching effects of bringing the quotation of history back into the art, agrees:

There is nothing wrong with being influenced, or even with copying. Imitation is how children learn. You have to acknowledge sources . . . . Quality is more important than originality. Doing something good is better than doing something first. In any case, originality is rare and not even

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46 Frank Gehry, quoted in Giovannini, supra note 45.
the highest virtue of an artist. It may be better to do slight variations within established traditions and conventions.\textsuperscript{47}

The custom of 'quoting' can be adequately illustrated by two examples. Nineteenth century British architect John Nash created in 1815, near the seaside in Brighton, England for his client the Prince Regent, a vacation house that has come to be known as the Royal Pavilion. In the kitchen of that structure Nash incorporated iron palm trees. Austrian architect Hans Hollein, in tribute to Nash's work, utilized metal palm trees in his famous 1978 Austrian Tourist Board offices in Vienna. This same palm tree motif, seen and admired in Vienna by Robert A. M. Stern, was brought to this country in his early 1980s indoor pool addition to a house in the Llewellyn Park section of West Orange, New Jersey. Mr. Stern credits Mr. Hollein, who in turn openly acknowledges his debt to John Nash.

Another, and more densely layered, example of this derivative tradition was considered by Robert Venturi, Denise Scott-Brown, and Steven Izenour in their 1972 study, Learning From Las Vegas:

The stylistic evolution from La Tourette to Neiman-Marcus is a characteristic development of form - - given symbolism in late Modern architecture. Le Corbusier's tense manifestation of late genius, a monastery in a Burgundian field is itself a brilliant adaptation of a white plastic vernacular of the eastern Mediterranean. Its forms became an Art & Architecture Building on a street corner in New Haven, a brick laboratory on the campus at Cornell, and a palazzo pubblico in a piazza in Boston.

\textsuperscript{47}Robert Venturi, quoted in Giovannini, supra note 45.
A latest version of this Burgundian cloister is a department store off the Westheimer strip in suburban Houston. This series of buildings from Burgundy to Texas illustrates the modern architect's tendency to glorify originality through copying it. 48

Speaking of the neo-traditional 'new urbanism' as it had first begun to be formulated by architects Andres Duany and Elizabeth Plater-Zyberk at Yale in the 1970s, architectural historian Vincent Scully has written, "Everything was available to be used again. Now, as always, there were models to go by, types to employ." 49 Of the commentary on Duany, Plater-Zyberk, and developer Robert Davis' Seaside, Florida in the profession's periodicals, Scully laments that "the houses there which have been most published in the architectural press... are those which most stridently challenge the [building] code, as if originality were architecture's main virtue." 50

The potential for interference with the tradition of quoting in architecture by enhanced copyright eligibility has repeatedly raised concerns within the architectural profession. In 1986, on the occasion of Congressional consideration of expanded coverage for architecture in order to comply with the Berne Convention, a senior official of the American Institute of Architects suggested that the proposed legislation might directly contravene the intent of the


50 Ibid.: 227
Constitution, which seeks to promote "the progress of science and the useful arts," in part by protection of creators' intellectual property:

The proposed language would produce precisely the opposite result, frustrating rather than fulfilling the Framers' intent by creating a 'chilling effect' on architectural progress.51

Four years later, during its testimony before Congress upon consideration of the Architectural Works Copyright Protection Act, the Frank Lloyd Wright Foundation acknowledged the fears of the AIA:

The concerns of the American Institute of Architects about a bill of this type are in large measure, in our view, simply an expression of the 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 . . .

There 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.52

This reliance upon, and open acknowledgement of, precedent is certainly at the heart of the ambivalence and outright discomfort which many architectural practitioners have expressed toward the

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introduction of legal norms of copyright, trademark, and patent into their field of professional endeavor. The fear of prohibition of architectural imitation appears to underlie architects' unease, and this phenomenon of reticence will be further examined in the chapter which follows. However, though many architects have spoken forthrightly about the importance of open access to works of both the distant and recent past, they have not been entirely inactive in attempting to protect their creative efforts from unrestricted availability, as will also be discussed.

The challenge, therefore, for Congress and courts of law has always been to "create a standard ..... that will protect the original and creative expression of architects without removing design elements from the palette available to other architects." 53 The challenge for architects is perhaps nowhere better expressed than by Paul Goldberger:

There are those architects who see the past as their own beginning, and stand on its shoulders, using it to gaze beyond. And then there are those architects who do not so much stand on these shoulders as crouch beneath them, and can do no more than timidly follow the past. 54

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53Winick, supra note 17: 1639.
54Goldberger, supra note 38: 36.
A second area of complexity which architecture presents to the development and application of copyright doctrine is its Constitutional status as a 'useful art'. In the eyes of U.S. law for most of this century the 'useful' has overruled the 'art' -- as discussed above, traditional tenets of U.S. copyright which proscribe eligibility to useful articles have prevented the extension of copyright to completed structures.

As enacted, the 1909 Copyright Act provided unambiguously in Section 5(g) for the eligibility of "works of art, models, or designs for works of art." Architectural works, as embodied in buildings or structures, were nonetheless deemed not eligible. The Copyright Office, in regulations issued in the year following enactment, established its basic premise: "Productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented."55

Yet few would deny that the design of works of architecture is not an endeavor wholly outside the realm of artistic creation. At the time of the 1990 hearings on the Architectural Works Copyright Protection Act considerable testimony was heard regarding this very subject. Register of Copyrights Ralph Oman noted that "it is precisely this ability of architecture to speak beyond its utility that fully justifies its status as one of the oldest and most revered forms of art."56 The Frank Lloyd Wright Foundation asserted similarly that

55Copyright Office Bulletin Number 15 (1910).
561990 Hearings, supra note 52: 49.
"architectural art is no less art than its counterparts in the world of sculpture and painting .... The time has come to accept, and protect, architectural art as art." 57

The eloquent writings of architecture critic Ada Louise Huxtable made an impression on the Congressional committee responsible for these 1990 hearings, for her comments on the artistic character of architecture were twice excerpted in the committee's final report:

Architecture is not unlike poetry, a point made by renowned critic Ada Louise Huxtable, who wrote that architects can make 'poetry out of visual devices, as a writer uses literary or aural devices. As words become symbols, so do objects; the architectural world is an endless source of symbols with unique ramifications in time and space'. 58

and,

Critic Ada Louise Huxtable once provided the following comment that may be helpful as an expression of the policy behind the legislation: 'Technology is not art, and form only follows function as a starting point, or life and art would be much simpler than they are. The key to the art of architecture is the conviction and sensitivity with which technology and function are interpreted aesthetically, in solutions of a practical social purpose'. 59

Concurrent with such sentiments, however, runs the belief that though the creative process in architecture may fall within the realm of the fine arts, as opposed to the applied or industrial arts, not all works of architecture are works of art. "It is unclear how many of

57 Ibid.: 136-137.
59 Ibid.: 18.
the total number of buildings constructed in the United States contain an artistic character," wrote the Register of Copyrights prior to his testimony noted above.60 One of the most active and eloquent proponents of extending copyright to architecture among the ranks of legal scholars, Professor David E. Shipley of the University of South Carolina School of Law, nonetheless noted that "if a structure could be classified as a work of art, the full protection might be appropriate for the structure as a whole; yet most structures are not works of art."61

In 1955 Congress allocated funds for a comprehensive program of research and study by the Copyright Office, as part of a movement for a general revision of the 1909 Copyright Act. Study Number 27, "Copyright in Architectural Works," by William S. Strauss, is a highly regarded and often-cited thirteen-page review. This legal scholar struggled mightily with the notion of "artistic structures":

In the broad area of architectural structures those constituting 'works of art' would seem to be relatively rare . . . As noted, the present [1909] statute protects a copyrighted 'model or design for a work of art' . . . . That provision would no doubt protect a sketch for an artistic sculpture against the making of the sculpture, and an artistic architectural structure might be equated with a sculpture . . . .

Ordinary structures embodying ideas, processes, or methods of construction, but having no artistic features, would not seem to be appropriate subjects for copyright protection. On the other hand, consideration should be given to providing explicitly for some kind of protection of architectural structures that are artistic in character . . . . Like the general term 'work of

601989 Copyright Office Report: 117.
61Shipley, supra note 7:434.
art', the concept of 'artistic' structures eludes precise definition.62

A large body of legal scholarship and judicial opinion concurs that 'artistic' merit or character is indeed elusive, and is so inherently subjective that courts of law are not a proper venue for such determinations. Supreme Court Justice Oliver Wendell Holmes' familiar warning in the 1903 copyright case of Bleistein v. Donaldson Lithographing Company prudently cautions that it would be "a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits."63

Courts of law and Congress have generally followed Justice Holmes' advice, and have avoided imposing qualifying tests of artistic merit or character. They have not hesitated to adjudicate and legislate in another area of the application of copyright to architecture, however -- with results which some find semantically incongruous: the characterization of monumental structures as purely "non-functional."64 The landmark case in this area occurred in 1936, Jones Bros. Co. v. Underkoffler, in which it was held that a copyrighted design for a cemetery monument (registered as a 'work of art') was infringed by the unauthorized use of the design in the construction of a substantially similar monument.

63188 U.S. 239 (1903).
64House of Representatives Report No. 1476, 90th Congress, 2d Session (1976): 55. ("Purely nonfunctional or monumental structures would be subject to full copyright protection.").
From this ruling, many legal scholars have extended the result to assert that structures such as the Washington Monument and the Statue of Liberty were to be regarded as monumental and 'non-functional', and hence were fully protectible by copyright as 'works of art':

In the words of Section 101 of the [copyright] statute, [monuments] have a "function that is .... merely to portray the appearance of the article." Therefore monuments are primarily sculptures, rather than useful edifices, and so even before December 1, 1990 (effective date of the Architectural Works Copyright Protection Act), they were considered copyrightable works."65

It is not their eligibility for copyright which is being questioned here - - only the semantic contortions which found monuments to be “non-functional.” Here again, architecture seems to have occupied a gray realm within copyright doctrine. To have characterized such monuments essentially as non-functional large sculptural works of art awkwardly drew a distinction that defies logic - - and denied their actual, substantive functions as national symbols, prominent markers in the landscape, observation lookouts, and tourist destinations. That their functions are manifestly more varied than “merely to portray the appearance of the article” seems apparent.

The ready eligibility for copyright of the Washington Monument, apparently on the basis of supposed non-functionality, at a time when the National Cathedral or the National Portrait Gallery would have been deemed ineligible, left unanswered exactly what

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definition of "functional" was being applied—habitability, temporary human occupancy of interior space, presence of furnishings? If eligibility was instead being determined on the basis of 'monumentality' ("Purely nonfunctional or monumental structures would be subject to full copyright protection"\(^{66}\)), this concept too was not defined, and might have proven similarly resistant to clarification.

One theorist has proposed an explanation for the difficulty experienced by many, both inside and outside the legal profession, in experiencing and evaluating architecture as art. Stanley Abercrombie, in his 1984 essay *Architecture as Art: An Esthetic Analysis*, posits the following:

Architecture is the most familiar of all arts. Its very familiarity obscures our vision of it as an art, for we know so many things about architecture that are extraneous to art: We may know its location and the building it replaced, its insurance rate and mortgage payments, its occupants and its furniture, how well its air conditioning works and how often its floors are swept. We cannot escape the burden of this esthetically irrelevant information any more easily than we can escape architecture itself . . . .

Architecture, as has often been said, is the unavoidable art. Its familiarity, its practicality, its frequent commercialism, and its ultimate ties to society and to its physical surroundings—all these are basic attributes of architecture, but they are not esthetic attributes . . . . As in no other art, the esthetic criteria for architecture are entangled with such mundane matters.\(^{67}\)

\(^{66}\)House of Representatives Report No. 1476, *supra* note 64.

There are other aspects of architecture besides its functional role as shelter and habitation, and its inextricable conflation of the esthetic and the mundane, that have contributed to its status as a particularly thorny subject matter for copyright. None of these, however, have proven as troublesome or insoluble for intellectual property doctrine as the utilitarian and art/not art enigmas.

Issues of authorship in architecture assume a more complex dimension than in most other creative endeavors subject to copyright. Design development almost always involves the active participation of at least one architect and a client, but by the time that many larger projects have progressed to the production of construction documents and actual construction, input has often been received from a wide cast of players: design partners and employees of the lead architect; contractors, subcontractors, and construction managers; engineers; financial backers; interior designers; design review boards; and occasionally the neighborhood and the prospective tenants or occupants of the building. All can have input into the design process, and could conceivably - - in the broadest interpretation of the term - - be considered to have contributed to authorship.

Though the end results of an architect's creative efforts are tangible objects - - drawings and models, documents, and perhaps a

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68 Some commentators have noted a similarly complex nature of “authorship,” for purposes of copyright, in the creation of motion pictures.
constructed building -- custom in the industry and the weight of much judicial opinion have established that an architect provides to his or her client a professional service and not a commodity or product. Hence, in the absence of specific contractual agreements to the contrary, drawings, plans, models, and construction documents all are considered "instruments of service" -- in which the architect retains all rights of ownership and copyright. That the owner may only retain limited copies of these documents solely for purposes of occupancy, maintenance, and repair, and may not re-use the plans without the authorization of the original architect (or other party to whom the rights have been transferred) often still comes as an unwelcome surprise to clients.

Yet another complication arises from the fact that architecture is the one form of copyrightable subject matter most susceptible to revision by alteration or addition to the original work. Also, as the Frank Lloyd Wright Foundation noted in its testimony before Congress in 1990,

The commercial exploitation of an architect's design, unlike most inventions, may lie dormant for long periods of time, not for lack of creativity but for lack of a match between paying client and architect.69

The problem posed by an architect's complete, or substantially complete, re-use of plans on a subsequent project for a different client -- in a sense, quoting himself -- is another anomalous

occurrence not typically presented to copyright doctrine by other creative endeavors. As noted by attorneys W. Robert Ward and Andrew J. Friedrich,

Both the former client and the new client have rights and legitimate expectations . . . . Particularly with regard to architectural services . . . . one of the commonly understood attributes is uniqueness.⁷⁰

Yet another anomalous aspect of the nature of architectural practice for copyright will be explored more fully in Chapter Eight, "Copyright and the Home Building Industry." The types of architecture most likely to be considered artistic works which are the result of talent, skill, and creative effort, are precisely those works least in need of copyright protection from subsequent duplication. As noted by the Register of Copyrights in 1990,

Most copyright infringement suits involve single-family housing . . . . Copyright protection appears to be less essential for large firms because the types of works they design are much less likely to be copied.⁷¹

One-time, high profile architectural projects are simply less vulnerable to wholesale unauthorized reproduction. The category of architectural works that would appear to benefit most from intellectual property law protection are those which are easily reproducible, or indeed may be designed with reproducibility in

⁷¹1989 Copyright Office Report: 12.
mind. "The more reproducible a building is, the more likely it is that the architect designed the building with the economic incentive of reproductions in mind," asserts Duke University commentator Raphael Winick.\footnote{Winick, supra note 17: 1606-1607.}

It should be noted here that another observer takes a more expansive view of vulnerability, however. Alan B. Stover, former counsel of the American Institute of Architects, has assessed the situation in this manner:

On occasion an owner may wish to substantially duplicate a building previously designed by the architect. Apartment buildings and other residential structures, commercial buildings (particularly speculative office buildings, restaurants, and hotels), industrial and recreational facilities all have a high likelihood of being duplicated. Local school committees are notorious for their attempts to duplicate school buildings. As in other cases of potential re-use of documents, however, this is rarely discussed with the architect.\footnote{Alan B. Stover, AIA, Esq., "What Can I Do to Prevent Others from Misappropriating or Infringing Upon My Drawings?", Cushman, ed., Avoiding Liability, supra note 70: 95-96.}

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There is yet another area in which architecture appears to defy the conventions upon which copyright is based. As seen in the preceding chapter, the underlying principle of intellectual property protections in the United States can be found in article 1, section 8, clause 8 of the Constitution. This so-called Copyright Clause bears repeating in this discussion. It directs Congress to "promote the
Progress of Science and the useful Arts, by securing for limited Times to Authors . . . . the exclusive Right to their respective Writings." 74

The promotion of the public good and the enhancement of public learning were, and remain, the most basic public policy goal of intellectual property law in this country. A brief review of interpretive analyses of the copyright clause will highlight an area in which architecture appears to defy the very reasonable expectations of the framers [emphasis added]:

- "The policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors" 75

- "By establishing a marketable right to the use of one's own expression, copyright supplies the economic incentive to create and disseminate ideas." 76

- "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creativity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." 77

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74 U.S. Constitution, art. 1, section 8, clause 8.
75 House of Representatives Report No. 2222, 60th Congress, 2d Session (1907): 57.
Limited monopolies of creative works are considerably more appropriate as mechanisms of incentive in the areas of literature and musical works, in which there are fewer "autonomous means of appropriating the fruits of [the artist's] high-risk investment in creations that attain commercial success."  

As commentator Raphael Winick notes,

Architects rarely price their services on the assumption that a design will be copied and re-used. The cost of one set of architectural plans almost always includes the architect's total costs incurred on that project, plus a reasonable profit. This contrasts with books and musical recordings, for which the sale of only one copy usually would not cover the cost of production.  

Intellectual property mechanisms clearly do not constitute a major factor in the fostering of creativity in the practice of architecture. A brief consideration of the framework of incentives and rewards within which the professional practice of architecture typically occurs will firmly establish this assertion.

Emory University commentator James Bingham Bucher identifies two primary incentive / reward mechanisms which affect creativity in architecture: the market for architectural works, and the architect's relationship with others - - both peers and clients. His argument is summarized below:

It is evident that the market for architecture values creativity. Those who commission architects desire uniqueness.

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81 Winick, supra note 17: 1606.
"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts'." 78

Upon the unflawed premise that architecture is one of the 'useful Arts', and proceeding from the economic rationale for copyright as adumbrated above, many commentators have advocated enhanced dimensions of copyright protection of architecture by assuming that architects will thus have greater economic incentive to create new designs, and thereby benefit the public. Failure to adequately protect their creative work by copyright, it is assumed by this argument, will result in diminished incentive and an increasingly impoverished advance of this perhaps most 'useful' of all the Arts.

All available evidence appears to indicate that this is not the case in architecture. One of the seemingly most plausible arguments on behalf of copyright in architecture in fact becomes, under further examination, largely unsupportable by a full consideration of the system of incentives and rewards within which architects actually practice.79

79 This challenge to the assumptions of other commentators is most effectively raised by Emory University law student James Bingham Bucher in a 1990 comment in the Emory Law Journal, "Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture." Bucher's argument forms the basis for the consideration of the subject as it appears in this study.
Limited monopolies of creative works are considerably more appropriate as mechanisms of incentive in the areas of literature and musical works, in which there are fewer "autonomous means of appropriating the fruits of [the artist's] high-risk investment in creations that attain commercial success." 80

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81Winick, supra note 17: 1606.
The architects have a natural incentive to be creative; those architects who exhibit creativity will be rewarded with new commissions and hence greater earnings. This is particularly the case in design competitions.

Another incentive mechanism which affects architects is prestige. Architecture is a profession in which recognition, particularly by one's colleagues, is highly valued. Recognition and creative design are closely linked: to achieve recognition an architect must exhibit creativity.

Given these diverse influences, it is apparent that expansive copyright protection will afford very little additional incentive for architects to create. Considering that the diversity of American architecture has evolved without expansive copyright protection there is no need to burden the practice with such protection.

As far as it is carried, Bucher's argument holds considerable validity. But his concern is solely with the higher profile designer of one-time works. As seen above in the consideration of vulnerability to copying, different types of architectural works are created under widely variant conditions, and hence are subject to different incentives for creativity. Architects whose production is primarily for reproducible single-family homes would certainly experience enhanced incentives to creative effort if reproductions of their designs by others brought corresponding remuneration. Architectural floor plan services derive similar incentives from restrictions on unauthorized reproduction. Incentives to creativity in these types of architectural works are unquestionably greater in an environment in which economic rewards pursuant to copyright exist.

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82 Bucher, supra note 79: 1268-1269, 1271.
83 Though the extent to which all "clients who commission architects desire uniqueness" is not clear. It is certainly not a universal expectation.
A final paradox of architecture in relation to copyright was expounded by the Frank Lloyd Wright Foundation in its testimony in 1990 before Congress on behalf of the Architectural Works Copyright Protection Act. The Foundation was supporting a finding previously reported by the Register of Copyrights:

As the Register of Copyrights noted, some architects currently may not make their works public because they are unable to prevent others from constructing the buildings depicted in their designs. Protection for buildings may result in greater access to design elements embodied therein, since architects may be less hesitant to make them available to the public. 84

In this view, enhanced copyright eligibility for architectural works would increase, rather than diminish, the aggregate body of designs in the public domain: "Copyright protection for the design elements of the building would thus result in greater public dissemination of unexecuted designs." 85

Unacknowledged by the Wright Foundation representative, and lending a circular nature to his testimony, was the fact that the Register of Copyrights had apparently received exactly one such assertion of practices of the zealous guarding of unreleased material in the architectural world: from the Frank Lloyd Wright Foundation

841990 Architectural Works Copyright Protection Act Hearings, supra note 52, Testimony of the Frank Lloyd Wright Foundation: 16.
851989 Copyright Office Report: 198.
itself.\textsuperscript{86} The public record of responses to the Register's 1988 Notice of Inquiry shows that among the ten individuals and organizations submitting written comments, only the Wright Foundation had made reference to such a practice:

In his lifetime, Frank Lloyd Wright produced tens of thousands of drawings and plans . . . . Most of these have not yet been sold to clients. (The sale of unbuilt designs provides a steady stream of income to the Frank Lloyd Wright Foundation each year.) If the Foundation had relied strictly and solely on patent protection, to the extent it was available, for all of Mr. Wright's drawings and plans, it would have lost the opportunity to exploit these designs commercially as Mr. Wright intended . . . .

Mr. Wright and the Foundation kept his designs largely as unpublished copyrighted works, limiting access to scholars and those with non-commercial needs. Thus, faced with apparently no protection against the construction by others of structures based on these plans, Mr. Wright and the Foundation found it necessary to prevent or limit publication of Mr. Wright's designs. In this manner they reserved the opportunity to exploit the commercial value of the designs over the next century. Such measures would become less necessary if copyright protection was fully available.\textsuperscript{87}

The actual extent of this practice of guarding and withholding designs cannot be readily determined. It appears from the available public record, however, that by failing to identify the source of such an asserted practice (the Wright Foundation), the Register's 1989 Report provided the Foundation with the opportunity to testify

\textsuperscript{86}It should come as no surprise that the Wright Foundation would adopt such a stance. It exists primarily as the repository, steward, and legal owner of Wright's designs. The incentive which lay behind its active participation in the architectural copyright proceedings will be noted below.

\textsuperscript{87}1989 Copyright Office Report, Appendix C, Comments of the Frank Lloyd Wright Foundation: 16.
before Congress nine months later that it agreed with the Register's finding of such practices in the industry.\textsuperscript{88}

\textsuperscript{88}In a telephone conversation of January 7, 1994, William F. Patry, Esq., Counsel to the Subcommittee on Intellectual Property and Judicial Administration of the House of Representatives Committee on the Judiciary, and a major participant in the Architectural Works Copyright Protection Act proceedings as a Policy Planning Advisor to the Register of Copyrights, augmented the story of Frank Lloyd Wright Foundation involvement in the events leading to passage of the Act. As enacted, the Act contains in Section 706(2) a provision extending copyright eligibility to the year 2002 to any architectural work that on the date of enactment (December 1, 1990) was both unconstructed and unpublished. If unconstructed by December 31, 2002, copyright protection would terminate for such works on that date. Mr. Patry explained that this provision was added to the legislation largely because of the Frank Lloyd Wright Foundation comments regarding its licensing arrangements, and the concomitant perceived need for vigilance in its stewardship of Mr. Wright's unpublished designs.
Chapter Three

Case Studies and Case Law: Two Disputes

Of the many copyright disputes involving design professionals that have terminated in litigation, two cases have been chosen for comprehensive review in this section. They have been selected because of the broad range of issues which the courts chose to address and adjudicate - - hence, the value of these examples to an examination of the legal status of the creative works of architects in the years immediately prior to the passage of the 1990 Architectural Works Copyright Protection Act.

* * * *

The first case is that of Aitken, Hazen, Hoffman, Miller v. Empire Construction Company, et. al. (U.S. District Court, District of Nebraska, 1982). The plaintiffs (hereafter, Aitken et. al.), a professional architectural and engineering firm, brought an action for damages against defendants Empire Construction Company, Belmont Construction Company, Lincoln Lumber Company, and William R. King, a professional engineer. All parties had their professional offices in the area of Lincoln, Nebraska. Plaintiffs alleged infringement of their copyright in a set of architectural drawings.

which had been used to construct an apartment building in Lincoln, by their unauthorized copying and use to construct a second apartment complex on an adjacent lot.

For purposes of concise exposition, the facts as determined by the court are here included in summary form. Judge Warren K. Urbom's decision, from which the following is extracted, should, of course, be examined in its entirety by a reader for whom all particulars serve a purpose not incident to the current study. In 1978 the Aitken firm designed an apartment building for Belmont construction, to be built on land purchased by Empire. Belmont and Empire were, in fact, controlled by one individual, Karl Witt. The agreement between Aitken and Belmont was oral, and no mention was made of copyright. Belmont contributed ideas in the form of sketches and verbal descriptions in the course of several meetings during the design development phase. Revisions were made in the preliminary drawings as a result of the client's participation.

Eighteen sets of the final blueprints, consisting of twenty sheets each, were delivered to Belmont in February, 1978. As was its normal practice, the architect retained possession of the original drawings. None of the sets of drawings were registered with the Copyright Office, nor was copyright notice affixed to any of the documents. Using these plans, Belmont completed construction of a 22-unit complex in 1979. Empire paid Belmont for its construction services and sold the building to Amwest Properties. Aitken billed
Belmont on an hourly basis and was paid $13,000 for its architectural services.

Later that year Empire again employed Belmont to construct an apartment complex on an adjacent lot. Without the knowledge of the plaintiff architectural firm, Belmont copied the plans previously used for the 22-unit building and brought them to Lincoln Lumber Company, which paid for their review by engineer William R. King as a customer service to Belmont. Upon review, King affixed his professional seal and returned the copies to Belmont. The latter firm completed construction of the second apartment complex in early 1980, which was again sold by Empire to Amwest.

In March of 1980 Aitken discovered that its plans had been copied and delivered to Belmont and Empire a bill totaling $35,973 for "services rendered." Both companies denied any liability and a mechanics' lien in the amount of the bill was filed against the real estate. A state court dismissed Aitken's filing because it had not established an express or implied contract for the provision of services in connection with the second project.

Aitken placed notice of its copyright on the originals of its plan in April, and also submitted its application for registration of copyright in its drawings to the U.S. Copyright Office, which became effective on April 29. Shortly thereafter the architectural firm notified the defendants of its registered copyright, and by letter on June 19 asserted its claim to Belmont and Empire that they had infringed the
copyright in the plans by "reproduction of derivatives of same" without authorization.

The lawsuit under discussion was initiated on June 18, plaintiff seeking damages for copyright infringement of its plan under the Copyright Act of 1976. Statutory damages were sought against defendant engineer King, and actual damages and profits against Belmont, Empire, and Lincoln Lumber. Aitken also sought costs, attorney's fees, and treble damages.

Judge Urbom first determined that the architectural plans in question were not a commissioned "work made for hire," a defense urged by Belmont in its assertion of a governing employer-employee relationship with Aitken. Had such a relationship been found, copyright ownership would vest in the employer - - a basic rule of U.S. copyright law. It was found that revised definitions of work-for-hire in Section 101 of the 1976 Copyright Act specified prescribed categories of independent contractor commissioning which did not apply to the Belmont - Aitken circumstance. It was further determined that in the absence of a written agreement between the parties declaring a work-for-hire relationship, the architectural plans in question could not be considered a work for hire.

Observing that the governing factor in work-for-hire cases under an employer-employee relationship is the determination whether the employer possesses the right to control and supervise the manner in which the work is performed. Judge Urbom declared: "The relationship between Belmont and the plaintiff is clearly that of
employer and independent contractor. Belmont did not exercise the
degree of control over the plaintiff's work necessary to render the
plaintiff its employee."90

In further dispensing with Belmont's work-for-hire claim, the
judge noted that the construction company had the right to direct the
result to be accomplished by its relationship with Aitken - - the
plans for the apartment building that incorporated their suggestions
- - but they did not possess the right to direct the means by which
the result was accomplished:

The relationship of Belmont and the plaintiff is also devoid
of other factors characteristic of an employer-employee
relationship. The plaintiff furnished its employees, drawing
tools, and place to work. The plaintiff was not continuously or
exclusively engaged by Belmont, but was engaged
simultaneously by many clients . . . . Belmont had no control
over when the plaintiff worked on its commissioned project or
the means utilized when such work was performed.91

Noting that under such conditions copyright in the drawings
vested in the plaintiff, Judge Urbom displayed in this section of his
opinion both the persistently pedagogic approach which
characterized his subsequent findings, and also a savvy
understanding of the actual conditions under which professional
architectural practice occurs.

* * *

90 Quoted in Carl M. Sapers, Legal Cases and Materials for the Construction
Professional, Volume I (Unpublished Course Readings, Harvard University
Graduate School of Design, 1990): 411. Hereafter referred to as Sapers, Legal
Cases.
91 Ibid.: 412.
Defendant Belmont attempted to establish a claim of joint authorship - - a strategy dictated by the language of the copyright act: "the authors of a joint work are co-owners of copyright in the work." 92 The company claimed both that it was actively and substantively involved in the preparation of the architectural plans, and that by accepting Belmont's involvement Aitken indicated its intent that the architectural plans be a joint work of authorship. Determining that the key element in a finding of joint authorship is the intent of the parties at the time of creation of the work, the judge dismissed Belmont's claim by finding that the construction company was not the author of the plans in question, and that neither plaintiff nor defendant intended the creation of a work of joint authorship.

Regarding Belmont's assertion of a "fair use" of the plans in question - - a category of non-infringing use established under the 1976 Copyright Act which allows use for purposes such as comment and criticism, news reporting, teaching, scholarship, or research - - it was found that the construction company's sole use was for commercial purposes. Applying a standard of fair use which weighs the effect of the use upon the potential market for the work, Judge Urbom determined that the plaintiff's only feasible market source for these particular plans was Belmont, and that by their unauthorized use Belmont destroyed their market value. For both reasons cited, no fair use of Aitken's plans was found.

9217 U.S.C., Section 504(b).
Upon consideration of the defendant's further claim of innocent infringement in its reliance upon plans which did not display notice of copyright, the court noted that such a defense hinges upon a finding that the defendant was misled by the omission of notice. The court here made note of custom in the architectural professional and also of specific behaviors of both plaintiff and defendant in its dismissal of Belmont's assertion of innocence:

In accordance with the custom of the profession and its past practices, the plaintiff retained possession of the original tracings for the project; the plans themselves identified the plaintiff as author, and Belmont was billed and paid for the plaintiff's services in preparing the plans. I find that Belmont was aware that the plaintiff claimed ownership in the architectural plans in question . . . . 93

The Nebraska court's consideration of monetary damages concluded its decision. Due to the painstakingly crafted formula applied to the chosen remedies accorded the plaintiff, and the detail-laden language of the damage award determination, this section of the ruling is the component most subject to abridgment.

Regarding actual damages, the court awarded to Aitken the fair market value of its architectural plans as revised for use in building the second apartment complex. That fair market value was determined to be "the amount Belmont would reasonably have paid to the plaintiff and the plaintiff would reasonably have expected to receive for the revision and use . . . ." 94 Here again Judge Urbom displayed his level of awareness of the nature of typical project

93 Quoted in Sapers, Legal Cases: 420.
94 Ibid.: 421.
development by denying Aitken's submission of fees in the amount of 7.5% of construction costs -- a percentage which the judge noted was excessive based on its having been the firm's prior customary fee for full services rendered, including supervision of contract bidding, supervision of construction, and payment of the contractor. Neither of the latter services would have been rendered had Belmont engaged Aitken in the revision of the plans for a second building.

The jurist here noted that Aitken itself had established the fair market value by the amount of fee it charged Belmont for initial design development -- $13,440. From this gross amount was deducted the costs the plaintiff would have incurred in revising the plans for re-use, found to be $3,600. Total actual damages sustained were hence found to be $9,841.

In addition to actual damages, Title 17 of the U.S. Code entitles a prevailing plaintiff in a copyright infringement suit to "any profits of the infringer that are attributable to the infringement . . . . [with] the infringer required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."95 Further deductibility from gross profits is allowed for the overhead expenses which are deemed to have assisted in the development of the infringing copies.

Through these doors of allowable subtraction from profits defendants Belmont and Empire each drove a dump truck full of deductions. Belmont's gross profits on the infringing building of

95 17 U.S. Code, Section 504(b).
$57,709 were whittled away to a net profit of $16,845. Empire was found to have suffered a net loss of $23,668 on the sale of the apartment complex, immunizing it from recovery by the plaintiff. Full court costs, as specified in the 1976 Copyright Act which governed at the time of the trial, were assessed against defendants Belmont and Empire.

As discussed elsewhere in this study, the timing of registration of a work with the Copyright Office in relation to the onset of infringement of that work lies at the heart of eligibility of plaintiffs for an award of attorneys fees and statutory damages -- the latter being fixed amounts which require no determination of actual damages suffered. Summarized briefly, such fees are denied to an otherwise prevailing plaintiff if the act of infringement of an unpublished work commenced before the date of its registration with the Copyright Office. Upon a determination that the Aitken plans were 'unpublished' works, the court addressed the sequence of events in establishing its penultimate finding. Because Belmont and Empire began their infringement of the plaintiff's copyrighted plans before Aitken's filing for registration with the Copyright Office on April 29, 1980 -- the effective date of registration -- an award of attorneys fees to Aitken was prohibited.

In conclusion, the court denied the award of treble damages sought by the plaintiff, a finding predicated upon the absence of statutory authorization for such damages under the 1976 act. Claims against Lincoln Lumber and engineer William R. King were dismissed.
- neither party was found susceptible to assertions of contributory infringement or vicarious liability. Because of the significance of the case in its establishment of judicial precedent, and in its interpretation of the Copyright Act in such a critical array of issues affecting architectural practice, the American Institute of Architects, the National Society of Professional Engineers, and the Nebraska Society of Architects had filed as 'friends of the court (amicus curiae) in support of the plaintiff.

For design professionals seeking to establish defensible rights in the not-uncommon circumstance of unauthorized re-use of documents by former clients, the 1982 judgment of the Nebraska District Court in Aitken, Hazen, Hoffman, Miller v. Empire Construction Company et. al. established a broad range of well-reasoned precedent, informed by the presiding judge's obvious familiarity with practice and custom in the design and construction of small to medium-scale commercial and residential developments. Determinations of significance for the design professions were either established or strengthened by the case in the areas of works for hire, joint authorship, fair use, innocent infringement, plans as professional instruments of service, and rights to court costs, actual damages, and profits.

* * * *

Certainly the most widely-publicized architectural infringement case in recent American history was the 1988 dispute between Scarsdale, New York custom house developer Chris Demetriades and
homeowners Nicholas and Cheryl Kaufmann. Reasons for the prominence of the case were many: its occurrence within the high end ($2 million +) of the home construction industry, the unabashed admission of near-verbatim copying by the defendants, the brazen construction of the copycat house just two doors away from the original residence, on the same street in the same posh suburb, and the coincidental timing of the trial in the year immediately preceding consideration and passage of the Architectural Works Copyright Protection Act.

Architecture magazine gave the story perhaps its most prominent play in the mainstream architectural press. In its issue of December, 1991 author Dale Ellickson asserted misleadingly that the Demetriades case was a primary reason for initiation of the architectural copyright legislation that became the 1990 Act. "Thereafter, new legislation became a top priority for the architectural professional," the author stated.\textsuperscript{96} That the timing of the Scarsdale dispute had, in fact, virtually nothing to do with the legislation that Congress subsequently crafted is apparent within the consideration of the Act's legislative history found elsewhere in this study.\textsuperscript{97}

The case came before Judge Goettel in the Southern District of New York in 1988, and carried the extended title of \textit{Chris Demetriades and}


\textsuperscript{97}A possible explanation for Ellickson's version of events is considered in Chapter Seven, "The Role of the American Institute of Architects."
Demetriades Developers, Inc. v. Nicholas Kaufmann, Cheryl Kaufmann, Judy Koch, Dudley D. Doernberg Company, Inc., Gino Gallo and John Gallo d/b/a Gallo Brothers, and MCR Consulting Engineers.98 The case has come to be known simply as Demetriades v. Kaufmann.

Plaintiff Demetriades was a real estate developer specializing in luxury custom-designed suburban residences, who prided himself on the 'unique' nature of his houses. During testimony it was revealed that his company had constructed forty homes in the three years prior to the lawsuit - each of which, it was asserted, was distinct from all others. Demetriades would further assert at trial that his firm's reputation and market position was made possible by the delivery of a unique home to its wealthy clients.99

In 1985 Demetriades engaged the services of architect Kenneth Nadler of Nadler, Philopena & Associates to develop plans for a residence at 12A Cooper Road in Scarsdale, New York. Construction was completed in late 1986, and one week after opening the house to the public in January, 1987 a bid exceeding $2 million was accepted. Defendants Nicholas and Cheryl Kaufmann were among those who had viewed and expressed interest in the Demetriades house.

99The court felt compelled to dispute Demetriades' assessment of his home designs: "We draw no conclusions as to the quality of the structure, but the visual appearance of the home is hardly remarkable, as plaintiffs intimate . . . Although the particular combination of certain features may arguably be unique, the home's design does not appear to be radically innovative or anything akin to a signal breakthrough in residential design." 680 F. Supp. at 660.
At a later date in 1987, the Kaufmanns learned that defendant Gallo Brothers, a Scarsdale real estate developer, owned a lot at 24 Cooper Road. In October of that year, the couple purchased the property through a realtor and contracted with the Gallo Brothers for construction of a house on the Cooper Road site. The terms of the agreement stipulated a "substantially identical design" to the Demetriades house - - a fact also known to the real estate agency which sold the lot to the Kaufmanns. A bewildered Judge Goettel observed,

> Just why a family that could afford a $2 million home would contract for a design substantially similar to the design of a home on the very same street is, to say the least, a bit puzzling.\(^\text{100}\)

Through a subcontractor previously in plaintiffs employ, the Kaufmann's developer came into possession of an unauthorized set of plans for the home at 12A Cooper Road. Defendant MCR Consulting Engineers was engaged by Gallo Brothers to copy the Demetriades drawings.

> Apparently not content with simply the pilfered plans . . . defendants trespassed upon plaintiff's property after completion of construction, entered the home, and took pictures of the interior. The purpose of this extracurricular photography, it appears, was to fill in whatever details could not be supplied by the architectural plans.\(^\text{101}\)

Upon becoming aware of the similarity of the early framing of the Kaufmann house to his own nearby product, Demetriades acquired an

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\(^{100}\)Quoted in Sapers, *Legal Cases*: 437.  
\(^{101}\) 680 F. Supp. at 660.
assignment of rights from his architect, obtained a registration from the Copyright Office, and initiated legal action on February 8, 1988 seeking a preliminary and permanent injunction against further reliance upon the copied plans and against further construction of the Kaufmann house -- at that point fully framed above a completed foundation. Plaintiff also alleged trade dress infringement, unfair competition, misappropriation, and deceptive practices.

The court began by issuing the preliminary injunction against use of the infringing plans. "This is the rare case of admitted copying . . . although certain modifications were made to the copied plans, there is no argument with the conclusion that the allegedly infringing copies are substantially similar . . . ."¹⁰²

On the question of an injunction against construction, however, the court reasoned its way to a distinction between unauthorized copying of copyrighted works, and unauthorized use of those copies -- a distinction which leaves many who first encounter this case without familiarity with copyright doctrine, and without knowledge of similar prior judgments, simply incredulous. By relying on nineteenth century Supreme Court dicta in the seminal copyright case of Baker v. Selden, the Demetriades court ruled that construction by the Kaufmanns could not be enjoined. From Baker, the New York

¹⁰²Quoted in Sapers, Legal Cases: 440.
jurist extracted the following doctrine:

Although copyright protection extends to the particular explanation of an art or work, it does not protect use of the art or work described by the copyrighted publication . . . . 103

We find that although an owner of copyrighted architectural plans is granted the right to prevent unauthorized copying of those plans, that individual, without the benefit of a design patent, does not obtain a protectible interest in the useful article depicted by those plans . . . . 104

Construction of a building imitating that depicted in copyrighted architectural plans does not, consistent with Baker, constitute infringement of those plans. 105

Significantly, though a preliminary injunction against construction was thus technically denied, the court did extend its order against copying to prohibit further reliance upon infringing copies of the Demetriades plans. In effect, as the court recognized, this would likely "shut down construction for a period of time, at least, while new plans can be drawn up and submitted to the Scarsdale Architectural Review Board for consideration." 106 The court also ordered an impoundment of the infringing copies within the defendant's control.

This line established by Judge Goettel between 'use' and 'reliance upon' the copied drawings certainly draws a fine distinction, and leaves the court's stated unwillingness to enjoin construction more than a bit undermined by the effective work stoppage that would

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103 Quoted in Sapers, Legal Cases: 445.
104 680 F. Supp. at 664.
105 Id. at 666.
106 Id. at 666, note 13.
result from re-drawing of new plans. Very few commentators upon *Demetriades* have observed the extent to which this outcome was in fact a significant vindication of the copyright owner's right of reproduction.

In the final analysis, this court was rigidly governed by an overly broad interpretation of *Baker's* idea/expression dichotomy. It remained unshaken in its assertion of building designs as subject matter protectible only by patent:

> Although individuals are not free to make unauthorized copies of copyrighted architectural plans, they remain free to duplicate houses depicted in those plans unless and until the designs embodied in such plans are secured by patent . . . .

Copyright law, in this court's opinion, was designed only to prevent reproduction, while patent was the proper tool to prevent use.

The court also dismissed the plaintiff's claim of trade dress appropriation. Noting that the Lanham Act which governs trade identity cases requires the establishment of a level of "secondary meaning" in the mind of the public for a building to qualify as a trademark, the court turned Demetriades' claim of the 'uniqueness' of his homes against him - - if in fact unique, the requisite development of association by the viewing public of a Demetriades house design with the Demetriades firm merely by sight was not possible. The court also found that the plaintiff would not prevail on claims of

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107 Id. at 666.
unfair competition, misappropriation, and deceptive business practices.

A second opinion in the case was issued four months later. The real estate agency, despite its knowledge of the copying, was found not guilty of contributory infringement. Knowledge of and participation in the infringement have been held to be prerequisites, and as noted by commentator Raphael Winick, "The contribution of the party to the infringement must be relatively high. The doctrine of contributory infringement was not intended to allow a plaintiff to bring a claim against all those who participated in the design process."108 No substantial involvement by the realtor in the infringement could be found, though the court indicated that making available the means of infringement -- such as the provision of photocopy or drafting equipment -- or a degree of control exerted over the primary infringer, might have occasioned a different judgment.109 The court declared that the application of a "simple knowledge and benefit test ... would ensnare individuals far too remotely or tangentially involved ..."110

At a third hearing of component elements of the Demetriades case on October 27, 1988 the plaintiff asserted a claim of misappropriation of trade secrets in the interior of the house: designs of the cabinetry, molding, and other detail work.111 While rejecting

108 Winick, supra note 17: 1631.
111 698 F. Supp. at 526, note 5.
the analogy to protectible trade secrets, the court held that "there can be little doubt that the design features in question are the product of plaintiff's skill and labor."112 Applying theories of divestive publication, however, Demetriades was declared to have forfeited his rights once the "home has been sold and title has passed."113 The court noted also the possible availability to the homeowner of the Demetriades house of trespass or theft actions.114

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The homeowners of 12A Cooper Road have been largely excluded from consideration in most commentary. Although they were not parties to the Demetriades action, the court did comment upon the potential for diminished "resale and psychic value" resulting from a copy of their house standing a mere 600 feet down the road.115 For their part, the Kaufmanns professed innocence of intent. "We didn't think we were doing anything wrong."116 Claiming that she only commissioned the copy because she liked the original, Ms. Kaufmann further asserted that "it is very hard for me to visualize from plans what a house would eventually look like when it is built."

Interviewed by the Washington Post's H. Jane Lehman in 1990, Kaufmann attacked the motives of builder Demetriades, noting that "he has gotten a lot of publicity from this."117

112Id., at 526.
113Id.
114Id.
117Ibid.
In response, the builder referred to the financial settlement he reached with the Kaufmanns, for an amount he was prevented from disclosing. "She could have designed a whole street with a good architect for what it cost."118

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118Ibid. It should also be noted that Judge Goettel had further vindicated the plaintiff's copyrights by specifically noting, in footnote 4 of the decision, that "damages in this case may be substantial. Plaintiffs assert that their architectural fees for the Demetriades house were approximately $40,000. If a willful violation of the copyright laws is proven, damages may even exceed that amount, up to and including $50,000." I am indebted to Carl Sapers for calling my attention to the significance of this language.
Chapter Four

Adherence to the Berne Convention: U.S. and Foreign Copyright of Architecture

The sole purpose of legislating at this time is to place the United States unequivocally in compliance with its Berne Convention obligations.

- - U.S. House of Representatives Committee on the Judiciary, on the occasion of Congressional consideration of the Architectural Works Copyright Protection Act, 1990

In order to understand the evolution of U.S. law affecting copyright and architecture in recent years it is critical from the outset to consider the words of Congress, as excerpted above. They are starkly factual, and absolutely true. At their writing, U.S. law was about to provide copyright protection to buildings and structures for the first time in the nation's history - - a legal right long held by architects in most other countries of the world - - yet the reason that Congress was considering such a change had surprisingly little to do with architecture or the legal rights of the creators of works of architecture. The Architectural Works Copyright Protection Act was, substantially, a piece of legislation which Congress was virtually forced to pass - - in order to join the international copyright community.
The primary reason for placing such emphasis upon this point is precisely because it would be so easy to assume the opposite: that a category of artists in professional practice, for many decades granted a more restricted set of intellectual property protections for their creative works than their counterparts in other countries, and also in comparison to other American artists or authors, had raised their cause with the help of their professional organization to a level of sufficient visibility and urgency that their efforts persuaded Congress to act in their behalf. This assumption is as plausible as it is inaccurate.

The discussion which follows will trace the evolution of federal legislation regarding copyright and architecture during the period from 1986 to 1988, culminating in U.S. adherence to the Berne Convention -- a process which subsequently led to the most intense scrutiny and legislative consideration of the intellectual property rights of American architects ever undertaken.119

119 As noted in the Preface, it is a goal of this study to function both as a concise introduction to the subject for the reader unfamiliar with the terrain examined, and as a contribution to the scholarship of the field. When considering the legislative subject matter of this chapter, and that which follows, the challenge of the proposed dual purpose assumes particularly difficult dimensions. A comprehensive examination of the hearings, studies, legislative histories, and commentary surrounding two major Congressional initiatives is beyond the scope, and the intent, of this study. The material exists most notably in summary form in the study titled Copyright in Works of Architecture, a report commissioned by Congress of the Register of Copyrights; and in the separate Committee Reports and Hearings transcripts published by the Government Printing Office.

The history of the dramatic evolution of statutory copyright protection of American architecture which follows will therefore be idiosyncratic. No attempt will be made to walk the reader sequentially through the more than four years of Congressional and Copyright Office deliberations, nor can a summary of the large volume of commentary -- primarily found in legal publications and the architectural press -- be provided.
American intellectual property law does not protect utilitarian works, believing that progress and creativity are retarded by preventing useful objects from being available to others to use, adapt, or modify.

The decision by the United States in the 1980s to become a member of the Berne Convention for the Protection of Literary and Artistic Works forced a reexamination of the conception of architecture as a utilitarian work under American law.

Congress determined that in order for the United States to comply fully with the Berne Convention - which protects architecture alongside other artistic works - American copyright law would have to recognize the artistic value of architecture by extending copyright protection to architectural works. 120

Beginning in 1905 with efforts to revise and consolidate U.S. copyright acts, through a series of design protection bills and Berne adherence acts introduced between 1913 and 1940, and culminating with studies undertaken in the 1950s to effect an omnibus revision of the 1909 Copyright Act, Congress has considered enhancement of copyright protection of architecture on many occasions in this century, all without substantive outcome. In the face of this history of consideration and subsequent retreat from amended architectural

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Merely the basics are included herein, as I have condensed and interpreted them, and as necessary for an informed consideration of the succeeding chapters.

120Winick, supra note 17: 1602-1603.
protection, why did Congress finally begin to enact significant revisions in the late 1980s?

The answer has much to do with industries other than those involved with the design and construction of buildings, and with U.S. isolation from the international copyright community. Dollars were the pre-eminent concern, as the Library of Congress acknowledged in its news release on the occasion of U.S. adherence to the Berne Convention. A major goal of the treaty-implementing legislation was the "effective suppression of piracy of American works abroad and for full exploitation of new global markets for copyrighted American works."121

The United States is the largest exporter of intellectual property in the world. U.S. copyright industries were responsible for a trade surplus of $1.2 billion in the year 1982 alone.122 Royalties paid to the U.S. film and video industries alone are reported to have accounted for a net $1 billion surplus in 1989.123 Total royalties and licensing fees received in 1987 from foreign firms ran a $7.7 billion surplus.124

Inadequate protection in other countries for the works of U.S. authors, artists, inventors, the film industry, and the computer software industry began to receive increasing attention in the mid-

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1980s. Estimates generated by the U.S. International Trade
Commission in 1988 indicated that foreign infringements of U.S. ideas
may have totaled $61 billion in lost revenue in that year alone --
$25 billion of which was potential income lost by holders of
copyright.

At the time of his signing of the Berne implementation act in
October, 1988, President Reagan highlighted the two industries which
may have been most active and vociferous in applying pressure upon
Congress for reform:

The entertainment industry alone may have lost $2 billion
in potential revenue in 1986 because of pirating, Reagan said.
And, he said, the computer and software industries may have
lost $4 billion in potential revenue. "That's why adherence to
the Berne Convention has been such an important goal of the
Administration and why this occasion marks a watershed for us," he said. 125

That the former actor-turned president chose to sign the bill at
the Beverly Hills Hilton surrounded by Hollywood stars and other
members of the film industry only served to underscore the
importance of the entertainment world to the implementation effort.
Other accounts highlight the role played by the computer software
industry:

Fearing that we might lose our commercial edge in computer
technology due to piracy, computer software manufacturers

125Lee May, "Reagan Authorizes Copyright Expansion," Los Angeles Times,
November 1, 1988, part 6, page 2, col. 4.
became the Berne Convention's strongest advocates, and it was largely through their efforts that it was finally adopted. 126

By joining the 102-year old international copyright convention, the U.S. was, in fact, positioning itself to achieve greater bargaining power in the negotiation of stronger enforcement and remedies for infringements of the intellectual property of a wide range of American creators of vulnerable works.

Many accounts of the Berne adherence process use the term 'consensus' to characterize the coalescing of opinion regarding the necessity for action that occurred in 1987 and 1988. Indeed, the full support of the White House, the Departments of State and Commerce, and the private sector carried the day. Though Berne implementing legislation had never before reached the floor of the House of Representatives, that body passed H.R. 4262, "The Berne Convention Implementation Act of 1988" by a unanimous vote of 420 to 0 on May 10, 1988.

The copyright community itself was supportive of U.S. adherence. Four major concerns of these scholars and legal professionals were identified in a Georgetown Law Journal study:

- "Concerns over the lack of effectiveness of domestic and international trade laws;
- Concern over the creation of more comprehensive international copyright protections;
- The absence of a voice for the United States in an effective international copyright organization; and,

The avoidance of "back door protections". 127

Testifying in support of adherence to the Convention before the Senate, and assisting with the accommodation of differing House and Senate versions of the implementing legislation, Register of Copyrights Ralph Oman was another who noted "the emerging consensus" favoring adherence. On October 20, 1988, by a unanimous voice vote, the Senate gave its advice and consent to ratification of the Berne Convention, and on October 31, 1988, President Reagan signed H.R. 4262 into law as P.L. 100-568 in the ceremony noted above. The law became effective on March 1, 1989 with U.S. adherence to the Berne Convention.

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What all of this has to do with architecture can be found in the language of the Berne Convention itself. Article 2(1) of the treaty requires protection for three categories of works related to architecture:

a) "works of architecture";
b) "illustrations . . . plans [and] sketches . . . relative to . . . architecture"; and,
c) "three dimensional works relative to . . . architecture."

The periodic interpretive guidelines published by the World Intellectual Property Organization (WIPO) to assist in implementation of the Berne treaty are similarly unambiguous in finding that

completed architectural works are protected by the Convention. Protection for works of architecture had been added to the Convention at its 1908 Berlin Revision Conference; protection for "three dimensional works" was added at the 1967 Stockholm Revision.

Early hearings on Berne implementing bills paid little attention to these architectural provisions, and it was only relatively late in the legislative process that the House and Senate realized the implications of adherence -- even an adherence by the proposed 'minimalist' approach favored by Congress, under which only those changes in U.S. law absolutely required for compliance with the international treaty were to be implemented. At hearings held before the Senate Committee on the Judiciary's Subcommittee on Patents, Copyrights, and Trademarks in February and March of 1988, Rep. Robert W. Kastenmeier (D-Wis.) described the history of architectural language in the various Berne bills:

Initially, all the bills assumed that it was necessary to introduce specifically a reference to architectural works as a subject matter of copyright and, once having done so, a number of specific exemptions and limitations had to be drafted to protect the reasonable interests of builders, consumers, and the public generally. It was certainly not my intent to provide copyright protection for functional or utilitarian aspects of architecture. In general, any protection for architectural works must be subject to the limitations which extend to other pictorial, graphic and sculptural works and therefore preserve the "idea-expression dichotomy."

Despite the original assumption, during House hearings convincing testimony suggested that present U.S. copyright law already protects works of architecture and works relating to
architecture (such as blueprints and models) so as to meet the
general standards of the Berne convention. Therefore, under a
minimalist approach, we might not have to legislate at all.
Very little testimony addressed the question of appropriate
protection for architectural works and, although
representatives of architects approved of the proposed step,
with necessary amendments, it did not appear to be a crucial
matter to them.

I am concerned about moving precipitously in a matter
which touches very fundamental lines, long drawn in our
copyright law, with respect to the non-protection under
copyright of creativity more appropriate to design or patent
protection. I am simply not satisfied that we know enough to
legislate with confidence. Whether we should extend
substantial protection to architecture and materials relating to
architecture under the general category of pictorial, graphic,
and sculptural works... can be considered after adherence to
Berne. This consideration can be in the context of design
legislation, by a specially appointed commission or appropriate
governmental agencies.128

As Kastenmeier indicated, and as is repeated elsewhere in these
pages as a major theme of this study, architecture presented a
conundrum to those attempting to fit it within the fundamental
precepts of existing copyright doctrine. Rep. Kastenmeier's statement
graphically describes one such moment in U.S. legal history. Having
heard conflicting testimony on the adequacy of current U.S. law to
meet the standards of compliance regarding protection of
architecture, both the House and Senate deleted sections from the
existing bills that specifically, and significantly, would have
expanded the copyright eligibility of architectural works.

128Rep. Robert W. Kastenmeier, Hearings before the Subcommittee on Patents,
Copyrights, and Trademarks of the Committee on the Judiciary, U. S. Senate.
100th Congress, 2d Session, on S. 1301 and S. 1971, February 18 and March 3,
1988: 54-55.
Given this uncertainty, and in the absence of a perceived urgency on the part of the architectural profession, deferral was the chosen course. As passed in October of 1988 the Berne implementing legislation added only a short amendment to current law, clarifying that architectural works are protected under the general category of pictorial, graphic, and sculptural works.

On April 27, 1988, Representative Kastenmeier wrote to Register of Copyrights Ralph Oman, requesting that the Copyright Office undertake a study of current U.S. and foreign laws regarding the eligibility for copyright of architectural works.

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As part of the study requested of the Copyright Office by the House Subcommittee, published in 1989 as Copyright in Works of Architecture, the Register of Copyrights undertook a survey of the statutes and selected case law of the 81 Berne member countries regarding works of architecture. The findings are summarized below, excerpted from the Report for their value in indicating the extent to which architects (and other creators of building designs) in the United States were accorded diminished levels of protection for their designs and buildings than their foreign counterparts:

A number of common provisions run through these [foreign] statutes. First the laws expressly protect architectural works embodied in buildings and structures. Second, works of architecture are generally protected without the need to meet a higher standard of originality, e.g., artistic merit. Some laws expressly state that no such standard is required, while others
provide special privileges to authors of works of architecture that possess such a character.

Works of architecture are generally granted moral rights, a right that conflicts, on occasion, with a right generally given to owners of buildings to make alterations of a technical nature or for purposes of practical utilization ....

If located in a publicly accessible location, [foreign works] are subject to unauthorized two-dimensional reproduction in the form of photographs, drawings, and paintings ....

Works of architecture are subject to the general infringement provisions for damages, except significantly, that an injunction may not be granted against a substantially similar building once construction thereof has begun, and infringing buildings may not be demolished. 129

Chapter Six of the Copyright Office report, "Foreign Laws on Works of Architecture," contains descriptions of the statutory provisions and selected case law of individual countries. Legal scholar Natalie Wargo, in a May, 1990 issue of the New York University Law Review, provides a similarly comprehensive review of foreign architectural protection at pages 414-439. 130

The most recent international attempt to develop uniform principles of protection for architecture was undertaken by a committee of governmental experts convening in Geneva under the auspices of UNESCO and the World Intellectual Property Organization (WIPO). Their purpose was the development of a Draft Model Copyright Law, and is of interest here for its representation of the

most recent occasion on which an international group has considered copyright and works of architecture.

One section of a set of proposed principles circulated in a 1988 memorandum by this committee discussed works of architecture. The 1989 Copyright Office report summarized the committee's model law provisions:

The countries agreed that the right of reproduction includes the right to construct the work of architecture and the making of copies in any manner or form of the works relative to architecture. Authors of works of architecture would enjoy the exclusive right of authorizing alterations except alterations of a practical or technical nature which are necessary to the owner of the building.

Authors would enjoy moral rights of paternity ... and of integrity (that is, to prohibit any distortion, mutilation, or other modification of, or other derogatory action in relation to the work of architecture that would be prejudicial to honor or reputation). Finally, a consensus exists that reproduction of external images of works of architecture may be permitted for private purposes and even for commercial purposes where the structure is on a public street, road, or other publicly accessible place.\(^{131}\)

These model law provisions were completed by the date that Congress began consideration of the 1990 Architectural Works Copyright Protection Act, and were made fully available for consideration -- they were reprinted in the 1989 Copyright Office Report presented to the House Subcommittee on Courts, Intellectual Property, and the Administration of Justice. The Copyright Office

\(^{131}\)1989 Copyright Office Report: 222-223.
noted that due to its general unavailability, the WIPO/UNESCO draft provisions were included in full in its report.

There is no indication in the published record, hearings transcripts, or legislative report that Congress ever referred to the international recommendations in its deliberations, despite the intent of UNESCO and WIPO that the guidelines should serve as useful points of reference for Berne member nations during future revisions of copyright law provisions concerning architecture.\textsuperscript{132}

It should be noted, however, that beyond minimum requirements for protection, the Berne Convention allows wide latitude to member nations in both the subject matter protected and the scope of that protection. The language of Berne does not require, in adhering to the Convention, that the United States (or any country) mirror the policies and laws of any other member nation. Indeed, the signatory nations to the treaty vary widely in their application and enforcement of copyright provisions regarding architecture -- a diversity of approach that contributed strongly to Congressional uncertainty regarding the adequacy of pre-1988 U.S. law to meet the standards of Berne, and which resulted in the decision noted above to commission a study and defer action to a future date.

\textsuperscript{132}This apparent failure of Congress to consider what would have been, at the time of its Architectural Works Copyright Protection Act proceedings, the latest international guidelines on the subject, has proven resistant to clarification.
Chapter Five

The Architectural Works Copyright Protection Act of 1990

As discussed in the preceding chapter, 1988 was the year in which legislation was filed in Congress with the explicit goal of U.S. accession to the Berne Convention: the Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong., 2d Sess. was introduced on March 28, 1988 and passed on May 10, 1988. A version of H.R. 4262 as amended by the Senate was passed on October 12, 1988, and was signed by President on October 31, 1988.133 U.S. adherence to Berne became effective on March 1, 1989.

Congressional apprehension and uncertainty prevented explicit protection of built architectural works in the language of the Act, however. While providing, for the first time, explicit federal statutory protection for architectural plans and drawings, some in Congress had determined that for the purposes of joining Berne, the separability test for utilitarian articles codified in the 1976 Act was sufficient to meet U.S. implementing obligations. A further account of 1988 Congressional reasoning was provided two years later on the floor of the House of Representatives by Rep. Robert W. Kastenmeier, chairman of the Subcommittee on Courts, Intellectual Property, and

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133Public Law No. 100-568, 102 Stat. 2853
the Administration of Justice:

During our initial deliberations on Berne adherence, the issue of protection for works of architecture failed to draw much response. Then .... two respected copyright scholars -- Professor Paul Goldstein of Stanford Law School and Barbara Ringer, Esq., former Register of Copyrights -- testified that creation of a separate statutory provision for works of architecture may not be required under the minimalist approach .... Relying on this testimony, the provisions on works of architecture were deleted from the Implementation Bill. The experts recommended, however, and I agreed, that further study of the issue be undertaken.

Consequently, on April 24, 1988 I sent a letter to the Register of Copyrights, Ralph Oman, requesting the Copyright Office to conduct a full review of the subject .... In order to gain information for the study, the Copyright Office published a Notice of Inquiry in the Federal Register, soliciting comments from all affected parties .... Eleven replies were received. Respondents included the Frank Lloyd Wright Foundation, the American Institute of Architects (AIA), individual architects and engineers, and law firms representing architects, contractors, and builders.

On June 19, 1989, Ralph Oman delivered his 226-page report to me. In reading the document, I was surprised to learn that the study had generated sharp conflict within the Copyright Office. 134

Entitled Copyright in Works of Architecture and presented by the Register of Copyrights to Rep. Kastenmeier in a press conference held in the James Madison Memorial Hall of the Library of Congress, the Report determines in its Executive Summary that while plans, drawings, blueprints, models, and separable artistic features of a work of architecture appeared to be adequately protected by extant

U.S. copyright law, the adequacy of protection for constructed "works of architecture" remained in doubt with respect to Berne Convention standards. The Report noted that the copyright law of virtually every Berne member country makes explicit reference to the protection of buildings and structures.

Four policy options were presented to the Subcommittee by the Copyright Office:

a). "Create a new subject matter category for works of architecture in the Copyright Act and legislate appropriate limitations;

b). Amend the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans;

c). Amend the definition of 'useful article' in the Copyright Act to exclude unique architectural structures; or,

d). Do nothing and allow the courts to develop new legal theories of protection under existing federal statutory and case law, as they attempt to come to grips with U.S. adherence to the Berne Convention and allow the various state court remedies to develop." 135

On February 7, 1990, Rep. Kastenmeier introduced the Architectural Works Copyright Protection Act (H.R. 3990) on the floor

of the House of Representatives. Hearings were conducted before the Subcommittee in March of that year, with testimony and written comment from architect Michael Graves, the associate general counsel of the AIA, the chief executive officer of the Frank Lloyd Wright Foundation, the Register of Copyrights, and the Assistant Commissioner for Trademarks of the Patent and Trademark Office.136

Enacted on October 27, 1990 as Public Law No. 101-650, Title VII, Section 701-706 (104 Stat. 5133, 5134), the Act was signed by President Bush on December 1, 1990. 137

As enacted, the Architectural Works Copyright Protection Act implemented one of the four policy options proposed by the Register of Copyright's report. It amended the existing Copyright Act's 'definitions' section by adding the following definition of an "architectural work":

An architectural work is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of

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136 These Congressional hearings on the 1990 Act before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives were conducted under the direction of Wisconsin Representative Robert W. Kastenmeier, in his role as Chairman of the Subcommittee. The transcript of the hearings constitutes a source document of considerable significance, contributing greatly to an understanding of the reasons why Congress crafted the legislation as it did. It is quite apparent, for example, that the Subcommittee relied considerably upon the testimony of the architectural professionals who appeared before it. The final language of the bill unambiguously reflects that participation.

137 The Act was incorporated within an omnibus judicial reform act, the Judicial Improvements Act of 1990, Public Law No. 101-650, 104 Stat. 5089.
spaces and elements in the design, but does not include individual standard features.\textsuperscript{138}

Prior to Congressional revision, H.R. 3990 had protected not only buildings, but also other "three-dimensional structures". Fearing that this designation may extend to "interstate highway bridges, cloverleaves, canals, dams, and pedestrian walkways," none of which Kastenmeier's subcommittee felt should be protected, the category was eliminated.\textsuperscript{139} The House Judiciary Committee had urged that the term 'building' include habitable structures like residences and office buildings, and also include structures used by people but not inhabited, such as churches, gazebos, and pergolas. Many commentators have noted the existence of a gray area between eligible buildings and possibly ineligible functional structures: swimming pools, parking garages, bandshells, barns, fences, and walls are among those in the latter category. Designed landscapes such as golf courses and gardens were similarly unaddressed. Some of these works will certainly remain beyond the realm of protection - others might find coverage under the still-governing "pictorial, graphic, or sculptural works" category of the 1976 Act - subject, of course, to the separability test for utilitarian objects.

Perhaps as a consequence of the resulting uncertainty, the Copyright Office requested commentary and subsequently announced

\textsuperscript{138}Architectural Works Copyright Protection Act: section 702(a) (1990). Hereafter also referred to as the Architectural Works Act.
its final regulations on October 1, 1992. Among the clarifications and revisions contained therein were the following:

"The term building means 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 following structures, features, or works cannot be registered: (1) **Structures other than buildings.** Structures other than buildings, such as bridges, cloverleafs, dams, walkways, tents, recreational vehicles, mobile homes, and boats. (2) **Standard Features.** Standard configurations of spaces, and individual standard features, such as windows, doors, and other staple building components.  

Among comments received by the Copyright Office regarding its proposed regulations were requests by the American Institute of Architects (AIA) for two modifications. It first argued for the adoption of a new registration form specifically tailored for architectural works - - an accommodation found unnecessary by the Copyright Office. The AIA also requested clarification of the definition of “publication.” The organization complained that limited distribution of architectural plans to public agencies and subcontractors had been found to constitute publication. The Copyright Office acknowledged that case law was congruent with the AIA's interpretation, and explained that it had no intention of mandating that filing plans with public agencies would generally . . . .

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constitute publication. It did not, however, inflexibly establish a policy that a public filing might never be considered publication. 141

Other elements of revised copyright eligibility under the 1990 Act are summarized as follows: The legislative history can be interpreted to extend protection to both the interior and the exterior of architectural works. Architectural plans and drawings are to receive dual protection: as two-dimensional "pictorial works" under the 1976 Act, and as architectural works "embodied in any tangible medium of expression" under the 1990 amendments. Also eligible for dual protection are monumental “non-functional” works of architecture previously eligible as "sculptural works," and now also as "architectural works". Such dual protections were fully and explicitly intended by the Judiciary Committee: "Either or both of these copyrights may be infringed and eligible separately for damages."142 Other media qualifying for dual protection are models, plans, blueprints and renderings of architectural works, and computer data and programs for design and three-dimensional drafting.

Commentator Raphael Winick noted the absence from protectible 'works of architecture' of some of the most profitable items created by architects:

Over the past twenty years, architects have used their skills to design a wide variety of household items. Teapots, electric razors, telephones, and other items have all received a great

141 Ibid., 45309.
deal of attention from architects. For an entire generation of Americans, these architect-designed items have become totems of success. Their designers have blurred the line between architecture, art, and industrial design. However, these objects, though designed by prominent architects, will not qualify as... architectural works, and must instead qualify as... sculptural works. As in all copyright law, it is the nature of the work, and not the profession of the author, that determines the copyrightability of the works.143

Regarding the standard of originality to be applied, the legislative history was quite specific:

The proposed legislation incorporates the general standards of originality applicable for all other copyrightable subject matter. This standard does not include novelty, ingenuity, or aesthetic merit...144

This last provision takes into consideration a fundamental principle of American copyright law noted in an earlier chapter, that judicial interpretations of artistic worth are to be scrupulously avoided. The standard of originality requires only that the work owe its existence to the efforts of the author. If registration is sought for subject matter which incorporates any element created by a prior author, that prior contribution must be clearly identified.

The incorporation of the right to build, the so-called "execution right," was well-established by the Act. This right constituted the first of the Copyright Office's four options, and was the alternative most promoted by the AIA. As considered above, many courts prior to 1990 had held that the owner of a copyright in architectural plans

143Winick, supra note 17, at 1628.
could not prevent others from building according to those plans, in the absence of actual copying of the documents.\textsuperscript{145} The right to reproduce the copyrighted architectural work can of course represent a fundamental economic benefit to the author. Exclusivity of reproduction pursuant to copyright appears well-established by the 1990 Act.

The existence of a considerable amount of skepticism regarding the advisability of extending copyright protection to buildings and other structures must be acknowledged. The opposition to the concept by the American Institute of Architects has been noted above, and will be considered more full in Chapter Seven. Among those who assert that discharge and subsequent unauthorized client use of plans and drawings represents the most frequent circumstance of vulnerability for architects -- in the real world of late-twentieth century practice -- the protections afforded under the 1976 Copyright Act were substantial and sufficient.

"Protecting buildings [by copyright] is chimerical, and the proposition has no relationship to the real world," asserts attorney Carl M. Sapers:

The 1976 Act afforded architects protection in the two areas in which they needed it: protection against being discharged in midstream and protection against an owner attempting to reuse the plans for a second project. Were it not for the

\textsuperscript{145}For a discussion of the execution right, and the extent to which copyright owners of architectural plans were in fact vulnerable under actual conditions, see Chapter One, "Copyright and Architecture in America: An Historical Overview, Anglo-American Traditions to the Twentieth Century."
interest in aligning our law with the Berne Convention . . . . I cannot imagine that the 1990 amendment would have been made.\textsuperscript{146}

Mr. Sapers, whose Boston-based practice with the firm of Hill & Barlow includes the representation of many architects, fears that the 1990 Act introduces a dangerous new element of vulnerability for his clients. As building owners begin to perceive the legal ramifications of owning a standing building which might become the target of a copyright infringement suit - - not a possibility before 1990 - - they might begin to demand covenants from their architects, in which the latter are required to warrant the originality (or derivation from the public domain) of the design. Such a covenant might also seek to indemnify and hold harmless the owner against any future infringement action. "This is a big price to pay to win a benefit of so little utility," cautions Sapers.

A further concern regards the new Act's expansion, and muddying, of the concept of "access." Along with "substantial similarity," access constitutes a core requirement for a finding of infringement under U.S. law. Now that access is no longer limited to plans and drawings, but extends to buildings themselves, this argument is concerned with the basis upon which access will be determined in the future- - given the ready viewing by any passerby of buildings \textit{in situ}, and from a distance in photographs.\textsuperscript{147}

\textsuperscript{147}These concerns are expressed in Mr. Sapers' article in the March, 1993 issue of \textit{Architectural Record}. ("Mixed Blessing: The Architectural Works Copyright Protection Act Is Not All it Seems," at pages 21-22.)
It remains to be seen whether architect indemnification of clients will become a staple of written agreements. Conversations with a number of architects and attorneys indicate that this has not yet begun to occur. Given that the act has been in existence for 3 1/2 years at the time of this writing, perhaps the fear is exaggerated. Or perhaps it will require only one widely publicized case of successful assertion of infringement against a building owner for the practice to become commonplace.

There is little doubt that effective, prudent, and thorough contracting -- the drafting of comprehensive written agreements -- remains the single best line of defense for most architects who practice in the realm of one-time, or high-style, commissioned works. The utility of the Architectural Works Copyright Protection Act might be negligible for such designers. However, as will be discussed in a subsequent chapter, the extension of copyright protection to completed structures has proven very useful to one category of building designer -- the professional home builder. The 1990 Act permits no distinction between architect-designed houses and tract housing. To the extent that each incorporates original expression, each constitutes a protectible building design under the act. Every commentator's perception of the wisdom of the Architectural Works Copyright Protection Act is doubtless influenced by the realm of buildings with which he or she is typically concerned.

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Broadened eligibility and expanded subject matter categories stand as signal hallmarks of the 1990 Act. Another is the limited protection offered the covered works. This combination of broad subject matter and limited protection appears to have been the method by which Congress accommodated its preference for minimalist accession to the obligations that the Berne treaty required of a complying copyright regime.

The first of the major limitations was supported by the architects themselves. The original draft of the Architectural Works Act had permitted building owners to make only minor or necessary changes without the permission of the architect. These provisions derived from the subcommittee’s correct perception that Berne language provides to authors of all eligible works variations of “moral rights” - rights of personality distinct from proprietary rights (such as copyright), which address issues such as the integrity of the work and the author’s reputation. At the urging of architect Michael Graves, this condition was replaced by an expansion of the owner’s right to make any changes to the building for any reason, including the right of demolition. Graves reasoned, not implausibly, that under the more restrictive doctrine owners would simply demand that architects assign the copyright to them, thereby resulting in wholesale forfeiture of the recently-gained protections.

The second major limitation is stated as follows:

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.148

This pictorial limitation protects the interests of the public and of other architects. It was a hotly debated question during the discussions of extending copyright protection to architecture. The Frank Lloyd Wright Foundation was among those who argued that economic harm accompanies unrestricted commercial use of photographs and pictorial representations of architectural works. The European countries have varied widely in their stance on the issue: Belgium, Germany, and France grant variations of a right of prohibition of two-dimensional reproductions to authors; the United Kingdom, Denmark, and Finland do not.

The range of remedies for infringement under the Architectural Works Copyright Protection Act include enjoined construction, statutory and actual damages, recovery of profits, attorneys fees, and demolition. The consequences of a determination of remedies are significantly mitigated if plans and drawings alone constitute the infringing element. Destruction of copies or return to the owner prior to construction represent a forestalling of substantive economic harm. When construction of an infringing building has begun, forms of relief assume greater consequence and complexity.

The Act permits copyright holders to enjoin construction of infringing buildings, even if substantially begun. Some testimony

148 Architectural Works Copyright Protection Act, section 704(a).
was heard which argued that the economic waste attendant to the
destruction of buildings already under construction should preclude
the granting of injunctions in most cases. The AIA favored a
principle of exercise of judicial discretion in the weighing of public
policy considerations regarding economic waste against the rights of
copyright holders. Duke University commentator Raphael Winick
assessed the problems inherent in injunctive relief for architectural
works as follows:

The economic waste accompanying an injunction against
construction of an architectural work may preclude injunctive
relief. Construction of a building requires significant costs by
investors, banks, and tenants. These parties would all be
greatly affected by an injunction against construction of an
infringing building. Destruction of an infringing building
entails even greater potential losses. Large economic costs,
such as land acquisition costs, accompany a construction project
long before construction begins. Compliance with local zoning
and construction regulations, and engineering and legal fees
impose similar costs. An injunction will disturb the repayment
schedule of construction loans and other forms of financing.
Statutory or actual damages or a return of profits may be more
appropriate forms of relief for infringements of architectural
works.\textsuperscript{149}

As seen in Chapter Three, the court in \textit{Aitken, Hazen, Hoffman,
Miller, P.C. v. Empire Construction Co. et. al.} held that damages for
infringing copies of plans should consist of actual damages — the fair
market value of the plans — and the infringer's profits. Another
approach to damages is represented in \textit{Robert R. Jones Assoc. v. Nino
Homes} (858 F. 2d at 280-81, 6th Cir. 1988) where it was found that
the plaintiff is entitled to the infringer's profits to the extent that the

\textsuperscript{149}Winick, \textit{supra} note 17, at 1629.
profits exceed actual damages. Other courts have crafted modes of relief that have included the mandated payment of a reasonable license fee for use of the copyright.

The Architectural Works Copyright Protection Act pre-empts state regulation of equivalent rights in equivalent subject matter, establishing unambiguously that most state private law rights pertaining to works of architecture will be pre-empted. It follows from this pre-emption clause that otherwise potentially available modes of alternative intellectual property protection, such as misappropriation, unfair competition, conversion, and unjust enrichment law may not be available to the author of architectural works.

A significant exception to the pre-emption clause was established by section 705 of the Act, wherein it was determined that "State and local landmarks, historic preservation, zoning, or building codes relating to architectural works" will not be pre-empted by the Act. These state and local ordinances often entail levels of control over buildings - - such as the right to demolish - - that were explicitly denied their architects, and reserved to building owners, under the 1990 Act. The framers of this legislation, seemingly acting under principles of federalism, have here acknowledged the primacy of valid local land use concerns - - over which it was determined that

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150 The principle of pre-emption is one of long standing. See, e.g., Sears, Roebuck & Co. v. Stiffel Company, 376 U.S. 225 (1964).
151 Architectural Works Copyright Protection Act, section 705.
federal copyright law, and the otherwise reserved property rights of building owners, ought not to govern.

The Architectural Works Copyright Protection Act applies to and protects original architectural works, whether embodied in buildings, models, plans, or drawings, that were created on or after December 1, 1990. Also protected are any architectural works embodied in unpublished plans or drawings before December 1, 1990 but not constructed as of that date. Unless constructed by December 31, 2002, however, such protection will terminate on that date.152 The normal copyright term is for the life of the author plus fifty years. The term of protection for works for hire is seventy-five years from the first publication of the work, or one hundred years from the date of creation, whichever expires first.

A final note regarding the Act's provisions: given the fact that the availability of statutory damages and attorneys fees to successful plaintiffs of infringement litigation continues, at the date of this writing, to hinge upon a definition of the phenomenon of "publication," the decision of the drafters of the Act to forego inclusion of specific defining language in this area appears questionable. The statutory concept of "publication" is a ready-made source of confusion for most architects, for whom the concept implies only coverage in the architectural press. A definition of "publication" as it applies specifically to works of architecture would have been beneficial.

152 q.v., Chapter Two, "Complexity, Contradiction, and Copyright." 105
Recent revisions proposed as part of the Copyright Reform Act of 1993 (H.R. 897) would eliminate the formality of registration with the Copyright Office as a prerequisite for the filing of an infringement suit - - if enacted by Congress the significance of 'publication' will thereupon be rendered moot.

* * * * *

There has yet to develop a substantive body of case law under the Architectural Works Copyright Protection Act. Aitken, Hazen v. Empire and Demetriades v. Kaufmann, as noted, arose from disputes generated in the late 1970s and mid-1980s, respectively - - both were settled prior to passage of the 1990 Act. One case may be observed: *The Value Group Inc. et. al. v. Mendham Lake Estates et. al.*,\(^{153}\) in which the U. S. District Court for the District of New Jersey filed an opinion on September 4, 1992 issuing a temporary restraining order upon the defendant. The court held that the owner of a copyright of architectural plans who is likely to succeed on the merits of a copyright infringement allegation is entitled to a temporary restraining order enjoining the construction of a house that would infringe the copyrighted plans.

Defendant Mendham Lake was charged with the use of a photocopy of floor plans contained in plaintiff real estate developer's promotional brochure. Although the court cited the 1990 Act, it noted that courts found authority under the prior 1976 law to issue

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\(^{153}\) The Value Group, Inc. et. al. v. Mendham Lake Estates et. al., Civ. Action No. 92-2758 (WGB), United States District Court (DNJ) (1992).
such orders as well. Judge Bassler added that Value Group's copyright registrations constituted prima facie evidence of copyright validity and ownership.

Actions arising under the Act, while slow to appear, will doubtless begin to be heard soon by the federal judiciary -- the judgments of these courts as they interpret the substantially altered statutory environment will deserve close scrutiny. 154

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Despite the testimony of architect Michael Graves, the Frank Lloyd Wright Foundation, and the American Institute of Architects in favor of passage at the 1990 Congressional hearing, a former and a current Register of Copyrights have each remarked upon the dearth of response to the 1988 Notice of Inquiry, and the difficulty in getting people in the profession to testify on the architecture issue. Perhaps most telling of all was the initial professional response to the availability of protection subsequent to passage of the Act:

According to Copyright Office reports, however, the new regime prompted only a "disappointing smattering of culturally insignificant claims": 675 filings for registration of architectural works in calendar year 1992. 155

That the long and convoluted path to expanded copyright protection for works of architecture has so clearly failed to receive

154 There may exist a lag time of deferred effect which has merely forestalled some registrations -- in this regard it should be remembered that final Copyright Office regulations were not issued until October, 1992.

an enthusiastic endorsement or utilization by many in the profession perhaps reflects the complexities which lay behind the decades of delay. We have seen how the nature and customs of architectural practice in this country, particularly the strong tradition of quoting and borrowing from prior works, has caused much uncertainty as courts of law and Congress have struggled with the anomalous exclusion of works of architecture from the protections accorded the works of other creative artists.

The dual nature of many buildings, as works of artistic expression and utilitarian objects serving functions of shelter and habitation, has contributed to a legacy of quixotic case law and awkward legislative retreats from international standards. More than a century was to pass before the United States found its 'minimalist' course to compliance with the Berne Convention. It is a revealing saga with much to say about the nature of American institutions, cultural values, and Constitutional priorities.

* * * *
"In determining copyrightability . . . . three primary interests must be considered. The first two are those traditionally considered in copyright law -- the interests of the architect, as the author, on the one hand, and the public, which includes architects who later will be borrowing ideas, on the other. But into this traditional balance must also be considered the significant aspects of the tangible property owner, the owner of the building. This is the interest that is concerned with the 'useful aspect' of the buildings . . . .

Subject to reasonable interpretation and application, the [1990] Act should protect originality and foster creativity without restraining competition or interfering with the legitimate borrowing of architectural ideas and concepts . . . .

If interpreted and applied by the courts to maintain a balance among the three interests -- private intellectual property, private tangible property, and public, the Architectural Works Copyright Protection Act will create advantages for each."

Chapter Six

The Architects: A Survey

The legal rights of American architects in the realm of intellectual property underwent substantive revision on December 1, 1990 with the enactment of the Architectural Works Copyright Protection Act. At the time of this writing more than three years have passed since the Act took effect. What has been the reaction of the architectural community and other design professionals in current practice?

The answer is not to be found in existing written considerations of the subject. A large body of legal scholarship addresses the topic of copyright in architecture, but aside from the occasional excerpted statements regarding the traditions of quoting and derivation in their profession, this literature does not include the voices of architects. Nor do other surveys that have been identified. Progressive Architecture magazine conducts an annual, topic-specific reader poll, but even in its surveys examining professional ethics and architect-client relations, issues of intellectual property and unauthorized use of documents have not been areas of inquiry. As noted previously, the American Institute of Architects does not conduct regular surveys of its membership.

This study, therefore, proceeds from the assumption that it is important to know what architects in current practice think of the relevance of copyright in their professional domain. In the absence
of their voices, hypotheses regarding the effect of expanded copyright upon professional practice remain purely speculative.

Toward that end, an informal survey of practicing architects was undertaken. Taking the form of a brief inquiry consisting of five questions, the survey was accompanied by an explanatory cover letter and mailed in the fall of 1993 to the principals of twenty architectural firms ranging in size from small offices of fewer than ten architects to large firms employing upwards of fifty design professionals.156

Follow-up telephone calls in early 1994 resulted in an aggregate set of twelve responses. The two extremes of the spectrum of firm size, the very large production house and the small office, proved most elusive and remain less well-represented in the set of responses described below.157 It was neither the intent, nor was it possible, to construct an extensive poll of a large number of practicing architects. Rather, the goal was simply to include the thoughtful considerations on the subject of copyright of a restricted group of practicing architects -- an objective which was substantially achieved.

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156 See questionnaire, enclosed as Appendix (following Bibliography).
157 As an example of the difficulty in obtaining responses, none of the four practicing architects who are members of the faculty of the University of Pennsylvania Department of Architecture, or are affiliated with that Department, responded to the questionnaire -- sent from a student in their own graduate school.
Design professionals vary in their attitude toward the importance of legal protection for their work. Some design professionals want their work imitated. Imitation may manifest professional respect and approval of work. When credit is given to the originator, imitation may also enhance the professional reputation of the person whose work is copied. Some design professionals believe that free exchange and use of architectural and engineering technology are essential.

Even design professionals who want imitation or who do not object to it draw some lines. Some design success is predicated upon exclusivity. Copying the exterior features and layout of a luxury residence or putting up an identical structure in the same neighborhood is not likely to please the architect or client. The same design professional who would want his ideas to become known and used might resent someone going to a public agency and without authorization copying construction documents required to be filed there.

This same design professional is likely to be equally distressed if a contractor were to copy plans made available for the limited purpose of making a bid. Much depends upon what is copied, who does the copying, and whether appropriate credit is given to the originator.\textsuperscript{158}

This description of the attitudes of architects toward design protection was written in 1985 by Justin Sweet, a professor of law at the University of California, Berkeley. Professor Sweet taught for many years one of the earliest course offerings in professional practice within the curriculum of a graduate school of architecture--at the UC-Berkeley College of Environmental Design. His assessment of the attitudes of architects is strikingly congruent with the findings

of the survey conducted for this study - - as described above, and as examined in the paragraphs which follow.

Asked to characterize their level of awareness of the changes in copyright of architecture effected by passage of the 1990 Architectural Works Copyright Protection Act, eight of twelve respondents considered themselves wholly uninformed, with another three characterizing themselves as at least moderately aware of the change. Only Phillip G. Bernstein, a senior associate of Cesar Pelli & Associates of New Haven, Connecticut, characterized himself as 'reasonably well-informed.'

These responses correspond markedly with the opinions voiced by lawyers who represent architects. In the course of interviewing five such attorneys, all expressed variations of the same theme: architects are substantially uninformed about their legal status, and the legal environment within which they practice.

The architects were asked to identify the source of whatever knowledge they had acquired regarding the 1990 Act, or of intellectual property protection of architecture generally. Among respondents who felt that they had developed any level of awareness, their attorneys and their own reading were the most frequently-identified sources of information. Perhaps most notable in this regard was the fact that only two respondents identified their professional organization, the American Institute of Architects, as a source of any of their information on the subject.
The architects were next asked whether they or the firms which they represented have ever registered any of their architectural works - either plans, drawings, models, or completed structures (as 'building designs') - with the U.S. copyright Office in Washington, D.C. None of the twelve respondents report having ever registered any architectural work, in any medium of expression. Three respondents noted that they have registered decorative arts, furnishings, and 'product designs', and two firms reported the practice of affixing copyright notice (©) on some of their documents. All architects, it should be noted, copyright their published writings.

The architects were then asked to discuss briefly the reasons which underlie their decisions to register (or not register) their works for copyright protection. The single most frequent reason given for not registering was administrative inconvenience. The 'hassle' of registration, even though they generally saw the potential value of protecting their works, was identified by two responding firms. Lack of knowledge of the procedures, the large volume of potential material, failure to understand the timing of registration within the design process, cost, and procrastination were other reasons given for not registering.

Five of the responding architects referred, to varying degrees, to a philosophical discomfort with the concept of copyright and its utilization within their profession. John (Chip) Harkness of The Architects' Collaborative (TAC) in Cambridge, Massachusetts and Charles Redmon of Cambridge Seven Associates in the same city, both
referred to their belief in the public domain, and the importance of a collaborative spirit in the profession. Asserting this line of thought most strongly was Joseph Esherick of Esherick, Homsey, Dodge, and Davis, in San Francisco, California:

I believe ideas - - if useful -- belong in the public realm and should not be private property . . . . Neither architecture or ideas should be commodified.159

Perhaps the most adamantly opposed set of responses was submitted by Samuel Y. Harris, an architect, engineer, and partner of the Philadelphia, Pennsylvania firm of Kieran, Timberlake, and Harris, who considers the copyright of building designs both a "total waste of time and money" and "obnoxious and arrogant." 160

Architects Robert Venturi and Denise Scott-Brown of Philadelphia referred in their responses to the futility of registration. It is their opinion that even if architects wished a measure of protection, the legal system would not be a feasible recourse for most practitioners in the event of an infringement. The extreme costs in both time and money of litigation in pursuit of infringement, they assert, would prevent most architectural firms from feeling that they could reasonably afford to proceed with an action. For Scott-Brown another concern is the difficulty which she perceives to be inherent in the crafting of an effective law - - one that would not ultimately create an overly litigious climate, in which firms would experience

the extreme costs of defending against unjustified suits filed against them.

A further concern of Venturi and Scott-Brown is the complex nature of design genealogy. "Ironically, the follower often does it first," said Venturi -- a phenomenon expanded upon by Scott-Brown, who imagined a scenario wherein the originator of a design idea which was published but unbuilt might later be precluded from reuse of his or her own idea by a litigious and deeply-pocketed follower -- who had copied, and incorporated in a built work, the original concept. Often the source, the original drawing, will not be acknowledged, or perhaps even consciously remembered, by the follower, Scott-Brown asserted.

Finally, the architects were asked to identify the most egregious examples of design plagiarism, theft, or infringement which had come to their attention. In examining their responses the statement of law professor Justin Sweet, noted above, bears considerable relevance: "Even design professionals who want imitation or do not object to it draw some lines."^161

The question was specifically phrased so that the architects were not being asked necessarily to describe infringements of their own work -- only cases of infringement of which they were generally aware. Of nine respondents who identified such occurrences, eight referred to situations in which their own work was the subject of perceived copying. Very clearly, there appears to be a raw nerve

^161Sweet, supra note 158: 400.
which the subject touches among these respondents -- even among those whose belief in an unrestrained public domain is high.

The phrasing ('taking credit for our plan', 'anyone who's so stupid he has to copy isn't going to really get it right'), choice of words ('verbatim copying is immoral', 'others taking credit ... can be irritating'), and even the punctuation ('virtually identical to one of our houses ... including paper place mats!') -- all speak to a degree of concern elicited by the identification of specific occurrences that was not as apparent in the more abstract responses to the preceding questions.

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In the Progressive Architecture reader poll published in February, 1988, architects were asked to assess the ethics of their profession. In response to the question, "What are the three strongest factors influencing architects to abide by ethical standards?", seventy percent of respondents identified "threat of lawsuits" and "fear of losing license" as the most significant factors. Legal sanctions of any sort, or indeed legal entanglements of whatever nature, are clearly a major concern of practicing architects.

No specific question in the P/A poll addressed the issue of intellectual property, though the importance ascribed to honesty in acknowledging the work of others is seen by the fact that seventy-one percent of respondents considered "accepting full credit for work that others collaborated on" to be a serious breach of ethics.
Chapter Seven

The Role of the American Institute of Architects

This chapter will consider the role played by the architectural profession's national organization, the American Institute of Architects (AIA), in the public policy dialogue regarding copyright of architecture in this century. The nature of the advice and information provided to its members by the AIA on the subject of intellectual property will be examined, as will the adequacy of those services as assessed by the members responding to the survey conducted for this study.

The efficacy of the AIA as a lobbying organization will also be critically assessed. In conclusion, the Institute's professional standards and codes of ethics, as they have addressed issues of practice such as attribution and supplanting the work of another architect - - issues with occasional intellectual property ramifications - - will be examined.

* * * *

The history of AIA participation in the discourse of public policy regarding provision of intellectual property protection to architecture is replete with evidence that the organization has on more than one occasion either failed to take a forthright stand, or has vacillated
when doing so. Apparent but unelaborated changes of position, and a general reactive status of following rather than leading, have characterized the Institute's legislative interventions, and appear to have diminished its role as an effective public voice for its membership.

The earliest apparent public policy statement of the AIA on the subject of copyright came on the occasion of revision conferences held by Congress beginning in 1905 to consider a consolidation of nineteenth-century statutes. At one such meeting, held at the Copyright Office in March, 1906, AIA director Glenn Brown asserted that,

"It appears proper that works of architecture should be protected further than as mere drawings. Architecture as shown in the completed work should be classed with sculpture and painting. Therefore there should be inserted some such phrase as 'completed works of architecture.'" 162

Despite this testimony the first revision bill, introduced in May, 1906, had no reference to architecture. The written record contains no explanation for the failure to incorporate Brown's suggestion. The next opportunity to testify was lost when, despite having been invited, the AIA did not send a representative to joint hearings of the Senate and House Committees on Patents.163

On the occasion of an omnibus revision of Title 17, the federal copyright statute, in 1976, no record is found of any AIA

162Legislative History of the 1909 Copyright Act, Part E, (Brylawski and Goldman, eds.): 11.
1631989 Copyright Office Report: 77.
involvement. Despite the presence within the Institute of a Government Affairs department and a Congressional liaison staff, no reference to consideration of the 1976 Copyright Act as it might affect their members could be found in the minutes of the Executive Committee of the AIA Board of Directors. Perhaps other copyright concerns were distracting the Committee, for the minutes of its July 29-30, 1976 meeting give evidence of AIA concern with infringement - - of its own publications and MASTERSPEC documents: "The Associated General Contractors have taken paragraphs from our copyrighted documents almost verbatim." 164

The AIA assumed a considerably more active role in public policy debate on the subject of copyright at the time of Congressional hearings held to consider U.S. adherence to the Berne Convention for the Protection of Literary and Artistic Works. A letter dated August 13, 1986 was sent by Dale R. Ellickson, senior director of the Institute's documents program, to Senator Charles McC. Mathias, Jr., the chairman of the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary. Expressing an 'informal opinion' due to the failure of the AIA Board of Directors to formulate an official reaction prior to the Subcommittee's deadline, Ellickson nonetheless forthrightly opposed proposals to extend copyright protection to completed structures - - and did so under

164 Minutes of the Executive Committee of the AIA Board of Directors, July 29-30, 1976. Thanks are extended to AIA archivist Tony Wrenn for his assistance with access to and use of these materials.
The present proposed language [extending protection to the building] would . . . . [create] a chilling effect on architectural progress . . . . [The current] system permits the free flow of ideas . . . .

It is clear that the proposed language would encourage architectural homogeneity . . . . Architects would have a strong economic incentive to repeat their own earlier copyrighted work, in order to avoid the exposure to potential liability inherent in creating new (and possibly infringing) designs . . . .

Unity [of the built environment] would be achieved not by free choice, but out of fear of litigation . . . . An architectural copyright owner's rights should continue to extend only to the plans and drawings for a structure and not to any feature of the structure itself . . . .165

The next opportunity for the AIA to express a policy arose in 1988 during House of Representatives subcommittee hearings on Berne adherence. At a February 9, 1988 hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, former AIA vice president

165Dale R. Ellickson letter to Senator Mathias, August 13, 1986, in "Hearings Before the Subcommittee on Patents, Copyrights, and Trademarks of the Committee on the Judiciary, U.S. Senate, 99th Congress, May 16, 1985 and April 15, 1986": 733-734. Of course, architect re-use of plans and drawings creates the potential for other problems. According to Denver, Colorado attorneys W. Robert Ward and Andrew J. Friedrich, "The architect seeking to minimize his exposure to liability should not reuse plans in their entirety to construct another project without the express agreement of both the client for whom the plans were originally prepared and the client for whom they are proposed to be reused . . . . Even without regard to legal liability consequences, the practice without agreement and disclosure would seem to raise questions of professional ethics." ("May I Reuse the Drawings to Construct Another Project?", in Avoiding Liability in Architecture, Design, and Construction, supra note 32, at 76). It should be noted, however, that the AIA's Architect's Handbook of Professional Practice (1987 ed.) stipulates that the architect is not precluded "from continuing to use details and information developed from prior work on future projects."
and former member of the Board of Directors David E. Lawson, FAIA, expressed other reservations about the bill then under consideration. As Ellickson before him, Lawson strongly opposed any "artistic character" requirement to qualify an architectural work for coverage, noting that no other subject matter category of copyright was held to any such subjective and arbitrary standard. Absent was any of the alarm regarding protection of structures apparent in Ellickson's anticipation of a 'chilling effect'.

The 1989 Copyright Office report assessed Lawson's testimony by noting that,

The AIA's position became somewhat less clear during the subcommittee's examination of the witness. In response to a question . . . regarding whether the U.S. could join the Berne Union without [emphasis added] modifying its law with respect to works of architecture, the AIA witness testified that the U.S. could.166

It was the Copyright Office's conclusion that this opinion "may have been the result of a misunderstanding of the Convention's requirements."167

The AIA's real agenda became clear upon submission of a letter one month after Lawson's testimony by R. Cheryl Terio, AIA Director of Governmental Affairs, to the House subcommittee chair, Rep. Kastenmeier. Noting that the Institute's February witness was merely testifying reactively to previously-crafted legislation, Terio

1661989 Copyright Office Report: 132.
167Ibid. : 4.
submitted a proposed amendment to the bill, written by the AIA:

‘The exclusive right of an owner of a copyright in an architectural drawing, plan, print, sketch, diagram, or model ... includes the right to prevent an unauthorized construction of the building or structure depicted' ... This [proposed] language ... avoids the 'can of worms' involved in having the copyright apply to the structure itself.168

Here expressed for the first time was the policy objective which governed AIA testimony and public pronouncements for the next two years - - from Berne Convention implementation in 1988 to 1990 Congressional consideration of the Architectural Works Copyright Protection Act. Legal scholar Natalie Wargo of New York University succinctly and plausibly assessed the AIA's shifting ground:

Apparently the AIA was not as committed to the notion of copyright protection for architectural works as its initial position [Lawson's testimony] might suggest. In March, 1988 [Terio letter], facing the increasingly held view that architecture had not received sufficient study, the AIA scaled back its support of copyright protection for architecture, saying it would be satisfied if an architect had the exclusive right to control the execution of his plans.169

The exclusive right to build from copyrighted drawings and plans, which some commentators have called an "execution right," became the basic policy proposal of the AIA - - which Terio further noted would not "prevent a 'reverse engineering' type of reproduction."

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169 Wargo, supra note 130: 459.
Similar testimony on behalf of the AIA is found within the Institute's response to the Copyright Office Notice of Inquiry published in the Federal Register in June, 1988. As discussed in a preceding chapter, the Notice solicited comments on a wide range of issues related to copyright of architecture -- subsequent to the deletion by Congress of expanded protections prior to passage of Berne implementation legislation earlier that year. Generated on behalf of the AIA by the law firm of Proskauer, Rose, Goetz and Mendelsohn, and dated September 16, 1988, the response continued the themes made explicit in the Terio letter. Regarding the AIA response, the 1989 Copyright Office Report noted that,

The other negative response came from the American Institute of Architects, which noted that, notwithstanding its opposition as a professional association, a number of its members were in favor of copyright protection for works of architecture. The AIA did not articulate the basis for its nonsupport for these members' positions. However, in meetings with the AIA representatives, Copyright Office staff were informed that part of the basis for the AIA's position was the willingness, even wish, of some architects to have their work copied.170

In its perception of lack of consensus among AIA membership, the Copyright Office was surely not mistaken. By acknowledging the lack of agreement on the issue among its members, the Institute was itself surely reflecting the ambivalence within the architectural profession about legislating in the area of copying, quoting, and reference to prior works -- an assessment strongly congruent with

the opinions voiced by the architects responding to the survey discussed in Chapter Six.

The Copyright Office report further assessed the AIA's determined advocacy of the exclusive right to execute copyrighted plans:

This right would include the remedy of demolition of infringing buildings. The right would not prohibit, though, construction of a substantially similar building derived from 'measured drawings'.

The AIA proposal is based on a premise that the principal value of plans is in their execution, and that current law does not adequately protect that value, since most decisions have held [that] copyright in the plans does not extend to the right to execute them in a structure . . . .171

Though the AIA was correct in its assessment that "most decisions" rendered by courts had not prohibited unauthorized construction, the Copyright Office pointed out that some courts at that date had based awards for infringement of plans on the profits earned by defendants on the sales of houses depicted in the plans -- "a significant disincentive for future infringement."172

The AIA response statement, as written by Christopher Meyer, Jon A. Baumgarten, and Robert A. Gorman for the Proskauer firm represented perhaps the most extensive public commentary yet to be issued by the Institute on the subject of copyright. Along with its open acknowledgement of disagreement within its ranks, and its determined advocacy of the exclusive right to build from plans

171Ibid.: 197.
without prohibition of reverse-engineered duplication, the authors addressed many fundamental architectural traditions and customs of practice in a thorough, if pedagogic, manner.

Excerpts from this AIA-sanctioned commentary are included below. The value of these comments lies in an understanding that they represent an attempt by the AIA to explain its view of the traditions and customs of the professional practice of architecture to a 'lay' audience unfamiliar with the design process - - specifically, to the staff of the Copyright Office, who would in turn report their policy recommendations to Congress. The AIA response included the following:

- - "An architect's rights in his or her creative works are unnecessarily constrained by lack of clear control over the construction of the buildings depicted therein, particularly by persons with whom the architect had no contractual relationship.

- - Time-honored practices of making 'measured drawings' from others' buildings and borrowing design elements would be unaffected [by the AIA proposal]; competitors would only be barred from constructing a new building from others' copyrighted plans.

-- Works related to architecture consist largely of arrangements, compilations, or modifications of previously existing components of other such works. While certain buildings may be striking in appearance, or even 'novel' - - in the sense that they have no demonstrable antecedents - - their designs may be seen to consist
substantially of the collocation of traditional elements. While some of these individual elements taken alone may be eligible for protection, their original arrangement -- in drawings, plans, and models -- by an architect results in a work of authorship....

-- Contractual arrangements.... have long been the norm in the architectural community. They work well in both the prevention and resolution of disputes, as long as third parties are not involved. When, however, parties not in privity [i.e. not contractually bound] argue over rights in drawings, plans, and other works related to architecture, then copyright and, to a lesser extent, other non-contractual forms of protection have major roles to play.

-- That other countries have chosen expressly to protect buildings and structures does not suggest that the United States follow suit. Architects in this country have long been free to 'borrow' from their predecessors and contemporaries, and this freedom has contributed to the global successes of American architecture. It is not against such practices, but against the stealing of architect's plans and drawings, and the unauthorized execution thereof, that the law's attention should be directed."\textsuperscript{173}

Partially on the basis of this response from the AIA, the Copyright Office included the following as one of the four alternative actions

which it recommended to Congress in June, 1989:

Amend the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans.\textsuperscript{174}

The penultimate opportunity for the AIA to make known its recommendations regarding copyright of works of architecture came on March 14, 1990. Hearings were being conducted on H.R. 3990, the Architectural Works Copyright Protection Act of 1990, and H.R. 3991, the Unique Architectural Structures Copyright Act of 1990, before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary. Testifying for the AIA was David A. Daileda of Smith McMahon Architects, Washington D.C., accompanied by David K. Perdue, associate general counsel and corporate secretary of the AIA, and Albert Eisenberg, the AIA senior director for Federal Liaison. Also testifying before the subcommittee that spring morning were Michael Graves, architect, Richard Carney, chief executive officer of the Frank Lloyd Wright Foundation, Ralph Oman, Register of Copyrights, and Jeffrey M. Samuels, Assistant Commissioner for Trademarks of the Patent and Trademark Office, U.S. Department of Commerce.

AIA representative Daileda began by urging the members of

\textsuperscript{174}\textit{Ibid.}: 224.
Be sensitive to long established practices and traditions among architects and others in the building industry that may be greatly affected by this change in the law. What we seek is balanced protection for architectural works that accommodates the realities of architectural practice.175

Daileda followed with a reiteration of the AIA's previously-noted position on the execution right, requesting its incorporation in the legislation. Noting the bill's inclusion of a prohibition of demolition as an available remedy for infringement of an architectural work, Daileda argued that "it is not at all inconceivable that a situation could arise where the very existence of an infringing structure is an irreparable injury to the copyright owner. In that case, the court should not be precluded from ordering a halt to construction, a substantial alteration so as to make the building not infringing, or even to tear down the building if the evidence properly supports that conclusion."176

As did all others testifying, the AIA's Daileda spoke in opposition to a proposal to limit the right of building owners to undertake only minor alterations and alterations necessary for repair, without the approval of the copyright owner. The AIA favored no restrictions upon the building owner regarding alterations subsequent to original construction.

176 Ibid.: 111.
Though the bills under consideration included protection for constructed buildings, a category of subject matter under copyright which the AIA had previously and strongly resisted, Daileda made no more than passing notice of that fact - - with no specific reference either to past AIA opposition or current Institute acquiescence.\textsuperscript{177}

The AIA, also in concurrence with the other witnesses, stated its absolute opposition to H.R. 3991, the Unique Architectural Structures Act, due to its inclusion of 'artistic' and 'unique' qualities as prerequisites to eligibility for copyright. Under questioning by Chairman Robert W. Kastenmeier, associate AIA general counsel David K. Perdue called attention to the distinctions between copyright and patent as they relate to works of architecture, and stated his belief that copyright would be a much preferred avenue for architects if made available. Perdue further noted the small size of most architectural offices [80-85% with fewer than 10 employees] by way of illustrating the general unavailability of in-house legal counsel, or regularly retained counsel, among the majority of practicing architects.

The final occasion on which the AIA provided input into the Copyright Act legislative process came in a request from House

\textsuperscript{177}In an accompanying prepared statement, Daileda did express an apparent, and rather substantive, change of AIA policy - - also without elaboration: "We believe that the authors of building designs should be protected from copying of the overall design including the shape of the building, the arrangement of spaces and elements, and the particular selection and arrangement of elements embodied in the design. However we would oppose any interpretation of "design" in the bill that extended to discrete elements by themselves. Our concern is that the well-accepted traditions of reference and limited borrowing of elements should not be suppressed." Ibid.: 116.
subcommittee chair Kastenmeier that the organization respond to the March testimony of Register of Copyrights Ralph Oman, who had raised nine specific questions regarding protection of architecture. Those AIA responses are enumerated below:

- Protection should not be limited to 'buildings' only, since there can be significant creative content in other works of architects;

- Exclusion from protection of 'absolutely functionally required' building elements, and originality alone as the standard of eligibility;

- Initial ownership of copyright to vest in author of work, unless contractually stipulated otherwise;

- Pictorial and photographic exemptions from protection to extend only to cases where the architectural work is not the primary subject of the pictorial representation;

- Same remedial rights for owners of copyright in architectural works as other copyright owners, to include full injunctive relief.

* * * *

How effective was the participation by the AIA in the Berne implementation and Architectural Works Copyright Protection Act legislative process? Perhaps the most generous assessment might determine that the organization's lobbying prowess and clout lie somewhere between that of the American Medical Association and the National Hammock Manufacturers Guild. There is simply no effective yardstick by which to measure advocacy. The AIA's
participation seemed to be characterized by gentility and reactive, rather than pro-active, testimony.

In fairness it is important to remember, as considered in preceding chapters, that this is not the story of a class of authors of creative works demanding with unanimity that their professional organization rise up and achieve parity in the legal arena. Rather it is manifestly the story of a national legislature being forced to find a means by which to fit architecture within statutory copyright -- pressures deriving not from the affected artist/authors themselves, but from vast commercial losses due in part to past U.S. isolation from the international copyright community, and from perceived treaty obligations. Given that the AIA was thus from the outset reacting to external initiatives, and that it represented a membership itself quite divided on the issue at hand, perhaps the absence of dynamic participation was to be expected.

Not expected, however, was the spin placed upon the legislative process surrounding the 1990 Act by Dale Ellickson -- the AIA documents director whose 1985 letter to Senator Mathias was previously noted. Ellickson's assessment occurs in the opening paragraph of a December, 1991 Architecture magazine account of the Act's provisions and the events leading to its passage.

Opening with a summary of the Scarsdale, New York custom-home infringement case, Demetriades v. Kaufmann, Ellickson then offered
his perception of the aftermath of that highly-publicized dispute:

Thereafter, new legislation became a top priority for the architectural profession. After intense lobbying by the AIA, the Architectural Works Copyright Protection Act was passed by Congress and took effect on December 1, 1990.\textsuperscript{178}

The record speaks for itself. There is no evidence encountered in the course of this study which would support either an assertion of copyright having assumed a position in the upper ranks of architects' priorities in the period 1988-90, or a claim of intensity as best characterizing the AIA's lobbying effort. To further imply that the Act was passed as a direct result of pressure applied by the AIA is at best misleading.

The assessment of sociologist Judith R. Blau in a 1983 study titled \textit{Professionals and Urban Form} is here germane. Assessing the data generated by a study of 267 occupational groups, Blau wrote the following:

A well-developed occupational organization is probably necessary if an occupational group is to realize its potential power . . . . Architecture's mid-level ranking on membership completeness implies that many architects have yet to see the benefits of a strong occupational organization . . . .

The argument can be made (and the data noted above seem to suggest) that architecture suffers economically . . . . because the profession is not well organized -- and thus, the AIA is not sufficiently strong to promote more favorable legislation and publicity.\textsuperscript{179}

A brief survey and assessment of AIA services to its membership in the area of intellectual property rights in their creative work concludes this consideration of the organization's effectiveness.

Very few of the architects surveyed for this study indicated that their awareness, if any, of copyright of works of architecture came as a result of information generated by the AIA. Yet it is the distinct impression of the Institute's legal staff that their copyright material is one of the most popularly-sought information packets distributed by the AIA at its annual convention.180

An architect who availed himself or herself of this information (and found the time to peruse it) would be well-served by its contents. The AIA copyright packet includes a thorough question-and-answer format pamphlet which in seven pages presents current and salient answers to pragmatic concerns of practicing professionals. A white paper prepared for the Institute by attorneys Michael F. Clayton and Ron M. Dreben of the Washington, D.C.. law firm Morgan, Lewis, and Bockius, addresses the most recent regulations of the Copyright Office regarding procedures for registration of architectural works, and provides practical advice relating to changes in construction industry practices pursuant to passage of the 1990 Act.

180Conversation with David K. Perdue, AIA Associate General Counsel and Corporate Secretary, July 12, 1993.
Members also receive a U.S. Copyright Office publication, "Copyright Basics," and a sample registration Form VA (Visual Arts). The final items in the packet are excerpted passages from the federal statute which detail the necessary elements of the copyright notice, and which highlight the changes effected by the 1990 Act.

An additional source of copyright information is provided by the AIA on its electronic subscription service known as "AIA On-Line," which incorporates an entry entitled "Copyrighting Architecture: Protection Checklist" - - a very pragmatic walk-through of prudent office practices dictated by the changes in the legal environment created by the 1990 Act.

Finally, the AIA member may derive further information regarding intellectual property in the pages of the Architects' Handbook of Professional Practice. This particular AIA publication is considered in somewhat more detail in Chapter Nine, "Architectural Education and the Professional Practice Curriculum: A Manifesto in Support of an Informed Profession."

There is no doubt that the AIA can provide to the interested member a panoply of thorough, timely, and practical information and advice regarding copyright. To the extent that AIA members in practice report limited awareness of copyright, it would appear that their lack of information cannot fairly be attributed to their professional organization.
Finally, there is the AIA Code of Ethics and Professional Conduct. The comprehensive AIA Code addresses a wide range of areas of professional behavior, but is only applicable to member practitioners. This level of tangency to the professional was further reduced when mandatory codes with penalty provisions were replaced in 1980 by a set of purely voluntary guidelines, the "Ethical Principles." This retreat was largely the result of a successful 1979 legal challenge by a member architect, known as the Mardirosian case\textsuperscript{181} -- which led the Institute to eliminate the mandatory standards out of fear that they would be held to violate antitrust laws if continued in force.

The first AIA ethics codes were developed in 1909, more than fifty years after the organization's founding. This early proviso inveighed against "falsely or maliciously injuring the professional reputation, prospects, or business of another architect." Through many permutations and title changes in this century, the AIA code and principles of professional practice have continued to address competitive practices regarding fellow professionals -- including supplanting, or accepting the commission of a previously employed architect -- but have never directly made mention of unauthorized or unattributed substantial copying.

\textsuperscript{181}The case involved allegations of supplanting a fellow architect and infringement of protected plans.
Perhaps the most recent version of the codes comes closest to addressing such behavior. As adopted in convention on January 1, 1987, the Code of Ethics and Professional Conduct consists of three tiers of statements: Canons - broad principles of conduct; Ethical Standards - to be aspired toward; and Rules of Conduct - which include sanctions. Rule R. 4.107 reads as follows:

Members shall accurately represent their qualifications and the scope and nature of their responsibilities in connection with work for which they are claiming credit . . . .

This rule is meant to prevent members from claiming credit for work which they did not do, misleading others, and denying other participants in a project their proper share of credit.

Ethical Standard ES. 5.2, "Professional Recognition," reads as follows:

Members should build their professional reputation on the merits of their own service and performance and should recognize and give credit to others for the professional work they have performed.

These current AIA codes, which speak more directly to issues of attribution, full credit, and acknowledgement, are as close as the professional organization allows itself to come to a proscription of infringement and appropriation, without authorization or acknowledgement, of the creative labors of another architect.
Chapter Eight

Copyright and the Home Building Industry

Though the Copyright Office in Washington, D.C. reports the receipt of "at least 100" registration applications for building designs each month, only a small percentage of these come from the offices of traditional or 'high style' architectural firms. The reasons for this phenomenon are varied and have been considered more fully in Chapter Two.

Who, then, is filing these registrations of buildings? Predominant among the filings are the designs of the home building industry. Particularly active registrants are the large-scale home building concerns that operate across state boundaries out of regional offices, and which employ their own in-house architectural group and in-house legal counsel.

Perhaps it should come as no surprise that the home building industry is the segment of the architectural world most actively pursuing intellectual property protections. Outside of the high-end, custom-designed luxury housing market which occupies the rarefied upper tier of the industry, home designs in this industry are marketed aggressively and are intended to be duplicated. The

182Telephone conversation with Copyright Office examiner Bill Briganti, December, 1993.
combination of active advertising, replete with mass distribution of brochures, flyers, and print media advertisements containing rudimentary floor plans and elevation renderings, and the potential exacerbation of loss that accompanies theft of designs intended for duplication, makes this industry particularly vulnerable to infringement -- and thus particularly attentive to the available menu of mechanisms of protection.

At least in theory, one of the most substantive revisions established by the 1990 Architectural Works Copyright Protection Act -- the prohibition of 'reverse engineering,' or the replication of a building design based on first-hand observation and measurement -- should have a large impact upon design theft in the home building industry. It is no longer legal to develop duplicated plans from measured drawings, sketches, photographs, or a simple walk-through of the copyrighted building of another designer. Having been told that such methods of monitoring of competitors and appropriation of house designs were commonplace in the industry, I assumed that the 1990 Act would provide an effective check on such practices. The story, as it develops below, is more complex and not so readily amenable to statutory solutions.

In order to understand current practice in the home-building industry interviews were conducted with the in-house legal counsel of six of the country's largest home-builders, with the assistant director of the legal department of the home building industry's professional organization, and with an architect who directs the
What did this group of industry insiders have to say? To a person, each acknowledged that walk-through monitoring of competitors' model homes is a standard practice in the industry. They further indicated that it is floor plans, and not exterior elevations or other elements of house design, that are the most closely-monitored design feature -- and the most commonly copied.

A low level of awareness, and a pervasive lack of current information, were also cited as problems in the industry. "Most [infringing builders] don't think they're doing anything wrong," claims San Francisco attorney David York. Another attorney, Jerold Schneider of Washington D.C., agrees with York: "Most builders and architects don't realize how much protection there is for them . . . And the people who copy the plans don't realize the extent of their liability." 

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183 Interviews were conducted with the following: Burgess Trank, Vice President and General Counsel of Centex Corporation, Dallas, Texas; John Stoller, General Counsel of Pulte Corporation, Bloomfield Hills, Michigan; Timothy J. Geckle, Corporate Counsel of Ryland Homes, Columbia, Maryland; Bart Pachino, General Counsel of Kaufman & Broad, Los Angeles, California; Peter Reinhart of K. Hovnanian, Red Bank, New Jersey; and Ken Gary, General Counsel of Toll Brothers, Huntingdon Valley, Pennsylvania. Also contacted were David York of the law firm of Latham & Watkin, San Francisco, California, an outside counsel who has represented Kaufman & Broad in infringement actions; Mary DiCrescenzo, Assistant Director of the Legal Department of the National Association of Home Builders; and Michael Woodley, Senior Vice-President and head of the Architectural Services Group of Kaufman & Broad.

184 Quoted in Rich Binsacca, "When Imitation Isn't Flattery," Builder, June, 1993: 102

185 Ibid.
Another problem in this industry derives from the ease with which architectural plans and drawings can be accessed. Upon filing with municipal code enforcement and building permit departments, such documents become public records. Model homes and subdivision sales offices are readily available sources of brochures and sales literature which often depict multiple floor plans.

Copies of sets of construction documents 'float around' among subcontractors who may be engaged in common by more than one builder, according to San Francisco attorney York. He also noted that the phenomenon of reverse engineering is not the means by which most home design infringement occurs, given the ease with which documents and plans are available. York represented the California-based Kaufman & Broad, the state's highest-volume home builder, in its 1992 infringement lawsuits filed against three northern California competitors. Those cases involved entry-level home designs in the $150,000 price range, and were settled out of court, in Kaufman & Broad's favor.

The California company is one of many of the larger home builders in the industry which have undertaken aggressive campaigns to identify and litigate the perceived infringing actions of competitors. Another was Columbus, Ohio-based Cardinal Industries, which prior to its termination of operations in 1990 had been the second largest home builder in the nation. Kevin Guynn, a Chicago attorney who represented Cardinal in its pursuit of alleged infringers, advocated a broad-based approach of staking every
conceivable claim against as many defendants as possible. Asserting that Cardinal's modular homes had a distinctly recognizable appearance, Guynn explained that,

> When we [believe] somebody has copied our appearance, we complain under the trademark or unfair competition laws. Cardinal can say that when you see that shape, you know it's a Cardinal unit . . . . [We file suit] against anybody and everybody we can find who has some kind of relationship to the infringement."186

Guynn's approach to his defense of Cardinal's designs, as reported in 1988, is anomalous in the industry. None of the industry principals interviewed for this study report reliance upon any such widely-cast shotgun strategy. In fact, attorneys John Stoller of Pulte Corporation and Burgess Trank of Centex Corporation, currently the two largest home building companies in the country, report that not every case of perceived infringement is given equal weight. Both indicated that their companies will assess the current value to the firm of the allegedly infringed house design - - in effect establishing a hierarchy of valuation within their catalog - - before a determination to proceed with legal action is reached. A similar statement was offered by Timothy Geckle of Ryland Homes who noted that "in order for our company to take action, it would have to be a design we have a high investment in."187 In every case, however, cease and desist correspondence is issued.

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186Quoted in Jerry DeMuth, "Builders Go to Court to Protect Floor Plans", Builder, January, 1988: 116.
The comments and observations of Centex attorney Burgess Trank addressed many aspects of custom and practice in the home building industry. A number of his colleagues in the industry, including National Association of Home Builders counsel Mary DiCrescenzo, weighed in with variations on the theme of "How many ways are there to build a three-bedroom ranch house?" In response to their apparent concern that copyright of house designs may remove too much from the public domain, Trank noted the availability of the defense of independent creation: if a substantially similar design has, in fact, been arrived at without access to or reliance upon a pre-existing copyrighted design, no infringement will have occurred.

Centex, with a total of approximately 12,000 completed units annually and 42 locations nationwide, is the country's largest home builder. For companies operating at this scale, distinct problems can arise. According to Trank, Centex house designs are essentially replicated nationwide by the company — often by means of adaptation of exterior elevations to regional preferences, with floor plans and interior details essentially unaltered.

The difficulty of avoiding duplicative copyright registrations may thus arise, in which failure to properly distinguish protectible 'new' design elements from the prior work from which they are derived may result in invalid registrations. Attacking the validity of this company's registrations is often the avenue chosen by those accused of infringement.
There is the further difficulty of proving actual damages in an infringement action brought against a smaller builder. Trank noted that the existence of a small number of infringing homes presents the copyright holder with the burden of proving that a particular sale would have been "captured within that specific market area."\textsuperscript{188}

The U.S. home building industry consists of a small number of high-volume, multi-state mega-builders at the top of the pyramid, beneath which are a profusion of local smaller builders. This profile of their industry was noted by all respondents, whose consensus opinion is that the "small guys" tend to be both less aware of and less concerned with the consequences that flow from duplication of copyrighted house plans. One industry attorney observed that this membership profile might create special problems for the industry's professional organization, the National Association of Home Builders: finding itself caught in the middle between its more numerous constituency for whom copyright is not a concern, and its more powerful members for whom the protection of designs has significant financial consequences.\textsuperscript{189}

Indeed this conflict appears to have been reflected in the comments of the NAHB's Mary DiCrescenzo. She referred to "two

\textsuperscript{188}Telephone interview, January 18, 1994.
\textsuperscript{189}Certainly issuing at least in part from these sources of ambivalence within the industry, Robert C. Greenstreet, dean of the School of Architecture at the University of Wisconsin-Milwaukee, has observed that "lobbyists for the building industry weren't camped on Capitol Hill [in 1990] clamoring for U.S. representatives to change copyright law." Quoted in LuAnne Lanke, "Design Ideas, Not Just Paper They're Printed On, Protected Under New Law," Business Journal-Milwaukee, v. 8, n. 23, March 8, 1991, sec. 2: 12.
school of thought" on the issue of copyright in the industry - - "builders are on both sides of the issue." She expressed strong concern about a diminution of the palette of design elements available to smaller builders, with their eventual removal by copyright from the public domain. DiCrescenzo further noted the introduction into the industry of infringement enforcement specialists - - presumably hired solely to monitor the designs of competitors.

Analogous to the interest in the subject of copyright which is reported by the American Institute of Architects, DiCrescenzo noted that her January, 1994 presentation on the topic at the annual NAHB conference in Las Vegas was attended by a far larger audience than she or the organizers had anticipated. Accompanying DiCrescenzo's speech was a handout entitled "Copyright Law for Builders." This document acknowledges that there is a great deal of confusion within the industry about the application of copyright to buildings, plans, and drawings. On the subject of common industry practices, the following advice was given:

An individual is now prohibited from copying someone else's model home. It is important to note that a builder may visit model homes, take photographs, and make sketches of the building. However, he cannot use these sketches and photographs to recreate the building.  

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190 In this respect, a divided membership reflects the analogous position of the American Institute of Architects - - openly acknowledged by the latter organization during its participation in the hearings on Berne implementation and the Architectural Works Copyright Protection Act.  
Ms. DiCrescenzo asserts that the most common pitfall for builders is the presentation by a potential home buyer of architectural drawings, house plans, sketches, or brochures, accompanied by a request that a house be built from these drawings. To her membership she advises, "In this situation it is essential that the builder ask the right questions about the plans. Where did they come from? Who drew them? Do the buyers own the plans?"192 If not owned by the home buyer, a builder is advised to seek permission to build from the copyright owner, and to protect himself by indemnification and hold harmless contract language, or refuse to build from the plans and attempt to redirect the buyer to one of the builder's own designs.

With one exception, the legal representatives of home-building firms who offered comment claimed that their companies have directed their in-house architectural groups to apply copyright notice to all drawings, plans, and specifications leaving the office. Policies regarding registration with the Copyright Office vary widely among the six firms, from assertion of diligent registration of 'all designs' to no registration - - with the middle ground of registration only upon perceived infringement also indicated.

Many of those interviewed mentioned that industry awareness of the issue of copyright was significantly heightened by the appearance of a feature article in the June, 1993 edition of Builder magazine. This article, entitled "When Imitation Isn't Flattery," made

192Ibid.: 5.
prominent mention of those builders and designers within the home building industry who are currently most active in the pursuit of copiers. "Both the new copyright law amendments and more competitive housing markets have inspired builders and architects to tighten their grip on original work and diligently pursue those who violate the law," it asserts.193

Under the heading "What About Knock-Offs?", the Builder article also discusses the phenomenon of competitor walk-throughs:

Collecting and evaluating another builder's floor plans and renderings is encouraged as a form of market research. Builders often visit competitors' models; so-called "knock-offs" of a floor plan or model have long been a part of the housing industry's vernacular.194

Also addressed is the vulnerability of house plan books and services, and new industry practices such as requiring prospective buyers to complete registration cards at the sales office indicating their awareness of the proprietary nature of the plans, and warning against shopping them to other builders for lower bids.

The observations of the one architect in the industry available for comment - - Michael Woodley, Senior Vice President and head of the architectural services group at Kaufman & Broad - - are of interest. In striking contrast to the philosophical bent of the other architects surveyed for this study, Woodley flatly asserts that "our concern is to

193Binsacca, supra note 184: 102.
194Ibid.
prevent our work from reaching the public domain." 195 Woodley is a strong supporter of heightened awareness of the issue in his profession and an open advocate of more widespread use of copyright. He is also a hawk in the spectrum of aggressiveness of approach to pursuit of infringement: "We must do everything in our power to protect our property interest in these designs."

* * * *

A thorough consideration of the subject of copyright and architecture in this country must consider the home building industry. The perceived need for avenues of design protection, and the frequency of allegations of infringement, argue for its enhanced significance in this realm of the building arts. The vast majority of adjudicated case law in the area of copyright and architecture has been generated by disputes arising between builders and alleged infringers of their residential designs. In a sense, therefore, the home building industry is where the action is in the development of both legal precedent and post-1990 registration with the Copyright Office.

Almost certainly not foreseen by Congress when it invited Michael Graves and the Frank Lloyd Wright Foundation to testify at the Architectural Works Copyright Protection Act hearings, and seen as a source of great irony by many others, the predominance among copyright registrations of industry-built home designs is nonetheless a

fact - - the underpinnings of which reveal much about the diverse attitudes toward the subject among design professionals in this country.
Chapter Nine

Architectural Education and the Professional Practice Curriculum:

A Manifesto in Support of an Informed Profession

A primary area of concern for every architect whose opinion was received in the course of this study - - every architect - - is a fear of, and antipathy toward, legal entanglements of any sort. Concomitant with this is an apparent distaste for the legal system generally. The expense of litigation, whether offensive in the pursuit of remedies, or defensive in the event of actions brought by others against them, is a source of extraordinary concern to architects. Indeed, many indicated that even in the event of obvious and potentially damaging theft, unauthorized use, or infringement of their work, they would be very reluctant to initiate legal action of any sort - - regardless of any perceived corollary issues of justice, equity, or potential liability.

This ought to be considered an unacceptable situation. To the extent that such foreboding pervades public attitudes toward the legal system generally, the problem is even more profoundly corrosive of faith in institutions critical to a functioning, and just, society. A hall of justice whose entry appears to its constituency to
be inaccessible absent extreme effort or unthinkable cost is as surely closed as one whose doors are literally locked and barred.

The pervasive fear of excessive expense and loss of time from the office appears to have paralyzed these architects with regard to any justifiable pursuit of redress. These perceptions on their part seem to be so strongly held that essential legal rights will almost certainly remain unasserted by these practitioners. The consequences for their practice and their careers may indeed be dire.

As to the costs of legal representation, this study is quite simply unprepared to propose, or even imagine, a solution. To the extent that innovations in this area have been proposed or attempted, as they presumably have been, this author will be most receptive to information about them. Perhaps the greater availability of the remedy of attorneys fees that will ensue from passage of the Copyright Reform Act is a start. But, as any of the responding architects might hasten to indicate, a judgment of damages awarded is a remedy itself reached only by the persistent, determined, and often extraordinarily time-consuming pursuit of redress through the manifold stages of litigation.

* * * *
Let him be educated, skillful with the pencil, instructed in geometry, know much history, have followed the philosophers with attention, understand music, have some knowledge of medicine, know the opinions of the jurists, and be acquainted with astronomy and the theory of the heavens.

Vitruvius, The Ten Books of Architecture, on the education of architects

One area of concern expressed by most of the architects surveyed, however, appears more amenable to resolution than the fear of time-consuming and costly litigation. The phenomenon of feeling uninformed about their legal status as practicing design professionals was one which the respondents consistently reported, though to varying degrees. To the extent that an architect in practice feels that he or she can neither hope to understand nor effectively anticipate and manage the legal situations that are inevitably encountered in the course of that practice, that architect will be in a position of defense and dependence.

This study proposes as a response to this situation, however modest, a renewed emphasis upon the presentation of mandatory, comprehensive professional practice curricula in every degree-granting design education institution in the country. This coursework is known by those already involved in its establishment and presentation — and most architecture schools offer some variation on the theme — as a "professional practice" curriculum. An examination of current such offerings at sample institutions,
interviews with their faculty, and conversations with other professionals involved in the development and advocacy of enhanced professional practice education of architects, have all led to the conclusion that this is an avenue which holds considerable promise.

A brief aside is not entirely inappropriate at this juncture, for it will augment an understanding of the depth of commitment to this recommendation. During the years 1990-92 while a student in the undergraduate College of Harvard University, I was enrolled in architectural history courses which were cross-listed with the Harvard Graduate School of Design. In the course of these studies friendships developed with a number of M. Arch. students. A rather critical, if not cynical, group on the whole -- though immensely talented -- these architecture students nonetheless reported with near unanimity their appreciation of one component of their coursework. Such a level of approbation from this particular group of students has remained a fixed memory -- as has the subject of the courses which they held in such high esteem: their sequence in Professional Practice. In fact, Harvard's professional practice courses are highly regarded within the field as a model curriculum.

The other end of the spectrum is represented by my own current graduate school. Architecture students at the University of Pennsylvania have not had access to a one-semester, full-credit practice course with regular, weekly meetings since the 1970s. An office organization course on the 'design of design organizations' was offered at Penn in the 1980s, but it was entirely elective, and was
not conducted on a regular weekly schedule, meeting only occasionally throughout the semester.

Non-credit seminars, 'elective week' discussions, and other experiments touching upon the subject were also offered in the 1980s at Penn. Though an elective one-semester offering has reappeared in the course listings during the current term (Spring, 1994), its presence appears to represent a response to perceived obligations pursuant to an impending accreditation review, rather than a commitment to comprehensive, mandatory professional practice coursework offerings. Twelve students in a total M. Arch. enrollment of 179 are currently enrolled in this elective offering.

The specifics of the situation at Penn are frankly illustrative of one graduate school's abdication of National Architectural Accreditation Board (NAAB)-mandated responsibility in this curriculum area. The purpose at hand, however, is a forthright and unabashed advocacy of professional practice coursework in every school of architecture. The spectrum whose extremes of approach are represented by Harvard and Penn is broad, and a brief consideration of the current status of professional practice curricula as specified by the NAAB will follow.

* * * *
"The budding architect discovered the law rather as a child discovered fire. He therefore learned above all to beware of it! So that his attitude to law is essentially defensive."

Thus does French legal scholar Michel Huet describe the education of the former architecture students of the Ecole Nationale Superieure des Beaux Arts.¹⁹⁶ Huet's assessment could serve equally as a description of the situation that prevails in the professional education and practice of architecture in the United States at the current date.

Few indeed are the American architects who approach the legal aspects of their professional practice with even a modicum of confidence, comfort, or assertiveness. Fear, in fact, is the prevailing dynamic - - yet it need not be so. Those students of architecture who are being exposed to legal concepts, and practice issues with legal ramifications, in courses on professional practice are manifestly better prepared to understand and manage the real world life of a real world architectural practice. The national accrediting board agrees, as will be seen below.

The NAAB is a corporation with a Board of Directors consisting of eleven members representing the AIA, the National Council of Architectural Registration Boards (NCARB), the Association of Collegiate Schools of Architecture (ACSA), the American Institute of Architecture Students (AIAS), and the public. The organization establishes criteria and procedures to evaluate educational

institutions offering coursework leading to the professional degree in architecture.

In its Conditions and Procedures, as adopted September 28, 1991, specific requirements of schools of architecture are enumerated, satisfaction of which may determine an institution's accreditation status. These criteria are deserving of examination, for the organization has determined that practice-related coursework is a requirement for accreditation and must address specific topic areas.

Section 3.7.2, "Education and the Student," of the NAAB Conditions reads, in part, as follows:

The education of a professional architect must occur in a pedagogical setting that prepares the individual for continuing professional, as well as personal, growth and development . . . Programs must demonstrate that their students are well-informed about their opportunities, responsibilities, and requirements associated with a professional career in the field of architecture . . ." 197

In section 3.8, "Satisfying Achievement-Oriented Performance Criteria," the following is stipulated under the "Social" sub-section of the required "Fundamental Knowledge" areas of study: "For the purposes of NAAB accreditation, graduating students must: 6) Be aware of levels of government and the areas of the law each has generated that affect architecture." 198

198 Ibid.: 16.
"Practice" is defined by the NAAB to include "the relation of the profession to society, as well as the organization, management, and documentation of the process of providing professional services." The following requirements of degree-granting institutions in the area of practice curricula are excerpted from the sections headed "Project Process and Economics," "Business Practice and Management," and "Laws and Regulations." They speak directly to the obligation to provide non-elective, full-credit, comprehensive professional practice course offerings:

For purposes of NAAB accreditation, graduating students must:

45) Be aware of the associated professional disciplines that make contributions to the project process and of methods for their coordination and management.

46) Be aware of the implications of economic systems, finance, and building costs on specific building projects.

48) Understand the architect's role in the project's design and construction, in the administration of the construction contract, and in the relationship with others involved with the project.

49) Understand the types of documentation required to render competent and responsible professional service.

50) Understand contract negotiations, office organization, financial management, and other activities surrounding the practice of architecture.

51) Be aware of the relevance of laws to professional registration, professional service contracts, and formations of design firms and other legal entities.

Ibid.: 20.
52) Be aware of the architect's responsibility to the client and to the public under different contractual and organizational arrangements.

53) Understand the architect's responsibility to provide for safety and accessibility and to incorporate relevant codes and standards in architectural design.

54) Understand the legal relevance of public health, safety, and welfare, property rights, building codes, zoning and subdivision, and other factors affecting building design construction, and architectural practice.200

As with all such cumulations of criteria whose goal is the promulgation of ideal standards, the NAAB Conditions and Procedures aim high. Are there, in fact, degree-granting programs whose 'pro practice' course offerings measure up to the stringent standards excerpted above? Interviews with instructors of practice courses, NAAB staff, and the editor of the AIA Handbook of Professional Practice indicate that the answer is yes. This author's review of the Harvard Graduate School of Design professional practice course outline confirms that this institution offers one such program. Materials describing the curricula of other degree programs are being sought for the purpose of a future, comparative assessment of the range of professional practice course offerings - - a detailed consideration of which is beyond the scope of the current study.

In the opinion of those interviewed on the subject of professional practice curricula, the comprehensiveness with which the NAAB

200Ibid.: 22.
criteria are met varies widely. At some institutions, the professional practice coursework is entirely elective. At others, practicing architects are brought in as adjunct faculty. Other schools focus upon the legal aspects of professional practice and engage an attorney to present contracts, liability, and tort law. Such courses typically exclude issues of office management, design firm organization, registration, and professional conduct, while the architect-led courses may be deficient in the consideration of legal aspects of practice.

The standards of the accrediting board, however, are unambiguous. While the vast majority of degree-granting architecture programs do offer at least one course relating to the professional practice of architecture, the reported variability in course content, faculty, credit hours, and mandatory/elective status indicates that this is a curricular area deserving of serious attention by most schools of architecture.

201 Among those interviewed were Ava J. Abramowitz, Esq., of the insurance underwriter Victor O. Schinnerer Co.; John Geronimo of NAAB; Robert C. Greenstreet, Dean of the School of Architecture at the University of Wisconsin-Milwaukee; David S. Haviland, Professor of Architecture at Rensselaer Polytechnic Institute and editor of the AIA's Handbook of Professional Practice; Alan Levy, adjunct professor in the Department of Architecture at the University of Pennsylvania; Don Lutes, adjunct associate professor in the Department of Architecture at the University of Oregon; Carl M. Sapers, Esq., attorney and adjunct professor at the Harvard Graduate School of Design; and Steven M. Sharafian, Esq., attorney and adjunct professor at the University of California at Berkeley.

202 According to those interviewed, these courses taught solely by the architects run the risk of becoming a recitation of "war stories" - purely anecdotal in nature.
There are indications, however, that increased attention is being given to professional practice education, both in the schools and among practicing architects. Under the auspices of the AIA director of education, two summer institutes on the subject of professional practice have been held. These workshops have had the specific agenda of "building a cadre" of educators committed to comprehensive professional practice curricula in their schools, according to David S. Haviland, Professor of Architecture at Rensselaer Polytechnic Institute. Professor Haviland led the first institute, during the summer of 1992, and will also direct the third in the summer of 1994. Fifteen participants attended in 1992 and twelve in 1993. Known as the AIA/ACSA Professional Practice/Design Summer Institute, the programs are underwritten by the Victor O. Schinnerer Company, a division of the CNA Insurance Companies.

Further consideration of professional practice education has been undertaken by the editors of the AIA publication, the Architects' Handbook of Professional Practice. First published in 1920, the Handbook is the profession's most respected and comprehensive manual of practice. The following is excerpted from the Foreword of the Instructor's Guide which accompanied the four-volume eleventh edition of the Handbook published in 1988:

Architecture students are a principal audience for the Handbook. During their professional education, prospective architects gain fundamental knowledge and skills; they also explore the values and mores of the profession and the settings within which architecture is accomplished...
It is the AIA's intention that the Handbook be used to teach practice in the schools . . . . There is a student edition and, for the first time, an Instructor's Guide. [The] Guide is written for architecture faculty members who teach professional practice. The Guide provides perspectives on teaching practice, outlines a number of specific approaches, and focuses on the roles the AIA Handbook can play.\(^{203}\)

The Instructor's Guide presents eight professional practice courses as described by their instructors, and several brief examples of other approaches to addressing practice issues in the architecture curriculum. With the goal of revising and expanding the Instructor's Guide in 1994, a request for proposals and course descriptions was sent to professional practice faculty across the country. The receipt of more than forty-five responses appears to indicate a high degree of interest in this effort to enhance the quality and availability of professional practice coursework in the nation's schools of design.\(^{204}\)

* * * *

A final word regarding the Architects' Handbook of Professional Practice. The Handbook has been thoroughly revised for its twelfth edition, to be issued in 1994. New subject matter has been added,


\(^{204}\)A survey of thirteen professional practice courses was undertaken in 1992 by University of Oregon adjunct associate professor of architecture Don Lutes, FAIA. Syllabi, contact hours, required texts, instructional methods, required student submissions, and methods of evaluation and testing were among the course components assessed in the survey. Lutes' study confirms the wide variability in these areas that was noted above, suggesting the need for further communication between those responsible for establishing individual courses -- a process which the the organizers of the summer institutes and the editors of the Instructor's Guide appear to have begun.
and substantive changes in architectural practice since the publication of the eleventh edition in 1987-88 are reflected in the revised edition.

In addition to a continuation of its prior primary function as a general guide to the AIA's standard forms of agreement and other documents, the new Handbook openly advocates a 'point of view', or attitude, toward the professional practice of architecture. Referred to by its editor, David S. Haviland, as having previously been considered "the architecture profession's defensive driving manual," the twelfth edition adopts a new approach in its incorporation of what the authors are referring to as "key messages . . . which, taken together, provide a working definition of "assertive practice" [emphasis added].205

These 'key messages of assertive practice' are as follows:

- "Architects can control their destinies within the building enterprise;

- The standard of care cannot manifest itself in the form of absolute guidelines;

- Architects can understand and manage the diverse conditions found in practice; and,

- Good practice is good business."206

This study finds itself in complete agreement with the notion that an assertive and aware practitioner, informed during his or her architectural education by required participation in a comprehensive professional practice curriculum, is in a markedly better position to manage the challenges of practice in the late 1990s.

* * * *

What began as a study of copyright in architecture thus concludes with an assessment of a component element of architectural education, and its potential effect on subsequent practice. The architects who have generously given of their time and thoughts in the course of their participation in this project all expressed some degree of discomfort with the legal issues surrounding their practice. A self-confessed lack of awareness, and a perception of being uninformed were pervasive among the respondents.

Again, excerpted from the key messages of the 1994 Architects' Handbook \textsuperscript{207}

"Architects can assess and manage risk - - and not run away from it." It is risky for the architect in practice to ignore or remain uninformed about the newly-enhanced rights of intellectual property

\textsuperscript{207}Ibid.
in his or her creative works. But these risks can be readily assessed, managed, and minimized by prudent, informed, and simple actions.

"The contexts within which architects work are complex but understandable." Intellectual property theory, legislation, and case law are complex, but there are resources readily available to the practicing architect to dispel this seemingly impenetrable fog, and which distill the information to its most essential and pragmatic basics.

"Practices and practice circumstances can be designed and are, in fact, fascinating and important design problems." An informed, proactive practitioner can indeed design a framework within which the possibility of unauthorized re-use or theft of his or her creative work, and the attendant financial loss and liability exposure, can be substantively diminished - - without the withdrawal of the work as a whole from the open domain of design ideas, which collectively form the body of tradition and incremental advance available to one's professional colleagues, present and future.

"An architect's education is a good time to learn about good practice." No newly-trained architect should graduate from his or her program of instruction without a solid, comprehensive grounding in the manifold aspects of contemporary professional architectural practice. That the law is one such component is perhaps today more critically the case than it has ever been.

* * * *
A concluding excerpt from *Architecture: The Story of Practice* by Dana Cuff is here submitted as a coda - in support of the proposal that issues of professional practice must be addressed comprehensively in the architectural curriculum, and in support of the thesis that an aware and informed architect is less likely to be controlled by the diverse conditions surrounding his or her practice, and is more likely to manage and control them.

"From the early history of architectural occupations to the more recent dynamics of offices and client organizations, the development of professional architecture has hinged upon the link between espoused beliefs and the circumstances found in everyday architectural practice . . . .

There is a clear connection to be made between the profession's emphasis on design and its distaste for management of office activities . . . . Because architecture is inextricably bound up with individuals other than designers, particularly the client or patron, the nature of this bond is hotly disputed, carefully tended, and romanticized. Architects sometimes deny the significance of other actors' roles in design, or suggest that paying attention to these relations is inherently non-architectural behavior -- that work should be left to businesspersons and managers . . . .

To ignore the social context within which buildings are designed is counterproductive for all parties involved, most assuredly for architects. By devaluing the conditions that frame the creative process, a spectrum of constraints and opportunities are overlooked and removed from the potential control of the architect."
In order to classify the wealth of source material identified during the research for this study in the most straightforward and accessible manner possible, the following organizational scheme replaces a more traditional bibliographic format:

**Time Period** - Classification by chronology here reflects three major periods in the evolution of American intellectual property case law and legislation: 1790-1909, from the framing of the copyright clause of the U.S. Constitution to the Copyright Act of 1909; 1909-1976, from passage of the former act to the beginning stages of consideration of the 1976 omnibus revision of U.S. copyright law; and, 1976-present, from passage of the 1976 Copyright Act through the Berne Convention Implementation process, to the 1990 Architectural Works Copyright Protection Act and its aftermath.

**Source** - Writings specifically on the subject of copyright of architectural works and other designed subject matter are primarily found in two types of publications: legal journals and law reviews, and other professional periodicals including those published for the architecture, engineering, construction, art, graphic design, and industrial design professions. There is also a body of basic reportage in the popular press, i.e., general circulation newspapers and magazines.
Within each time period, as delineated above, this Bibliography will classify entries by source, or type of publication. Within publication type, items are arranged 1). chronologically in the case of legal journals and law reviews, and 2). chronologically within each periodical or publication title in the case of professional periodicals and the popular press.

**General Copyright Theory and History**  -- Any thorough consideration of a focused sub-section of copyright law, as has been attempted in this study on the subject of architecture, must begin with an examination of basic material on the broad subject of intellectual property, its theory and history. A wide array of such source material was utilized in the course of this study, and is noted separately in this Bibliography.

**U. S. Government Publications**  -- Publications issuing from the office of the Register of Copyrights, or from Congressional committees, are listed separately.

**Foreign**  -- This study has concentrated on English-language material. Hence, the greatest body of referenced material from outside the United States is of British origin, with some contributions from Canadian and Australian sources. These materials are arranged by country of origin, in chronological order of date of publication.

**Miscellaneous**  -- Included in this category are a variety of bibliographic entries, including those published by the American
Institute of Architects, and a considerable body of legal scholarship on the distinction between design patent and copyright.

1790 to 1909

I). Legal Publications


II). Professional Periodicals

The American Architect and Building News


"Summary: An Architect's Copyright." October 25, 1879 (v. VI, n. 200): 129.
"The Use or Abuse of Published Plans." (Letter to the Editors, with response). January 9, 1886: 23.


The Brickbuilder

"Copyright in Architectural Design." April, 1899 (v. 8, n. 4): 65.

The Inland Architect and News Record


1909 to 1976

1). Legal Journals / Law Reviews


II. Professional Periodicals and the Popular Press

The American Magazine of Art

"Pirating Designs." August, 1929 (v. XX, n. 3): 469.
Architectural Forum


Architectural Record


"Ontario Court Decision Hits Design Plagiarism." October, 1957 (v. 122): 40,44.


Burlington Magazine


Design (UK)

Harvard Business Review


House and Home


Industrial Design


Interior Design


Interiors


Journal of the American Institute of Architects

"The Copyright on the Uniform Contract Upheld by the Court." March, 1918 (v. 6): 141-142.


New York Architect


New York Times Magazine


Pencil Points


Progressive Architecture

"How Effective is Copyright of Plans?" October, 1954 (v. 35): 89-90.
"Copyright Protection - - Patent Medicine Gag or Professional?" (Letters to the Editor, Hugh Stubbins et. al.) November, 1954 (v. 55): 15-16.


1976 to Present

I). Legal Journals / Law Reviews


II). Professional Periodicals and the Popular Press


"Tressard Wins Infringement Suit." Interior Design 48 (September, 1977): 64.


Glazer, Steven A. "Practice: The Pitfalls in Protecting Your Designs from the Clutches of Others." Architectural Record 177, n. 6 (May, 1989): 37, 39.


Hoyt, Charles K. "Don't Throw Away Your Copyright Stamps." Architectural Record 177 (September, 1989): 29.


Parker, Robert A. "Should We Copyright Design?" ID 38 (May/June 1991): 54-57.


**Foreign Journals and Periodicals**

I). England


"Architectural Copyright." *Royal Institute of British Architects' Journal* (hereafter referred to as *RIBA Journal*), May 2, 1931: 469


"Meikle versus Maufe." Architectural Review 90 (September, 1941): 100+.


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II. Canada


III). Australia


IV). France


V). Germany


VI). Italy

"Vero Falso=True False." Abitare (January 1992, n. 303): 110-[128].

Design Patent and Copyright


Copyright History and General Theory

I. History


II. General Theory


Encyclopedia Britannica 1972 edition, s.v. "Copyright."


Minutes of the Board of Directors Collection, AIA Archives, Washington, D.C.


"Using the Copyright Law to Protect an Architect's Work."
("Copyright 1993, The American Institute of Architects").

**National Architectural Accrediting Board**


**United States Government**


Enclosed are five brief questions on the subject of copyright of works of architecture. Your responses would be highly valued.

A descriptive paragraph on the following page explains the origin and nature of this request. Many thanks, in advance, for your consideration of this questionnaire.

Sincerely,

Robert Saarnio
University of Pennsylvania
Graduate School of Fine Arts
Graduate Program in Historic Preservation
Questionnaire:

Copyright Protection of Architecture

The following five questions are sent to you in conjunction with research undertaken for a master's thesis at the University of Pennsylvania, currently in progress (Advisor: Professor David G. DeLong; Reader: Carl M. Sapers, Esq.). I am writing a history of the evolving doctrine of intellectual property law in the United States regarding the creative works of architects and the professional practice of architecture. The period from 1976 to the present has been a period of dramatic change, involving the most significant revisions of copyright protection of architecture in U. S. history.

Legal scholars, attorneys, and courts of law have established an extensive body of commentary on this subject, but the voices of architects are markedly under-represented -- both in public discourse and in the written record. Your comments can be provided either for full attribution, or for anonymous compilation and statistical purposes only. Please indicate your preference in the space provided at the end of this document. Thanks for your assistance!

The Short Form: If time constraints prevent a written response, feel free to indicate here that you prefer a brief (ten-minute maximum) telephone interview -- for which purpose I will call your office to schedule such a conversation, at your convenience.

1). How well-informed do you consider yourself regarding the changes made in U.S. copyright law by the 1990
2). Has your awareness of this legislation, and of copyright or patent protection of architecture in general, come primarily from your attorney, the A.I.A., colleagues, or from your own reading?

3). Have you ever registered any of your plans, sketches, drawings, models, or 'building designs' (completed structures) with the Copyright Office in Washington? If yes, which of these types of creative work have you registered? In what year(s) did you register this work?

4). Most importantly: If your answer to Question #3 was "No", please indicate why. Many commentators have noted a significant degree of ambivalence about copyright of building designs within the architectural profession -- reasons cited include fear of restrictions upon creative freedom, and the strong traditions of borrowing, quoting, and derivative works within the professional practice of architecture -- both of which may mitigate against practitioner comfort with the concept of copyright of works of architecture. Your comments will greatly enhance my ability to augment
5). What have been the one or two most egregious examples of design plagiarism, theft, or infringement which have come to your attention?

Please select one of the following options:

a). I agree to the full attribution of my comments.

b). I prefer to provide the above responses anonymously and for statistical compilation only.

Your name:
Should you have any questions regarding this material, please do not hesitate to contact me by telephone at (215)-438-6192.

Your time and assistance are greatly appreciated!

Robert E. Saarnio
University of Pennsylvania
Graduate School of Fine Arts
Graduate Program in Historic Preservation