Narrativizing the Architectural Copyright Act: Another View of the Cathedral[1]

Xiyin Tang

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[1] The latter half of the title, is, of course, a variation on the name of Guido Calabresi and A. Douglas Melamed's game-changing article, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV . L. REV. 1089 (1972). Calabresi and Melamed's title refers to Monet's paintings of the Cathedral at Rouen. The authors point out that theirs is only but one way of looking at the issue— "[t]o understand the Cathedral one must see all of them." 1089 n. 2. I by no means attempt to tack on my work to such an influential piece of scholarship. I merely used it, perhaps for obvious reasons, for a cathedral's embodiment of institutionalized, iconic architecture. Of course, in engaging with only one strain of the available dialogue, our understanding of what architecture *is* or can do is necessarily limited.

INTRODUCTION

"We tell ourselves stories in order to live."[2]

Joan Didion wrote the above in 1979, the first of many lucid lines about the need for narrative as part of the human condition. And of course, why wouldn't we? Narrative is what makes order possible, and without some form of order, life would be chaos, and hence, to many, unimaginable, undesirable, impossible. Didion was a writer, but writers, like lawyers, rely on narrative to order their universe, to inject sense and stability into an otherwise unstable world. Surprisingly, both narrative and law have much to do with a third form of ordering: architecture. The architect Peter Eisenman had written that we "assume the metaphysics of architecture…to have the status of natural law."[3] And, in that sense, perhaps architecture, more so than law and literature, reassures us that the world is *not* blighted with relativity or arbitrariness, but instead the *real*, for "it is the nature of architecture, unlike any other discipline, to establish center, to manifest presence, to be the agent of reality…. Architecture, because it *is* bricks and mortar, holds out the promise of reality, authenticity and genuine truth in a surreal world where truth is a managed item developed by committees, produced by writers and sold by media spokesmen."[4]

Given architecture's claim on our collective need for stability, shelter, and, no doubt, aesthetic pleasure, perhaps it's both apt and surprising that architecture was not given official status in the United States as a valid, copyrightable art form until just under 20 years ago—and even then, as a necessary prerequisite to our country ratifying the

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[2] JOAN DIDION, THE WHITE ALBUM 11 (1979).
[3] Peter Eisenman, *Architecture and the Problem of the Rhetorical Figure*, *in* THEORIZING A NEW AGENDA FOR ARCHITECTURE: AN ANTHOLOGY OF ARCHITECTURAL THEORY, 1965-1995, at 176, 176 (Kate Nesbitt ed., 1996).
[4] *Id*.

Berne Treaty, the world's most important copyright convention.[5] Europe, on the other hand, had recognized copyrights in architecture for quite some time.[6] Nevertheless, in 1990, the 101st Congress passed the Architectural Works Copyright Protection Act (hereinafter called the "Act"),[7] for which the Subcommittee held a legislative hearing with witness testimony. These witnesses were: the Register of Copyrights' Ralph Oman, an Administration witness (Jeffrey M. Samuels), the American Institute of Architects' David Daileda, the Managing Trustee of the Frank Lloyd Wright Foundation (Richard Carney), and an American Institute of Architects fellow—Michael Graves.[8] It bears pointing out that of all the witnesses, only one—Graves—was a practicing architect.

Unsurprisingly, Graves' work and architectural theory played an important role in delineating and justifying the ultimate guidelines Congress sets out as to the purpose and limits of the Act. But I argue that these guidelines unfairly restrict the definition(s) of an architectural work, and, in doing so, muddle and confuse the accompanying legal analysis.

Since the passage of the Act twenty years ago, there have been as many law review articles as there has been case law addressing the Act, all of which seem split on which standard to apply in determining copyrightability. The divide is best summed up as those who would prefer the standard to be the same as that for "useful articles" (i.e. filtering out all components that have some "utilitarian" aspect) versus those who want a

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[5] *See* H. REP NO. 101-735, at 6 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6935, 6940.
[6] For signatories of the Berne Convention (all of whom recognize architectural copyright), see ANTHONY SPEAIGHT, ARCHITECT'S LEGAL HANDBOOK: THE LAW FOR ARCHITECTS 371 (9th ed. 2010).
[7] Copyright Improvements Act of 1990, Pub. L. No. 101-650, Tit. VII, 104 Stat. 5133 (1990) (codified in scattered sections of 17 U.S.C.).
[8] *See* H. REP NO. 101-735, at 6 (1990).

"total concept and feel" test (i.e. that uncopyrightable elements can come together to form a copyrightable whole). The former camp sees the copyrighting of architecture as strictly going *against* the Constitutional prerogative to encourage progress in the field and thus would prefer to have the scope of protection be as restrictive as possible, akin to that of computer software,[9] while the latter camp ignores the "useful article" and "Progress" issue all together.[10]

This Paper argues that the latter stance misreads the legislative history of the Act, yet the former stance is simply wrong. First, I look at how the House Report unfairly endorses Grave's mode of story-telling about architecture, inadvertently resulting in a preference, codified via the Act, for his strain of postmodern building,[11] to the detriment of styles that avoid such populist, decorative symbolism. Consequently, those who have internalized such arguments cling to the idea that any architectural element that is shaped in some way by efficiency or economic concerns is patently uncopyrightable because it

[9] *See, e.g.*, Dream Custom Homes, Inc. v. Modern Day Const., Inc., 8:08-CV-1189-T-17AEP, 2011 WL 976420 at *8 (M.D. Fla. Feb. 22, 2011); Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC, 716 F.Supp.2d 428 (E.D. Va 2010); Trek Leasing, Inc. v. U.S., 66 Fed. Cl. 8 (Fed. Cl. 2005); Todd Hixon, Note, *The Architectural Works Copyright Protection Act of 1990: At Odds With the Traditional Limitations of American Copyright Law*, 37 ARIZ. L. REV. 629 (1995); Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering Out "Total Concept and Feel"*, 101 NW. U. L. REV. 1851 (2007).

[10] *See, e.g.*, T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97 (1st Cir. 2006); Shine v. Childs, 382 F.Supp.2d 602 (S.D.N.Y. 2005); Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002); Vanessa N. Scaglione, Note, *Building Upon the Architectural Works Protection Copyright Act of 1990*, 61 FORDHAM L. REV. 193 (1992).

[11] This style of architecture is best exemplified in the works of Robert Venturi and Denise Scott Brown (who wrote the definitive book about how architects can learn much from the billboards and strip malls of Las Vegas, see *infra* p. 33 and accompanying notes), as well as the neoclassical style of Robert A.M. Stern (the current dean of the Yale School of Architecture).

lacks choice.[12] As I show, such deterministic views are overly simplistic, and patently wrong.

I argue, on the other hand, that a broader, more protective "total concept and feel" test, like the one applied in the 2005 SDNY opinion *Shine v. Childs*, is nonetheless a valid reading of the Act as it is also, contrary to prior arguments, the best standard for promoting progress in the architectural field. This point is all the more elucidated with a look at current developments in architectural theory and work that have made an aesthetic mantra out of externally-determined factors like zoning laws and economic efficiency, or architecture that yearns to be revolutionary, rather than the mere puppets of market demand. For these reasons, I propose a simple two-step standard that addresses the fear of undue monopolies on useful forms while ensuring broad copyrightability for all styles of architecture.

Above all, this Paper argues that to deride architectural protection as merely a necessary evil—a by-product of the Berne Convention—at odds with the traditional limitations against copyrightability of useful articles is to restrict the very definition of architecture *itself*. That is, the argument (which Congress equivocally buys into) necessarily rests its feet on a specific notion of what architecture is, and proceeds from there, a definition that Graves in no small part had helped to foster. Secondly, by widening our understanding of architecture beyond that of the legislative history, this Paper hopes to reconcile the current split in the courts (as well as within the scholarly literature) between progress and protection in showing that the two, like Graves' man vs. machine dichotomy, are not mutually exclusive.

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[12] *See* Su, *supra* note 9; Hixon, *supra* note 9.

I. AT WAR WITH ITSELF: IS THE ARCHITECTURAL COPYRIGHT ACT AGAINST OR FOR CONCEPTUAL SEPARABILITY?

A. *Architecture and the New "Functionally Determined" Standard*

The reason I had opened this essay with a quote on narrative and story telling is because both the Act and the Copyright Clause itself are necessarily dependent on the written narrative. In ways that will soon be clear, the House Report reads as an implicit endorsement of one dominant mode of story-telling about architecture, at the expense of all else. But first: the Copyright Clause.

Embodied in Article I, section 8, clause 8 of the U.S. Constitution, the Clause grants Congress the power to protect the "writings" of authors in order to "promote the progress of Science." Thus, it was important for the passage of the Act that architectural works themselves (and not just the drawings, which were protected already under then-Copyright law) qualify as "writings."

The idea of architecture as text is one that's been written and theorized about extensively in the architectural field. However, one feels Congress visibly struggling to fit architecture into such a definition[13]—if it weren't for the U.S. interest in joining the Berne Convention (in order to protect against foreign piracy[14]), one may well guess that Congress wouldn't have tried. In order to do so, Congress needed a champion. Enter

[13] REP NO. 101-735, at 11-12 (1990).
[14] *See* EDMUND W. KITCH & HARVEY S. PEARLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 571 (4th ed. 1991).

notorious postmodern architect Michael Graves (I mention that he was post-modern because Graves' distaste for the Modernist idealization of the machine [think Le Corbusier's 'machines for living'[15]] becomes part of the narrative he sells, and the one that Congress inadvertently codifies). Congress draws particularly and extensively on Graves' 1982 essay, "A Case for Figurative Architecture" [16]. It is easy to see why. For one, Graves began his essay with a direct analogy between architecture and literature (this is in service of a broader point, which I will get to). He writes, "Literature is the cultural form which most obviously takes advantage of standard and poetic usages, and so may stand as a model for architectural dialogue."[17] His use of the "poetic" is perfect, as it turns out, for Congress itself will go on to state that "[a]rchitecture 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.'"[18] This is enough to convince the Congressional committee that an architectural work qualifies as a "writing" under the Constitution.[19]

But that's just the beginning. Because now Congress is tasked with elucidating the very *importance* of architecture, its worthiness to even be protected, at all. The tale Congress chooses to tell is one that speaks exclusively to its social function, to the relationship between men and their buildings. The House Report states, "Architecture

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[15] *See* GEORGE H. MARCUS, LE CORBUSIER: INSIDE THE MACHINE FOR LIVING (2001).
[16] Michael Graves, *A Case for Figurative Architecture, in* BUILDINGS AND PROJECTS: 1966-1981, at 11 (Karen Vogel Wheeler et. al. eds., 1982).
[17] *Id*. at 11.
[18] H. REP NO. 101-735, at 12 (1990).
[19] *Id.*

plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a work of art. It is an art form that performs a very public social purpose. As Winston Churchill is reputed to have once remarked: 'We shape our buildings and our buildings shape us.' We rarely appreciate works of architecture alone, but instead typically view them in conjunction with other structures and the environment at large, where, at their best, they serve to express the goals and aspirations of the entire community."[20] Congress' emphasis on the social and the community-oriented role of architecture may serve the purpose of convincing the public that architecture is valuable enough to society to achieve copyright protection, but in doing so, it vaunts a specific *kind* of architecture—the kind that operates with man at its center—as the most desirable, valued form of architecture.

As it turns out, Graves is the perfect frontman for this call to architecture's social goal. In "A Case for Figurative Architecture," Graves distinguishes between what he terms "standard" usage and "poetic usage," or the "internal and external manifestations of architectural culture."[21] Modernism on the other hand, according to Graves, did not preoccupy itself with "this debate about standard and poetic language," choosing instead to base "itself largely on technical expression—internal language—and the metaphor of the machine dominated its building form. In its rejection of the human or anthropomorphic representation of previous architecture, the Modern Movement undermined the poetic form in favor of nonfigural, abstract geometries. These abstract geometrics might in part have been derived from the simple internal forms of machines

[20] H. REP NO. 101-735, at 11 (1990).
[21] Graves, *supra* note 16, at 11.

themselves."[22] Graves rejected the Modernist ideal. Instead, as one may very well guess, Graves was a big fan of anthropomorphic work, as he claims that "[u]nderstanding the building involves both association with natural phenomena (for example, the ground is like the floor), and anthropomorphic allusions (for example, a column is like a man)."[23] Unsurprisingly, Graves' favored architecture sees *man* both as the *center* of this space (he derides famed modernist architect Mies van der Rohe's Barcelona Pavilion because it is "oblivious to bodily or totemic reference, and we therefore always find ourselves unable to feel centered in such space") and as the architectural referent (he sees the "tripartite division of [a] wall into base, body, and head," while not "literally imitat[ing] man," as "nevertheless stabiliz[ing] the wall relative to the room, an effect we take for granted in our bodily presence there").[24]

In turn, Congress internalized and then codified this dichotomy quite well. "The intent of the legislation is to protect only what Mr. Graves calls 'poetic language'," the Report says, embodied in architecture that is "responsive to issues external to the building, and incorporates the three-dimensional expression of the myths and rituals of society."[25] Thus, "internal language"—what the House quotes Graves as calling the "basic form—determined by pragmatic, constructional, and technical requirements," is patently uncopyrightable.[26] This point is further backed up by the House's quoting of Huxtable, who says: "*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

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[22] *Id.*
[23] *Id.* at 12.
[24] *Id.*
[25] H. REP NO. 101-735, at 17 (1990).
[26] *Id.*

architecture is the conviction and sensitivity with which technology and function are interpreted aesthetically, in solutions of a practical social purpose."[27] What Congress has done here, in effect, is bring back the headache-inducing "separability test," albeit in a new format: unlike in pictorial/graphic/sculptural works, in which the work is subjected to a test of whether or not the "design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences,"[28] architectural copyright rests on whether a design element is *functionally determined* (one would have to guess, then, that the copyrightable aspect, i.e. "poetic" language, must in some way implicate the social, as well).[29]

This is ironic because Congress will then go on to acknowledge that "[t]here is considerable scholarly and judicial disagreement over how to apply the separability test, and the principal reason for not treating architectural works as pictorial, graphic, or sculptural works is to avoid entangling architectural works in this disagreement."[30]

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[27] *Id* (emphasis added).

[28] *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (denying copyright protection to the "RIBBON" bike rack because of inability to separate aesthetic and functional concerns). Alternatively, in *Carol Barnhart, Inc. v. Economy Cover Corp.*, the Second Circuit interpreted the seperability test as asking whether the aesthetic features are mandated by the utilitarian functions of the article. 773 F.2d 411 (2d Cir. 1985).

[29] H. REP NO. 101-735, at 19 (1990). Aside from this restriction, perhaps architects and judges alike will take heart in knowing that, like the rest of copyright law, architectural copyright has a rather low bar when it comes to originality (which, as Justice O'Connor wrote in the seminal copyright case *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991), is the *sine qua non* of copyright law)—it does not require a showing of "novelty, ingenuity, or aesthetic merit." Congress acknowledges that "[s]ubjective determinations of artistic or aesthetic merit are inappropriate and contrary to fundamental principles of copyright law"—presumably, at least, as long as the work shows some poetic soul.

[30] H. REP NO. 101-735, at 18 (1990)

B. *Comparing the "Useful Articles" Doctrine*

While the so-called separability test is no doubt exasperating for its various formulations (courts have applied tests of physical separability, conceptual separability, and Nimmer's marketability test[31]), it nonetheless earmarks an important attribute of intellectual property law. The Copyright Act of 1976 defines a useful article as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[32] Useful articles are denied copyright protection because there is another avenue available to designers of such items: patent law—specifically, a design patent.[33] Because of the power of a monopoly on useful items, patent law's term of protection is shorter than copyright's, yet is much stronger (copyright, after all, has built-in defenses to would-be infringers like fair use[34]).[35] Accordingly, the hurdles an inventor needs to jump through to secure a patent are much higher than copyright (which merely requires a showing of a modicum of originality): a hopeful design patent holder must prove that his invention is novel, original, *and* ornamental. The process is time-consuming and expensive, to boot, ensuring that a patent holder's rewards do not exceed his effort, which would create a windfall to the owner.

[31] *See* Barton R. Keyes, *Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law*, 69 OHIO ST. L.J. 109 (2008).
[32] 17 U.S.C. § 101 (2006).
[33] 35 U.S.C. § 171 (2006).
[34] 17 U.S.C. § 107 (2006).
[35] 35 U.S.C. § 289 (2006).

Thus, in many ways, the copyrightability of architecture is at least, superficially, as questionable as copyrighting fashion[36]—the latter of which has yet to achieve copyright status. The war regarding whether fashion should be copyrighted mainly centers around whether to do so would increase or decrease innovation/progress in the fashion industry, which is, of course, an industry centered around planned obsolescence and consumption.[37] And if architecture, too, like one commentator notes, is entrenched in a market model of supply-and-demand—that is, if architects only create because of a client's demands, then surely the incentivizing aspect upon which the Constitution's grant of copyright power rests is nullified.[38] But, as I argue in Part III, such a simplistic view of the architectural field lacks imagination, taking account only of the service architect but not the speculative one.[39] Further, such an argument is akin to arguing that we need not grant copyright protection to the fine arts because there will always be market demand for the original painting (unlike in film or music, in which copies are fungible).[40] But these

[36] Professors Jeannie Suk and Scott Hemphill make a direct comparison between the copyrightability of fashion designs and architectural works in *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1185 (2009), suggesting a similar solution for fashion (i.e. carving out a new statutory right).

[37] *See A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, 109th Cong. 88 (2006); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design,* 92 VA. L. REV. 1687 (2006); Suk & Hemphill, *supra* note 34.

[38] James Bingham Bucher, Comment, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 39 EMORY L.J. 1261, 1268 (1990).

[39] *See* Jeffrey Kipnis, *Diagram, in* HUNCH 11: RETHINKING REPRESENTATION 86 (Penelope Dean ed., 2007); Section III, *infra*.

[40] Bucher, *supra* note 38, says: "As long as there is a demand for architecture, there will be a demand for architects. Considering the wide diversity of architectural works in our society, it is evident that the market values creativity….Thus, architects have a natural incentive to be creative; those architects who exhibit creativity will be rewarded with new commissions." One of course starts to wonder if that same argument wouldn't apply to the fine arts.

arguments miss the boat, for they assume that incentivizing innovation depends only on economic costs gained (or lost), absent of demoralization costs or subjective value. But that is another point I will get to in Part IV.

For now, it suffices to note that the House Report is a text at war with itself. It wants to go beyond the idea that architecture is a mere useful article, for useful articles are patently uncopyrightable, due in no small part to the belief that to do so would allow monopolies on functionally useful forms. On the other hand, Congress does not know how, instead falling back on the old belief that architecture exists to serve mankind, to house them, to be habitable structures capable of sheltering us. If that's the case, then it's easy to challenge Congress by asking whether anyone should be allowed to have a monopoly on such a socially-beneficial form. And, in co-opting Graves' rhetoric about the easy partition between the "poetic" and the "standard," Congress both makes the case for the importance of architecture's social functions as it exacerbates the fight for limited protection to just those anthropomorphic works. The "two-step" test that Congress envisions: first determining if there are original design elements present, and then asking whether such elements are "functionally required,"[41] once again shows Congress unable to escape the useful articles doctrine. Thus, on its face, Congress has complied with the Berne Convention. But a closer reading of the legislative history will leave reason to seriously doubt whether any architectural work can make the cut. As we will see, Congress' equivocating will result in a split between the courts.

[41] H. REP NO. 101-735, at 18 (1990).

II. CURRENT CASE LAW: ABSTRACTION/FILTRATION VS. TOTAL CONCEPT AND FEEL

A. One Side of the Divide: Trek*'s Abstraction-Filtration-Comparison Standard and the "Supersubstantial Similarity" Test*

As predicted, a look at a recent case addressing the Act will bring the idea of "functionally determined" to the point of existential absurdity. In *Trek Leasing, Inc. v. United States*[42], the plaintiff, an architecture firm, attempted to sue for copyright infringement when defendants, another architecture firm, built a similar post office in a nearby town (both were commissioned by the United States Postal Service). The Federal Claims Court starts, "According to 17 U.S.C. § 101, an architectural work 'includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features'."[43] They go on to state that the plaintiff "admits that some of its decisions were influenced by economic concerns instead of aesthetic ones. These elements raise serious questions about the copyrightability of Plaintiff's work."[44] In a section of the opinion devoted exclusively to "[e]fficiency, [n]ecessity, and [e]xternal factors," the court, in complying with consistent analysis from other circuit courts in which "elements dictated by efficiency, necessity, or external factors must also be filtered out of the court's infringement analysis," points out that, for example, the plaintiff's decision to use faux stone was dictated by economic concerns

[42] Trek Leasing, Inc. v. United States, 66 Fed.Cl. 8 (Fed. Cl. July 7, 2005).
[43] *Trek*, 66 Fed.Cl. at 12.
[44] *Id* (internal quotations omitted).

(real stone would've been too cost prohibitive), as was their decision to use concrete masonry units for the exterior walls.[45] Further, the court points out that the plaintiff "could not use real (structural) wood lintels to secure a faux stone structure due to building codes….Furthermore…the parapet must be placed along the roof's edge, and the placement of that edge is determined by the location of the walls, which is determined by the USPS drawings. Therefore, the parapet placement is also unprotectable expression (as is the location of the cap, which sits atop the parapet)."[46] Essentially, the court, rather than look at the work *as a whole*, has chosen to view *any* element of the work that is necessarily dictated by another (presumably, unprotected) element of the work—in other words, an element that logically follows or is dependent on another unprotected element—as therefore somehow "necessarily, efficiently, or externally" dictated, and thus unworthy of protection.

In doing so, the court applied yet another dubious test: the so-called "abstraction-filtration-comparison" test, which has been applied to another field of hotly-contested copyrighted work: computer software.[47] That is, rather than examine how the whole of the work could be an original—and even, to use Graves' word—poetic expression, the court instead embarks upon a *separation* of the unprotectible aspects of plaintiff's work from the protectable elements (sound familiar?[48]). Thus, once the court had solidly

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[45] *See id.* at 16.
[46] *Id.* at 17.
[47] *See id.* at 12 (noting that while the abstraction-filtration-comparison test is normally applied to computer programs, the D.C. Circuit "applied a similar analysis to an architectural work case"). *See also Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary*, 100th Cong., 1st & 2d Sess. 679 (1988) (testimony of Paul Goldstein).
[48] See discussion of conceptual separability test, *supra* note 28.

filtered out any element dictated by "external factors," what was left was "necessarily a 'thin' [copyright]."[49] Often, the court notes, "this results in the organization of the elements being the only protectable aspect of the copyrighted work."[50] Yet not only does this test directly fly in the face of Congress' other dictate in the Act, which is a recognition that "creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectable whole,"[51] it also circumvents the statutory language of the Act, which provides that an architectural work "includes *the overall form as well as* the *arrangement and composition of spaces and elements* in the design."[52] How could the court have made such a mistake? Perhaps because the equivocal wording of the Act, which also states that "individual standard features" are not included in the overall protectable work,[53] could just as easily lend itself to the filtration test as it resists it. But how do we determine what "standard" is? Not only does *Trek* conjure up Graves' definition of "standard" as any building component touched by technology or practical concerns, but its result is also very much dependent on a narrative of architecture as one of creative resolution to functional and social problems (as Congress had so quoted Huxtable[54]). In this light, architecture has much in common with computer software, and thus could conceivably be evaluated under the same standard.[55]

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[49] *Trek*, 66 Fed.Cl. at 17.
[50] *Id.*
[51] H. REP NO. 101-735, at 17 (1990).
[52] 17 U.S.C. § 102 (emphasis added).
[53] *Id.*
[54] *See supra*, p. 7.
[55] Daniel Su, *supra* note 9, has made this point, writing: "[T]here are many similarities between architectural works and computer programs. Both types of work represent a hybrid of functional and creative elements. Both architects and software engineers face a

This determination in turn led the *Trek* court to apply a more stringent test to evaluate similarity. While the traditional test for determining infringement is the "ordinary observer" test, the court decided to apply the "more discerning" observer test—requiring a showing of "supersubstantial similarity" in order to constitute infringement.[56] This, I argue, is a pernicious standard, if for no other reason than that it makes it vastly easy for would-be infringers to loophole around the law by changing small details, such as the color or size of building material (in fact, the *Trek* court suggests that the "Plaintiff's choices regarding the color and type of faux stone" constituted its few "original" elements[57]—presumably, had defendant used a different variety of stone, there would be no finding of supersubstantial similarity).

Of course, to be sure, a post office that worked in part off of USPS building plans[58] is not exactly the high water mark of creative endeavor, but then again, Congress itself had explicitly stated that the bar for originality when it came to architectural copyright protection would be low.[59] *Trek* therefore stands as harmful precedent. Post-*Trek*, one must presume that any element dictated by building codes or involving economic consideration is inherently unprotectable (this is not an unrealistic fear: current case law is already headed that way, see *infra*). Given the nature of architecture as a discipline (that it caters to a client's economic concerns, that it is heavily regulated by building and zoning codes), can *any* work pass the *Trek* hurdle?

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similar set of external factors that limit their freedom of design choice. The nature of the problem that a computer program aims to solve is analogous to the building program requirements of an architectural design." 1875.

[56] Trek Leasing, Inc. v. United States, 66 Fed.Cl. 19 (Fed. Cl. July 7, 2005).

[57] *Id.* at 17.

[58] *Id.* at 16.

[59] *See supra* note 29.

The answer, I suggest, merely involves placing a different lens on the same world. But I will return to this question later. For now, I will take a brief look at another recent case, *Shine v. Childs*, for a different answer to the same statutory text.

B. Shine v. Childs*: A Promising Future*

Shine v. Childs was a 2005 New York district court case involving a famous and well-established defendant, David Childs of the behemoth architecture firm Skidmore Owings & Merill (SOM).[60] The plaintiff, on the other hand, was a young architect named Thomas Shine, who had designed a soaring skyscraper as part of a studio project at the Yale School of Architecture. [61] As part of Shine's final review in late 1999, a jury of invitees, including Childs, evaluated his work. The reviews were glowing.[62] Unfortunately, in December of 2003, Childs and SOM presented a design for Ground Zero's Freedom Tower that Shine alleged was strikingly similar to his prior project.[63] This suit ensued.

The court declined to "filter out" uncopyrightable elements and analyze "the elements of plaintiff's works separately, comparing only those elements that are copyrightable to those present in the designs for the Freedom tower."[64] Judge Mukasey briskly writes, "[A]s our Circuit noted, we might have to decide that there can be no originality in a painting because all colors of paint have been used somewhere in the

[60] Shine v. Childs, 382 F. Supp.2d 602 (S.D.N.Y. 2005).
[61] *Id.* at 604.
[62] *Id.* at 604-05.
[63] *Id.* at 606.
[64] *Id.* at 610.

past."[65] Reading the same statutory text as *Trek*, the *Shine* court comes to the opposite conclusion, choosing instead to hone in on the words "overall form" and "arrangement and composition" to evaluate the work—even with its arguably unprotectable individual elements—as a protectable whole.[66] Accordingly, the court elects to use the substantial similarity test, rather than *Trek*'s ultra-stringent supersubstantial similarity one.[67]

As is often the case, judge-made law will continue to shape the outer limits of architecture's copyrightability. To ignore the legislative history of "poetic" versus "standard" and focus solely on the text of the statute can yield two opposite results, as *Trek* and *Shine* have shown us. 17 U.S.C. Section 101 states: "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 spaces and elements in the design, but does not include individual standard features."[68] The text is easily amenable to both a *Trek* interpretation of filtering out the standard features and evaluating the remaining whole with a very thin copyright that subsists mostly in the exact arrangement of elements in space, or the *Shine* interpretation of acknowledging that while individual standard features may not be copyrightable by themselves, they can nonetheless coalesce to form a copyrightable whole. As *Shine* was decided in August of 2005, a mere three months after *Trek* was decided, the ground is now ripe for either interpretation by future courts.

Subsequent case law, though none as high-profile as *Shine v. Childs*, has been equally divergent in its interpretation of the Act. For example, in the recent 2010 case

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[65] *Id.*
[66] *Id.* at 609.
[67] *Id.* at 612.
[68] 17 U.S.C. § 101.

Harvester, Inc. v. Rule Joy[69], the district court cited "(1) market demands, (2) building codes and manufacturers' clearance directives, [and] (3) functional demands" as factors that "operate to limit in some way the opportunity for originality and available ways in which to express elements in [plaintiff's] Architectural Drawings."[70] "Market demands" can even "include the expectations and design tastes of prospective consumers of the residential apartment and commercial retail space,"[71] raising very serious questions as to what architecture would be copyrightable at all under such a standard. Unsurprisingly, the *Harvester* court decided that the plaintiff's copyright was a "thin" one, at best.[72] The *Harvester* approach that treats expression addressing "market demands, building codes and zoning requirements, functional demands, the physical site and environment, budgetary constraints and available technology" as "merging" with the idea and thus unprotectable under the merger doctrine was followed in the 2011 case *Dream Custom Homes v. Modern Day Construction*.[73] As we will see in Part III, such standards raise serious questions for the copyrightability of prominent, creative architectural works being built today. On the other hand, the district court in the 2009 case *T-Peg v. Vermont Timber* declined to apply *Trek*'s abstraction-filtration-comparison standard, which was urged by the defendants (for obvious reasons).[74]

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[69] Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC, 716 F.Supp.2d 428 (E.D. Va 2010).
[70] *Id.* at 440-41.
[71] *Id.* at 441.
[72] *Id.* at 434.
[73] Dream Custom Homes, Inc. v. Modern Day Const., Inc., 8:08-CV-1189-T-17AEP, 2011 WL 976420 at *8 (M.D. Fla. Feb. 22, 2011) (citing *id.*).
[74] T-Peg, Inc. v. Vermont Timber Works, Inc., CIV 03-CV-462-SM, 2009 WL 839522 at *2 (D.N.H. Mar. 27, 2009).

Part IV of this Paper will suggest a new standard for proceeding that hopes to replace the split in court opinion with a uniform standard that nonetheless takes into account the difference between your standard resort fare and a work of monumental architecture like Shine's. But to understand further why the abstraction-filtration standard is pernicious—and why we should *not* evaluate architectural work under the computer software standard—we must first look at current developments in architecture, all of which move away from the legislative history's false dichotomies of poetic versus standard, man versus machine, creative versus determined, and internal versus external, into a new understanding of the intellectual progress architecture can foster.

III. ALTERNATE NARRATIVES: BERNARD TSCHUMI, PETER EISENMAN, AND THE DUTCH SCHOOL (OR, FUNCTIONALITY REBUKED)

In order to justify *Shine*'s use of the "total concept and feel" test, we must first ward off the possibility that such a test as applied to architecture could stifle progress by allowing monopolies on useful forms. That is—while *Shine* relies on a textual reading of the statute, it is not immune from Constitutional attacks.

What the Act and all the legal literature surrounding the Act have implicitly focused on, knowingly or not, is merely one view, to return to the title, of the cathedral. That is, in emphasizing architecture's socially beneficial aspect, as Congress did, or in deriding architectural copyright as superfluous to the progress of the field, as the literature has done, all the analysis surrounding the Act so far is only speaking to the service architect—the architect that merely "seeks to expertly fulfill the needs and desires

of a client," resulting in work that only reflects the "self-replicating ambitions of entrenched power and the banalizing forces of the market."[75] But such is a vastly limited view.

Because then there is the speculative architect—the one who "foregrounds his effort to *change* architecture so that it, in turn, can help shape a better world."[76] In what is a brilliant repetition of the same Churchill quote Congress had used in the Act's legislative history, architect Jeffrey Kipnis writes: "Winston Churchill said, 'We shape our buildings; thereafter they shape us.' Karl Marx would have agreed, *once he had reversed the order of causality*."[77]

Speculative architecture challenges the assumptions we hold about an architecture that can do nothing but be pre-determined end products that reflect the mass desires of consumer society, and it is these assumptions that are being challenged right now by the radical architecture of today. The examples I will provide will serve to not only dispel the (what I argue, wrongful) notion of architecture as akin to "useful articles," but also prove the unworkability of *Trek*—and Congress' tentatively proposed—two-step "functionally determined" standard.[78]

A. *Bernard Tschumi: Useless Architecture*

I want to eradicate once and for all the notion that, as one commentator put it, "[f]ew,

[75] Kipnis, *supra* note 39, at 86.
[76] *Id.*
[77] *Id.* (emphasis added).
[78] H. REP NO. 101-735, at 18-19 (1990).

if any architectural structures have been conceived and commissioned without some functional purpose in mind even if they are clad in artistic overtones."[79] Indeed, there is some eagerness amongst the Act's detractors—and equivocating language on Congress' part[80]—to label architecture as a useful article. Architecture is useful only insofar as the service architect aims to please his client. And though Modernism's oft-repeated mantra, "form follows function," still stands as the most prominent historical justification for architecture's utilitarian calling, this is just one narrow tunnel view into the whole of architectural history.[81] Architect Bernard Tschumi (and the former dean of the Columbia Graduate School of Architecture) traces the history of the other side of the story, that of revolutionary architecture: "[architectural revolutionaries'] attempts to find a socially relevant, if not revolutionary, role for architecture culminated in "the May 1968 events with 'guerilla' buildings, whose symbolic and exemplary value lay in their seizure of urban space and not in the design of what was built….This nihilistic prerequisite for social and economic change was a desperate attempt to use the architect's mode of expression to denounce institutional trends by translating them into architectural terms."[82] Tschumi reiterates the distinction between the autonomous architecture that powers the field via its ability to *dream,* and its ultimate translation into the service architecture that we think of when the word is invoked.[83] In Tschumi's view, "architecture seems to survive only when it saves its nature by negating the form that society expects of it. *I would therefore suggest that there has never been any reason to doubt the necessity of*

[79] Hixon, *supra* note 9, at 649.
[80] H. REP NO. 101-735, at 18-19 (1990).
[81] Hixon, *supra* note 9, at 648; Scaglione, *supra* note 10, at 210.
[82] BERNARD TSCHUMI, ARCHITECTURE AND DISJUNCTION 45 (1996).
[83] *Id.* at 46.

architecture, for the necessity of architecture is its non-necessity. It is useless, but radically so. Its radicalism constitutes its very strength in a society where profit is prevalent."[84] In other words, it is the *will* and, indeed, the *goal* toward revolution and estrangement that gives the field its ultimate progressive power. Further, Tschumi's plea for uselessness is not completely utopian: he acknowledges, after all, that the architecture he speaks of—the whole of the field that aims to break free of the useful ends society ultimately makes of it—might "contain more revolutionary power than its numerous transfers into the objective realities of the building industry and social housing."[85] But built works are only half the story. As the facts of *Shine v. Childs* have shown us, anything—from models made for a graduate student studio to proposals submitted as part of an architectural competition (which is the other reality of the field—proposals that may never end up built but still may end up copied)—could be fair game for copycats.

B. *Likewise, Peter Eisenman: Alienation Games*

For further proof that even built works are not inherently utilitarian, one need only look at the provocative work of Peter Eisenman, who takes the idea that buildings are necessarily humanistic or even inhabitable and inverts it on its head. Eisenman, whose work I began this paper quoting, sets out to challenge the idea of architecture as shelter, comfort, or stability. Applying Derridean philosophy to architecture, Eisenman's goal is to *dislocate* dwelling in an attempt to continuously

[84] *Id.*
[85] *Id.*

reinvent architecture itself.[86] But Eisenman's work, too, is a work of literary proportions, and thus would be right at home in Congress' attempt to situate architecture within the meaning of "writing"—albiet a writing of a very different kind. Using what he terms the "rhetorical figure," Eisenman's architecture works to free the field from its dependency/attachment to representation; sick of architecture standing in as a readymade sign for age-old cultural signifiers or reinforcement of institutions, Eisenman would rather create *new* content by "dislocat[ing] site implications from their culturally predetermined meanings."[87] Deeply opposite to Graves, Eisenman does *not* want to center—he wants to decenter; rather than read a figure aesthetically or metaphorically, Eisenman would rather a figure be read rhetorically.[88] Only by doing so can architecture remain the "constructive activity" it is, and in turn, create institutions, rather than institutionalize.

As a result, works like House VI, which he designed for clients Richard and Suzanne Frank in 1972, are difficult to the point of pure alienation. Funny that in the client's tell-all book, *Peter Eisenman's House VI: The Client's Response*, the Franks claim to "love living in such a poetic structure," in what is a pure invocation of Graves' language.[89] The truth of the matter is that Graves would've hated House VI, for it does not take man as the center of its reference point at all. For example, originally, a glass strip had divided the bedroom, forcing the Franks to sleep on opposite sides of the room

[86] *See* Eisenman, *supra* note 3, at 18.
[87] *Id.* at 21.
[88] Eisenman, *supra* note 3, at 18, 21.
[89] SUZANNE FRANK, PETER EISENMAN'S HOUSE VI: THE CLIENT'S RESPONSE (1994).

in what is a comical denial of the master bedroom prototype.[90] Additionally, basic expectations for a house—like a handrail for the staircase—are absent.

Likewise, in his 1989 building, the Wexner Center for the Arts (Ohio State's contemporary art space), Eisenman's use of "not quite vertical," "not quite horizontal" colliding floor and wall planes had the intention of putting "in suspension the sense of the pull of gravity."[91] As goes the story, legend circulated that the building was known to make people vomit, until a journalist uncovered that Eisenman himself had made up the story.[92] But the story is instructive, for, as Professor Andrew Ballantyne aptly points out, "By some scale of values he was actually enhancing the reputation of his building by letting it be known that it was hostile to humanity."[93] As such works and ideologies show, we've long moved beyond the world of Modernism and form-follows-function, and even of that of the social or the human as the ultimate goal—as perhaps best-exemplified by the newly-coined catchphrase for this school of architects: the "posthumanists".[94]

C. *The "Dutch School": Inevitability as Aesthetic Mantra*

Even highly prolific, successful architects these days—those who straddle the

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[90] PETER EISENMAN, HOUSES OF CARDS (1987).
[91] ANDREW BALLANTYNE, WHAT IS ARCHITECTURE? 14 (2002).
[92] MICHAEL POLLAN, A PLACE OF MY OWN 68 (1998).
[93] BALLANTYNE, *supra* note 91, at 14.
[94] *See, e.g.*, K. MICHAEL HAYS, MODERNISM AND THE POSTHUMANIST SUBJECT: THE ARCHITECTURE OF HANNES MEYER AND LUDWIG HILBERSEIMER (1995); Neil Badmington, *Theorizing Posthumanism*, 53 CULTURAL CRITIQUE 10 (2003).

line somewhere between speculative and service architects—put on the "Yes man" suit in order to make a game of the very nature of architecture. In what I will dub the "Dutch school"—specifically, the firms OMA, MVRDV, and BIG—architecture's "functionally determined" aspect becomes the very playstuff for fancy and irony. These three firms have made an aesthetic mantra out of the *seemingly* externally-determined, working off of zoning laws, borrowed airspace, and efficiency concerns to create works that seem inevitably determined yet achieve highly original, creative ends, as if commenting on the modern role of the architect (a position architectural critic Keller Easterling calls duplicitous[95]) itself. It is, in a sense, a winking nod to the Modernist credo of "form-follows-function"—but if anything, the new garde—including the "Dutch school"—addresses the idea of whether form is *ever* a mere inevitable product of functional concerns.

The Office of Metropolitan Architects (OMA) has designed some of the most iconic contemporary buildings in the world—including the Seattle Central Library, Casa da Musica concert hall in Portugal, and the CCTV tower in China. Its principal Rem Koolhaas, a prolific writer and architectural theorist, makes an aesthetic mantra out of the seemingly inevitable. In writing on OMA's proposal for the 2001 extension to the Whitney Museum in New York[96] (the project was eventually handed over to Renzo

[95] Easterling, in writing on the extra-jurisdictional spaces of international or transnational companies and their corporate playgrounds, says: "Duplicity is the prevailing logic and organizational disposition in this space….Curiosity and ingenuity nourish a position wherein one is too smart to be right." Keller Easterling, *Zone, in* WRITING URBANISM: A DESIGN READER 297, 302 (Douglas Kelbaugh & Kit MCCullough eds., 2008).
[96] *See* Appendix 1 (OMA, Proposal for the Whitney Museum).

Piano[97]), Koolhaas cheekily emphasizes the concept of obedience. Koolhaas writes of the project's conception,

> Handed a commission with a wink—design an extension of such virtuoso brilliance that the Landmarks Preservation Commission, custodian of the adjacent late-19th Brownstones, will swoon and give permission for demolition—OMA instead chose to take the preservationist and zoning laws tangling Breuer's Whitney strictly at face value. The result is a building growing from a miniscule footprint, in full submission to the zoning envelope, reaching up and over the Brownstones and the Breuer, 'like a gigantic cat's paw.' This act of obedience engenders a triple liberation: the Brownstones could be used, for the first time, to house prewar, smaller paintings in intimate spaces…or like a Procrustes bed to try to counteract the gigantomania of contemporary art.[98]

The proposal, unfortunately, was "deemed disrespectful."[99] But this point goes exactly to the whole genius of Koolhaas and OMA's work: in recalling the seemingly inevitably-determined nature of both skin (in adhering to the zoning envelope) and program (that a museum must be hospitable to the art it keeps), OMA has in turn engendered a building this is neither conventional in shape (thus

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[97] *See* WHITNEY MUSEUM OF AMERICAN ART: NEW BUILDING PROJECT, http://whitney.org/About/NewBuilding/About (last visited June 11, 2011, 2:49 PM).
[98] Rem Koolhaas, *2001 Whitney Museum Extension, New York (1966 and 1985)* (on file with author).
[99] *Id.*

the rather offensive and comically out-of-place image of a cat's paw stretching over the Upper East Side) nor agenda (the forced preservation of small paintings in private homes). That the end project was deemed liberating and disrespectful is illustrative: Koolhaas is aligning himself *not* with the avant-garde, dedicated to broaching new ground as if in some desperate escape from the inevitability that plagues the architectural profession, but with the *arriere-garde*—turning obedience into quiet subversion. By adhering to the exact letter of the client's demands, Koolhaas rather allows his own vision of the world—as chaos and comedy—reign, though, as the case of the Whitney shows, not always to the satisfaction of the client.

Likewise, the Bjarke Ingels Group (BIG)—headed by Bjarke Ingels, a protégée of Koolhaas—takes the idea of the *arriere-garde* and channels it into one overwhelming position: "Yes Is More," or, what Ingels calls "pragmatic utopianism."[100] Inherent in the mantra is the idea that you can somehow play the Yes-man and also manage to *exceed* such parameters. For too long, Ingels notes, "the field of architecture has been dominated by two opposing extremes," on "one side an avant-garde of wild ideas, often so detached from reality that they fail to become something other than eccentric curiosities," and on the other side the "well-organized corporate consultants that build predictable and boring boxes of high standard." Thus, "[r]ather than choosing one over the other, BIG operates in the fertile overlap between the two opposites," a position Ingels deems evolutionary, rather than revolutionary.

[100] BIG, YES IS MORE: AN ARCHICOMIC ON ARCHITECTURAL EVOLUTION 14 (2009).

BIG's winning competition proposal for a waste treatment plant in Copenhagen is the perfect embodiment of such mediated avant-gardism.[101] BIG notes that "[m]ost of the recently built power plants are merely functional boxes, wrapped in an expensive gift paper. The main 'function' of the façade is to hide the fact that factories are having a serious image/branding problem."[102] What's ironic about the boring, aesthetically unimaginative power plants of today is that, presumably, if the façade lacks function, it might be, under the efficiency/external/economic factors test used by the *Trek* and *Harvester* courts, presumably copyrightable. But BIG, on the other hand, 'want[s] to do more than just create a beautiful skin around the factory. [They] want to *add* functionality! The ambition of creating added value in terms of added functionality does not stand in contrast to the ambition to create beauty. It does not have to be either/or."[103]

But BIG's desire to functionalize what would otherwise be a non-functional, probably-copyrightable building envelope might set off alarm bells. Again, items with utilitarian functions traditionally been relegated to the realm of patent law, for, as the Supreme Court had once stated in explaining trademark law's aesthetic functionality doctrine,

> The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead

[101] *See* Appendix B (BIG, Proposal for the AMF Waste Treatment Plant).
[102] BIG, AMF, http://www.big.dk/projects/amf/ (last visited June 26, 2011, 3:35 PM).
[103] *Id.*

> inhibiting legitimate competition by allowing a producer to control a useful product feature. It is the province of patent law, not trademark law, to encourage invention….[i]f a product's functional features could be used as trademarks, however, a monopoly over such features could be obtained without regard to whether they qualify as patents and could be extended forever.[104]

Copyright protection, while not perpetual like trademark protection, nonetheless lasts far longer than patent law. But here is where we find BIG's stated intent of "adding functionality" diverging from the actual purposes behind the functionality doctrine's prohibition on extended monopolies. As it turns out, BIG's idea of "added functionality" means "turning the roof… into a ski slope for the citizens of Copenhagen."[105]

Comical? Yes. Ridiculous? Probably. But this is exactly the kind of unconventional, tongue-in-cheek, playful thinking parading under old form-meets-function talk that BIG is notorious for. It cannot seriously be argued that skin-as-ski-slope is such a useful feature of a building that to deprive future architects the ability to use it would inhibit competition in the field. Yet if we resign ourselves to filtering out any elements with a supposed functional bent, BIG's hyper-creative idea for a rooftop skiing slope is now fair game for any architect, while a monolithic grey skin might somehow manage to surmount the low originality barrier in obtaining copyright protection.

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[104] *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995).
[105] BIG, AMF, *supra* note 102.

A last example of the type of "Yes"-driven architecture that achieves uncommon ends is MVRDV's 2001 proposal for the Eyebeam Institute in Chelsea.[106] Like OMA's proposal for the Whitney extension, MVRDV's building envelope conforms smoothly to the zoning envelope. But "[b]y using the ultimate limits of given urban zoning, the volume permits for an oversizing that allows for interior voids, that can become a collective zone throughout the building, accentuating an endless interior, in which all functions, both Eyebeam's and the tenants, can be addressed. This envelope turns the Institute into a landmark within its surroundings."[107] Under the current abstraction/filtration/comparison standard, both the interior voids and the iconic building envelope would be uncopyrightable. But the act of oversizing (by using the maximum allowable envelope) is artistic genius, for it allows the creation of an endless series of tiny interior voids that is at once beautiful (resembling "[a] giant bee-hive") as it is expressive (the voids are a modern-day rewriting of the cathedral's hollow-tower; "[t]he cathedral like effect follows the logic of eternity: it avoids a fashionable and rapidly outdating architecture").[108]

These architectural examples—of taking the demands and efficiency concerns of the external world and, in turn, *making them beautiful, or sublime*—

[106] *See* Appendix 3 (MVRDV, Proposal for the Eyebeam Institute).
[107] MVRDV, http://www.mvrdv.nl/#/projects/170eyebeamnewyorkmediagalaxy (last visited June 11, 2011, 3:20 PM).
[108] *Id.*

are nothing less than art. It is, as Koolhaas puts it, "an art…[that] animate[s] larger and larger spaces," "engender[ing] an Apocalyptic Sublime."[109]

IV. TOTAL CONCEPT AND FEEL, REWORKED

A. *The Case for Broader Protection: Demoralization Costs and Expressive Content*

If it is true that Graves' narrative of populist social architecture with mere "symbolic appendages"[110] (surely superfluous, surely copyrightable) has dominated the legal conversation about architecture's "real" role and what protectable architecture is or does, then shifting the conversation to other views of the cathedral would necessarily mean widening the arena of protected works under the Act.

Now, it is highly possible—indeed, likely—that architecture does not need copyright to thrive, as it has survived all these years (in the United States, at least) without it. And if, as one commentator has argued, there are plenty of other incentive mechanisms in place for an architect: the client and/or the prestige of winning a competition, then does it matter if the scope of protection is narrow, rather than wide?[111]

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[109] Wall Text, Cronocaos, An Exhibition by OMA/Rem Koolhaas, New Museum (May 7, 2011).

[110] This phrase comes, conveniently, from a section titled "Social Architecture and Symbolism (as if plucked out of a section of the House Report)" in Denise Scott Brown and Robert Venturi's defining work on postmodern architecture, *Learning from Las Vegas*. ROBERT VENTURI, DENISE SCOTT BROWN & STEVEN IZENOUR, LEARNING FROM LAS VEGAS: THE FORGOTTEN SYMBOLISM OF ARCHITECTURAL FORM 155 (1977).

[111] Bucher, *supra* note 38, at 1269-70.

One reason this is harmful, I argue, is that to narrow protection so that Robert Venturi's symbolic appendages or Graves' anthropomorphic columns are covered but OMA's towers are not (or, at best, receive a "thin" copyright that any hopeful infringer with half a head on their shoulders would be able to circumvent) would be to unfairly single out specific architectural styles,[112] sending those architects a clear message: Your work doesn't make the cut (as original, as worthy of protection), but others do. This becomes significant when we take into account demoralization costs (to borrow Frank Michelman's phrase in his famous article on Takings Law[113]). Applying Michelman's demoralization costs to the losing architect, such costs would be those "disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered" (in the form of infringement damages) and the "present capitalized dollar value of lost future production caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion" (for example, those architects practicing under similar styles).[114] To be clear, such demoralization costs only apply if an individual feels that his or her work (or, probably more appropriately, an individual architecture firm, which, though collaborative, nonetheless exudes a unique style) has been unfairly singled out[115]—in other words, in a

[112] This has been previously argued, at least in the sense that the Act discriminates against Modernist styles (I argue that it discriminates against almost all styles, with the exception of some of postmodern architecture's more ornate forms). *See* Scaglione, *supra* note 10, at 206-07.
[113] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).
[114] *See id.* at 1214.
[115] I.e., when the harm focused on one individual is unusually great—see *id.* at 1123.

classical Rawlsian conception of fairness, the loser cannot feel that there are specific preferences in play.[116]

Of course, in a world in which no architectural work is copyrightable—as in, in the United States of twenty years ago—this would not apply. And, to a certain extent, because architectural copyright is still new—much, much younger than the concept is in the other arts—it might still come as a shock when an infringement claim is actually deemed valid, rather than the opposite.[117] But the proprietary nature of human beings also cannot be denied—the one that is tempted to look at a similar work and say, "Hey, that looks like mine." Even the architect Daniel Libeskind—who claimed to "not mind that Donald Bates," the architect of Federation Square in Australia, used "acute angles reminiscent of [Libeskind's] work"—could not help but be "initially disturbed" when Eisenman revealed a design "for a Holocaust memorial in Berlin….[which] looked too much like the memorial garden [Libeskind] had designed for the Jewish Museum in that city."[118] And yes, while the social sanctions for "an accusation of architectural plagarism"—including "cocktail party chatter and snippy blogs"[119]—nonetheless still exist, a claim for infringement would be available as a last resort to vindicate oneself in the eyes of the public—as Shine did with Childs in his David and Goliath tale.

After all, the laws that we have in place do not merely serve utilitarian ends, but are also a vindication of what we as a society are prepared to value. For example, the recently-enacted Visual Artists Right of 1990 and its set of restrictive rights on visual art

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[116] Michelman, *supra* note 113, at 1220.
[117] *See* Fred A. Bernstein, *Hi, Gorgeous. Haven't I Seen You Somewhere?*, N.Y. TIMES, Aug. 28, 2005, at 27.
[118] *Id.*
[119] *Id.*

owners (the creator of the work can "prevent any intentional distortion, mutiliation, or other modification of that work which would be prejudicial to his or her honor or reputation"[120]) abrogate the traditional property rights of owners in the name of a greater vindication of the value we accord to art as a society. The Architectural Works Copyright Protection Act, too, can have expressive value—if it allowed architecture to free itself of the commonly-held notion of being nothing but a vehicle for shelter and solace—and stand, instead, on its own two bold feet. Just as fine art exists as more than mere commodity pieces to be bought and sold in the stalls of Art Basel, so architecture too is more than just condo buildings made in service of the wealthy—it is, like music, film, art, and literature—a form of writing, capable of grafting its own intentions and narrative onto the world around it, rather than vice versa.

B. *The Two-Factor Balancing Approach (Between Tract Homes and High Architecture)*

But, at the same time, the possibility of monopoly—especially in the so-called "bread and butter" architecture (condos, tract homes)[121]—cannot be taken lightly. But to allow for loopholing by using a "supersubstantial" standard (begging the question, really, of what architect would be so dastardly as to copy another's project wholesale without even minor modifications), or to denigrate "high architecture" like those of BIG and OMA as merely cloaked by a "thin copyright" just because individual elements are seemingly "functionally" determined by laws or the market (as would be the case if, for

[120] 17 U.S.C. § 106(a).
[121] *See* Su, *supra* note 9, at 1856.

example, OMA's client asked for a building skin that looked "iconic"), is *not* the answer. Here's a better idea.

To begin with, copyright law, unlike patent law, already has built-in mechanisms that preclude absolute monopoly. In addition to the "independent creation" rule (two authors who independently arrive at the same result are nonetheless both valid copyright holders[122])[123] and the idea/expression dichotomy, there is also the fair use defense.[124] While the idea of fair use in architecture has not been litigated nor written about,[125] it is easy to imagine the concept as it applies to architecture: the field is, like the other arts, one of taking old components and making them new. Thus, if a would-be infringer had used another architect's copyrighted element in a transformative way, and as part of a larger project, the work would be easily amenable to a fair use defense. And, in the case of tract homes or condos, the "nature" of the copyrighted work itself (the second of the fair use factors) is akin to factual works: it receives a very thin protection. Only an egregious copier, then, would fail the fair use test.

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[122] Note, also, that independent creation in some way precludes the idea that a not-too-original tract home developer could monopolize the whole field, as "[t]he less creative the choice, the stronger the inference that the same choice or group of choices made by another was made independently." Procter & Gamble Co. v. Colgate-Palmolive Co., 199 F.3d 74 (2d. Cir. 1999).

[123] I acknowledge that architecture, like fashion, has very much of a "it's the zeitgeist" feel to it—as in, two firms might very well arrive at the exact same result if certain ideas are circulating in the air that year, as was the case one year with architects Thomas Leeser and Diller & Scofidio. *See* Bernstein, *supra* note 117. Since the two architects did so independently, there would be no infringement case.

[124] Codified at 17 U.S.C. § 107, courts weigh four factors in determining whether defendant has a valid fair use defense: "(1) the purpose and character of the use (2) the nature of the copyrighted work (3) the amount and substantiality of the portion used and (4) the effect of the use upon the potential market for or value of the copyrighted work."

[125] At least, not in depth. In Thomas M. Gilbert Architects v. Accent Builders and Developers, 337 Fed.Appx. 303, 309 (4th Cir. 2010), defendant *tried* to make out a fair use defense, but only addressed the fourth factor, ignoring the other three. Unsurprisingly, the Fourth Circuit dismissed it.

In addition to all of copyright's built-in protections against monopoly and supporting the free flow of information and ideas, I want to also suggest a simple two-factor balancing test that courts can consider when deciding whether a building design is copyrightable or not. While the "total concept and feel" test should be applied in most cases—thus, allowing a jury to evaluate the original and infringing work for substantial similarity, courts should consider awarding summary judgment to the defendant only in cases in which the gain to many (in having such form be in the public domain) would vastly outweigh the loss to the individual (this is a reformulation of Michelman's balancing test[126]). This test would therefore ensure that, if, for example, an architect were to develop a form for low-income housing that is able to maximize the number of available units and breathable space per unit while creating an overall pleasing skin in accord with the zoning code (thus alleviating urban blight), he should be denied a copyright for both the overall form and the individual components (for example, a special form of window that maximizes sunlight while being cheap and aesthetically pleasing) because he would realize that it is in his best interests to do so, for not only has the general welfare of society increased via a dramatic increase in available, affordable low-income housing, but, in the long run, this arrangement might benefit *him* specifically, via, for example, clearing more available building space for other developments.[127] On the other hand, an MVRDV design for an art space that smoothly conforms to the zoning envelope, though determined by external factors, would nonetheless be copyrightable because the gain to future art spaces hoping to use the same shape simply because it's beautiful would be de minimis, rendering MVRDV's perceived loss at having their

[126] Michelman, *supra* note 113, at 1194-96.
[127] *Id.* at 1220 (discussing Rawls' principles of fairness).

signature aesthetic be in the public domain unjust (one could also advance an argument that this in turn would make society as a whole *worse off* because these unique, monumental works of architecture would then slowly devolve into quotidian figures incapable of inciting aesthetic awe, and, in turn, heightened experience). Such a two-factor test would address concerns that architectural copyright could impede progress by allowing monopolies on vital, useful articles. Such a test would also find *against* the copyrighting of, for example, tract homes (if independent creation doesn't take care of that problem), because of the public interest in having them built cheaply, efficiently, and in large number. Thus, the tendency to want to "filter out" seemingly banal elements in seemingly banal buildings would be stifled, for such a tendency makes bad precedent for architecture like OMA's, which shares that tendency toward banality in irony only, rather than in fact.

CONCLUSION

Our current penchant for easy dichotomies and facile answers about what architecture is or what it exists for, especially in light of the Act's split between art and technology, must be reevaluated. We cannot forget, after all, that what Graves supported and Congress codified, via architectural statute, was the distaste or devaluation of the Modernist ideal of the machine—an ideal perhaps nowhere better demonstrated than in Le Corbusier's *Five Points of Architecture*, or in Alan Colquhoun's "Typology and

Design Method" [128]. But it cannot be disputed that both Corbusier and Colquhoun, along with endless other Modernists, were also deeply involved with the idea of beauty, of aesthetics, and how we can arrive there, or what it means. [129] Colquhoun himself acknowledges that "[w]hat appears on the surface as a hard, rational discipline of design, turns out rather paradoxically to be a mystical belief in the intuitive process"[130]—it is the urge to *will* our romantic inner selves onto the cold external world around us. If the Modernist ideal is of "a world of pure technology" in which form is merely "the result of the application of physical or mathematical laws rather than of previous association or aesthetic ideologies," then Venturi and Scott Brown are right to point out that this is nothing but a mere conceit—"even…the world of advanced technology…[is] not totally determining; there are areas of free choice."[131] And, more importantly, even assuming that the Modernist ideal could succeed, that we can ever achieve a world of "pure" technology—that utopia, too, is itself a form of aesthetic ideology.

But Modernism aside, we cannot assume that the leaps in new building material and the need for efficient housing that erupted shortly after World War II form the new status quo of architecture's complacent role to better serve—via machine—mankind.[132]

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[128] Alan Colquhoun, *Typology and Design Method*, ARENA, J. ARCHITECTURAL ASS'N 11 (1967).

[129] Le Corbusier had written, after setting out his five points of architecture, "The five essential points set out above represent a fundamentally new aesthetic." *Five Points of Architecture, in* L'ESPRIT NOUVEAU (1923), *available at* http://caad.arch.ethz.ch/teaching/nds/ws98/script/text/corbu.html.

[130] *Id.*

[131] VENTURI ET AL., *supra* note 110, at 133.

[132] The Case Study House program, which ran from 1945 to 1966, proves that efficiency and frugality were the banner words of the day, as well-known architects like Eero Saarinen and Pierre Koenig were commissioned to design model homes as part of the housing boom spurred on by the return of soldiers from World War II. *See* ELIZABETH SMITH, CASE STUDY HOUSES: THE COMPLETE CSH PROGRAM (Taschen 2002).

For there are also those leaps of faith that every art form makes every few decades in order to better discover, or more firmly entrench, itself in its own discipline. To me, Eisenman's evocation of a molten architectural practice continuously shifting in the uneven plates of its own violent eruptions does more to advance a notion of progress than Graves' plea for a return to the anthropomorphic rituals of our mythical past. Paradoxically, Congress had written that "[p]rotection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal" (of progress).[133] Congress is right that there *is* a constitutional goal in mind—of progress—but proceeding forward does not merely mean ornamenting our surrounding environment with nice, habitable buildings. Alienating architecture and difficult architecture and unexpected architecture can work to force us to confront our own assumptions, and that on its own has the power to create real, or radical, change. As Tschumi writes in an echo of the Eisenman quote I had opened this paper with,

> [A]rchitecture is constantly unstable, constantly on the verge of change. It is paradoxical that three thousand years of architectural ideology have tried to assert the very opposite: that architecture is about stability, solidity, foundation. I would claim that architecture was used….against and despite itself, as society tried to employ it as a means to stabilize, to institutionalize, to establish permanence. Of course, this prevailing ideology meant that architecture had to ignore the other terms of its equation (i.e., to be nothing but 'the artful building of spaces')…or to

[133] H. REP NO. 101-735, at 12 (1990).

> coincide with frozen rituals of occupancy—a court of justice, a hospital, a church, even the vernacular one-family house—in which the rituals of the institution were directly reflected in the architectural spaces that enclosed them.[134]

In turn, if we are truly keen on promoting creative possibility on an earth that remains ever-shifting, then we should avoid totalizing narrativistic impulses to subdivide, to dialectize, to neatly categorize, to abstract-and-filter, to end the search for alternative possibilities because being convinced the answers are in front of us is so much easier. Because while a world of chaos may be well-near undesirable, a world without possibility is simply unimaginable.

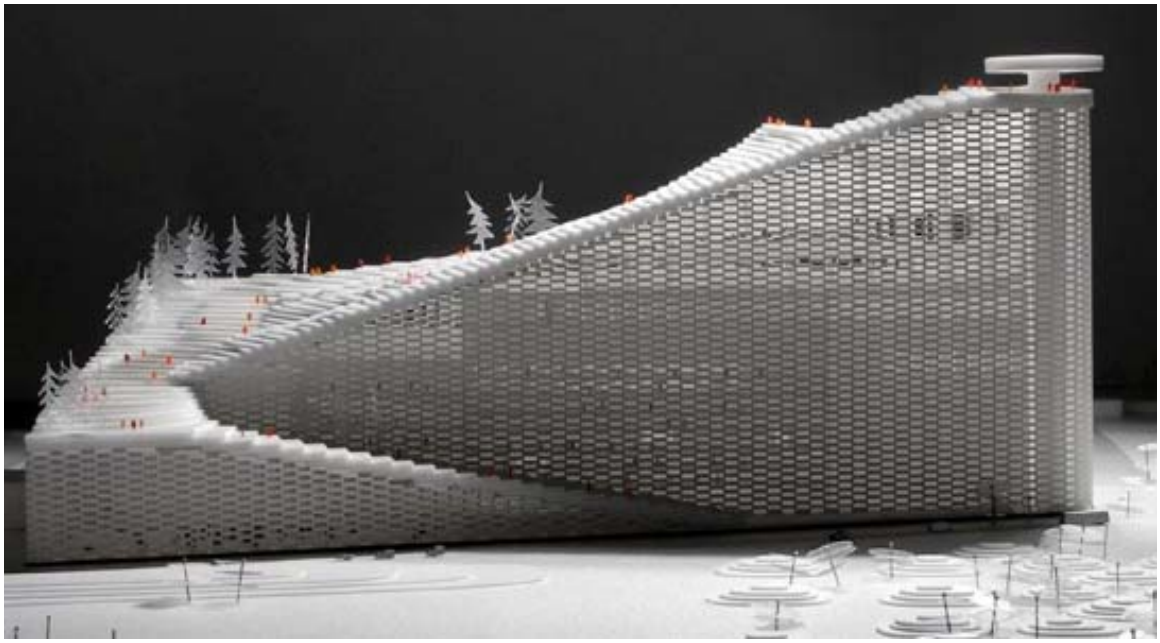
[134] TSCHUMI, *supra* note 82, at 19.

APPENDIX 1: OMA, PROPOSAL FOR THE WHITNEY MUSEUM

The Cat's Paw

Source: OMA
(http://www.oma.eu/index.php?option=com_projects&view=portal&Itemid=10&id=724)

APPENDIX 2: BIG, PROPOSAL FOR THE AMF WASTE TREATMENT PLANT

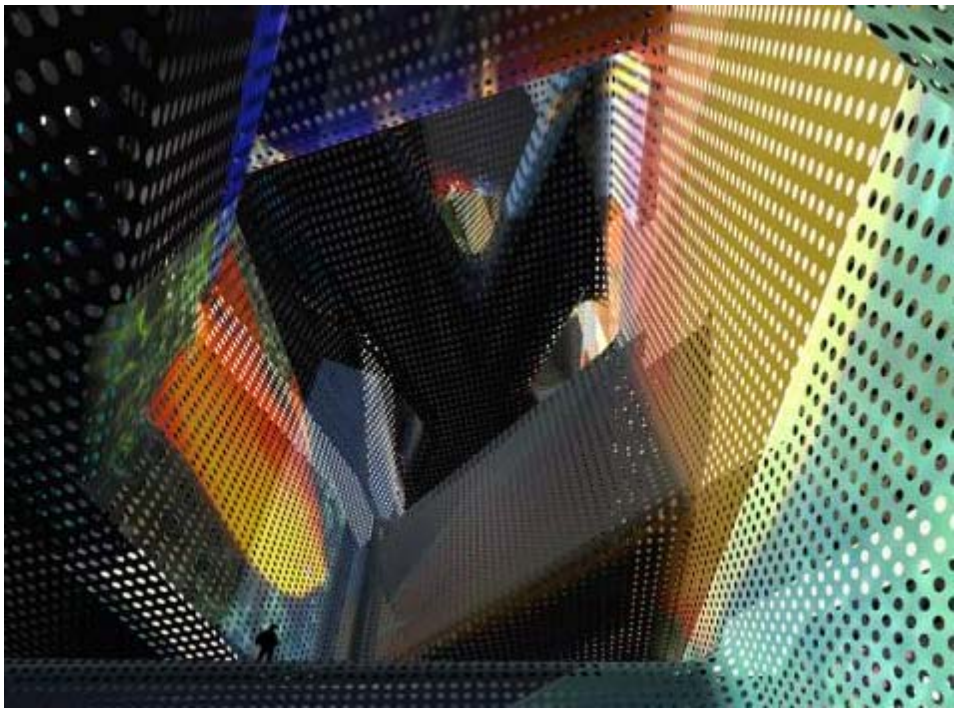


Skin as Ski Resort

Source: BIG (http://www.big.dk/projects/amf/)

APPENDIX 3: MVRDV, PROPOSAL FOR THE EYEBEAM INSTITUTE

Exterior



Interior Voids

Source: MVRDV
(http://www.mvrdv.nl/#/projects/170eyebeamnewyorkmediagalaxy)