Sculpture, Industrial Design, Architecture, and the Right to Control Use of Publicly Displayed Works

Richard H. Chused
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ABSTRACT—This article explores the anomalous ways in which copyright owners may control use of works they publicly display. Treatment of rights associated with publicly displayed sculpture and architecture are dramatically different. The copyright statute deprives owners of copyrights in constructed buildings of the ability to police the ways in which imagery or other uses of the publicly visible structure may be exploited by others. This article focuses on three related but different settings involving the public display of (1) a work of graffiti, (2) a large-scale sculpture, and (3) a building with sculptural features. Through an analysis of the differences in their treatment, this article investigates problems in extant law and suggests potential resolutions of the issues.

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INTRODUCTION

The right of copyright owners to control use of their publicly displayed work is not a rational construct. Similarly, the copyright code’s

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definitions of pictorial, graphic, and sculptural works on the one hand, and architectural works on the other, defy logic. Different statutory standards govern the way publicly visible aspects of both pictorial, graphic, and sculptural works on the one hand and architectural works on the other may be protected, fairly used, or commercially exploited. Copyright owners of pictorial, graphic, and sculptural works control the use of their publicly displayed works, with an important exception allowing a work to be displayed by its owner at the place where it normally is housed. Control over use of architecture routinely visible to the public, however, is nonexistent. The copyright owner’s management of rights in a constructed architectural work visible in a public place was limited when the architecture provisions were added to the code in 1990. Anomalous distinctions in the ways publicly displayed works may be used are exacerbated by the quite different statutory definitions of pictorial, graphic,

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1 The exclusive rights of a copyright holder are described in 17 U.S.C. § 106 (2017): Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

   (1) to reproduce the copyrighted work in copies or phonorecords;
   (2) to prepare derivative works based upon the copyrighted work;
   (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
   (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
   (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
   (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Permission to display where the work is located is granted by 17 U.S.C. § 109(c).


17 U.S.C. § 120 - Scope of exclusive rights in architectural works

(a) PICTORIAL REPRESENTATIONS PERMITTED.—

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.

(b) ALTERATIONS TO AND DESTRUCTION OF BUILDINGS.—

Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.
and sculptural creations and architectural works. These two sets of differences—management of publicly displayed works and definitional norms—lead to judicial resolutions of similar disputes in illogical and incoherent ways. This essay explores these problems, first by discussing situations in which similar uses of different types of copyrightable works were incompatibly resolved, and then by suggesting some solutions for these ongoing problems.

I. STORIES AND THEIR COPYRIGHT CONSEQUENCES

Three stories demonstrate the scope of these problems—two involving pictorial, graphic, and sculptural works and the other regarding a construction project that may have been an amalgam of different types of work. The first two involve the non-permissive use of illegal graffiti or street art in an advertising campaign and the hotly contested use of a sculptural work in political ways the artist found totally unacceptable. The final story reviews a controversy over the use of a large scale outdoor architectural, or perhaps sculptural, urban landscape as a backdrop for a fantasy super-hero film.

A. Pictorial, Graphic and Sculptural Works

1. Street Art and the Public Display Rights of Illegally Made Works

A series of controversies have arisen in the last twenty years over the use of street art by various businesses in advertising campaigns and other publicity efforts. Perhaps the most widely known and interesting is the

3 The differences arise in part because of the definitions of architectural works on the one hand, and pictorial, graphic, and sculptural works on the other. Both are defined in 17 U.S.C. § 101:

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.

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

2018 controversy between Jason “REVOK” Williams, a Los Angeles-based street artist, and H&M Clothing. Williams created the graffiti piece pictured below on a handball court at the William Sheridan playground in gentrifying Williamsburg, Brooklyn."
He made it by creating a rig holding eight spray paint cans which simultaneously marked a wall when pressed against the surface. The New York City Department of Parks and Recreation claimed the piece was illegal—an act of vandalism and damage to city property that was later painted over by public authorities.

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8 Complaint at 4, H&M Hennes & Mauritz GBC AB et al. v. Williams, No. 1:18-cv-01490 (E.D.N.Y. Mar. 9, 2018)
Before the work was removed, H&M developed a “New Routine” advertising campaign for some of its sportswear prominently using William’s work as a backdrop for an acrobatic, gymnast like “dance.”

FIG. 2: IMAGE FROM H&M “NEW ROUTINE” ADVERTISEMENT

Jeff Gluck, Williams’ lawyer, sent H&M a cease and desist letter protesting the violation of copyright laws. The company’s response was to file suit against Williams seeking a declaratory judgment that he could not

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9 For a portion of the video see David Ashworth, H&M’s Scandelous “New Routine” Sportswear Campaign, YOUTUBE (Mar. 16, 2018), https://www.youtube.com/watch?v=ABhJuyAf3el [https://perma.cc/NM7U-EGD5].
11 Complaint at 8, H&M Hennes & Mauritz GBC AB, No. 1:18-cv-01490.
hold a copyright in illegally painted graffiti works. In its complaint, H&M claimed that “Williams has no copyright rights to assert because his Graffiti was created through criminal conduct” and that “federal copyright protection is a privilege that does not extend to illegally created works.”

The story’s denouement was fast and embarrassing for H&M. Graffiti, hip-hop, and other artists complained bitterly that H&M’s legal position was culturally and legally untenable; they initiated an online movement to boycott the company that quickly gathered steam. Within a short time, H&M stepped back from the brink, voluntarily dismissed its case, and later settled the dispute not only by agreeing to remove Williams’s work from its ads, but also by contributing funds to various Detroit arts organizations in settlement of Williams’s copyright claims. The outcome of the dispute is one of many examples confirming the growing market power and widening aesthetic appeal of street art. H&M had the misfortune not only to use the work of a widely known and important artist, but also to make its ad as the legal and cultural power of the graffiti community was rapidly growing. Advertisers using graffiti in their campaigns now routinely cave when challenged. And the stunning $6.75 million damage award in the long and tumultuous 5Pointz moral rights litigation sent a definitive warning to businesses that their assumptions about the free and easy ability

12 Id. at 6.
13 Id. at 5.
14 This was by no means the first time H&M found itself in hot water over an advertising campaign. A short time before the REVOK controversy, the company ran an ad with a picture of a black child wearing a sweat shirt with the phrase “Coolest Monkey in the Jungle.” Needless to say, the uproar was immediate and overwhelming. The company quickly apologized. Liam Stack, H&M Apologizes for 'Monkey' Image Featuring Black Child, N.Y. TIMES (Jan. 8 2018), https://www.nytimes.com/2018/01/08/business/hm-monkey.html [https://perma.cc/Z4SR-KGFB].
17 See the articles, supra note 4.
to use street art as they pleased without legal consequences were simply wrong. These cultural shifts in attitude about street art were given room to flower by two critically important aspects of copyright law—the protectability of original works of expression even if they are made in violation of non-copyright legal norms and the scope of control by owners of copyrights in pictorial, graphic, and sculptural works over the way others may use the works when they are publicly displayed.

a. Legality of Graffiti

Though there is some literature suggesting that illegal graffiti is not copyrightable, those “illegality” arguments are of dubious validity. Illegal work is not barred from protection. The United States Supreme Court has not directly spoken on the issue but has vigorously eschewed making content judgments in determining whether a work is protectable. The copyright statute makes that legal strand sensible. For even if a work’s creation or publication violates a non-copyright norm, nothing in the copyright statute bars criminal or civil prosecution for the illegal activity while still affirming the validity of any copyrights. For example, defamation claims may be pursued against authors and trespass charges may be brought against graffiti artists. Parties may force defamatory works to be withdrawn from the market and illegal graffiti to be taken down. Those obtaining judgments in such cases from writers or painters may levy on any profits gained from intellectual property royalties or art sales. But the copyrights themselves are not affected; they continue to exist. Someone reprinting a defamatory book may be subject to two law suits—one by the author of the book and the other by the person defamed.


20 Marc J. Randazza, Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights, 16 NEV. L.J. 107, 133 (2015). The classic statement about the duty of courts to eschew aesthetic quality judgments was made by Justice Holmes in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903). In a case about the copyrightability of circus advertising posters, he wrote:

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. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.
The basic rule long has been that to be available for copyright protection a work simply must be “original” and “fixed” in a tangible medium of expression. The originality requirement is hardly stringent. Some small exercise of human creativity in the formation of a work is usually sufficient. Compose a mostly trite, bad poem and pat yourself on the back for producing a copyrighted work. While the fixation requirement mandates that a work be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration,” that standard does not embody any idea of permanence. The expectation that a work of graffiti will be erased or painted over at some point in the future does not mean that its visibility is transitory and therefore not protectable. Holdings that materials stored in computer memory for short periods are “fixed” under the copyright statute make that quite clear. In short, the works of REVOK were copyrighted, illegal or not.

b. Control Over Use of Public Displays

The most important aspects of copyright law for purposes of the REVOK dispute are the exclusive rights of the owner of a copyright in a pictorial, graphic, or sculptural work to “display the copyrighted work publicly,” and to prevent further use of that work once it is visible to the public. While the owner of a particular tangible copy of a work has the right to display that copy in the place where it is located, others do not have the right to make their own copies, to display copies in other locations, or to publish copies in various media. The simplest example is provided by a painting hanging on a museum wall. When the artist sells that work, she retains the copyright interest in the absence of a written contract specifically transferring all of, or an exclusive right in, the intellectual property rights. Ownership rights in the physical object embodying the artistic expression, however, pass to the buyer of the piece; physical property rights in a copy of an expressive work are held by the owner of the object. That is treated as a separate bundle of interests from the intellectual rights. Strangers to both the property and intellectual rights in the painting, however, have no automatic right to use either one.

22 It makes no difference that street art often is temporary. Short term visibility is enough. Indeed, in the process of discussing modern transitory art installations, some have even argued that the limitation to “transitory” should be eliminated. See Megan M. Carpenter, If It’s Broke, Fix It: Fixing Fixation, 39 COLUM. J.L. & ARTS 355 (2016).
24 Id. § 109(c).
25 Id. § 204.
26 Id. § 202.
Despite the general conclusion that graffiti is copyrightable even when illegally crafted, the very odd wording of the copyright statute’s provisions on the public display right evokes complexities. Since copyright in such work is clearly held by the artist unless specifically conveyed to a buyer, REVOK held the public display interest in his street art. The work’s illegality was irrelevant. Property rights in the physical attributes of the work, however, are a bit less straightforward. If the work had been made with permission of the owner of a building, the copy of the work on the structure was owned by the party with title to the property, but the display right was both held by the artist and protected by the Visual Artists Rights Act’s moral right provisions limiting the building owner’s right to copy, mutilate, distort, or destroy the work. Normally works of visual art not in, or made part of, a building may not be mutilated if that action would harm the reputation of the artist or destroyed if the work was of recognized stature. But in the case of a work in or made part of a building with permission, the owner may in some cases mutilate or destroy a work, if notice is given to the artist ninety days before action is taken or if the artist

27 The full text of the statute on this point is in 17 U.S.C. § 113(d)(1)-(2):

(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author’s rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner’s intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

The references in this section to §§ 106A(a)(2) and (3) refer to the rights of authors to limit mutilation, distortion, or destruction of a work.
agrees contractually to waive moral rights. There is, therefore, a split in the rights of a building owner and an artist when the creative work is made with permission.

As a result, fascinating conflicts between the owners of intellectual and physical property rights may arise. The recent 5Pointz dispute is a prime example. The works of street art in the complex were made with permission, but the building owners failed to obey the copyright statute when they white washed the compositions before demolishing the structures in anticipation of redeveloping the site. On the other hand, when the graffiti is installed illegally or without the permission of the owner of the building, the physical rights of the building owner take precedence if the graffiti is deemed undesirable. The statute only protects display rights and moral rights for “works in or made part of a building” when they are created with permission. Not surprisingly, therefore, the building owner has the right to remove from view a piece put up without permission—to, in short, terminate the public display right.

But in the case of the REVOK work on the city-owned handball court, the work was not placed on a building—defined by Copyright Office regulations as something that is “humanly habitable.” On its face, therefore, the statute placed the handball court artwork in the same shoes as any other two-dimensional work of fine art, such as a traditional composition on a canvas. While it is clear that REVOK retained the rights to control use of his street art in commercial advertisements regardless of whether the art was made with or without permission, the anomalous use of the word “building” in the moral rights provisions of the copyright statute would bar the city as owner of the handball court wall from destroying the work if it was of “recognized stature.” And that result would extend to all...

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29 See Chused, supra note 18. I have eschewed exegesis here on the moral right issues involved in 5Pointz because that would force me to repeat much of what is said in the 5Pointz article. Related issues surface in the next section on sculpture and the display right.
30 Id. at 613–15.
31 Id. at 606–07.
32 Id. at 589.
33 Id. at 597. The more complex relationship between physical and intellectual rights when graffiti is made on a building with permission of the owner plays out in 17 U.S.C. § 113(d). There actually is an intriguing and potentially controversial anomaly in the statute. § 113(d) mentions two scenarios—one about works placed in or on a building with permission of the owner and the other about placement without permission. But what about work placed on something other than a “building” as in the REVOK setting? Given the failure to craft a provision about such an event in § 113(d), the standard provisions of § 106A, barring mutilation or destruction, would presumably apply.
34 See 37 C.F.R. § 202.11(b)(2) (defining a “humanly habitable structure” as one “designed for human occupancy”).
cases where illegal art is placed on a structure rather than a building—regardless of whether it was painted with or without permission, legally or illegally. If a similar creative endeavor was painted without permission on the wall of a school, however, the city or other owner of the property could take it down without penalty. That result seems unlikely to be well received by courts, but the statute appears to compel it.

It would have been better if Congress had used a word like “structure” rather than “building” in the code to define both a work of architecture and to describe limitations on moral rights in works in or made part of a physical location. If we assume that judges will find a way to ignore the obvious dilemma, or to impose the same standards in structure cases that the statute imposes in cases involving buildings, the city then had the power to destroy the work—to effectively terminate the right to display the work where it was painted. That right, if it existed in the city, however, did not extend to H&M. That is what got the clothier in trouble. They had no legal right to use the illegality of the piece or the legitimacy or illegitimacy of its public display as a basis for claiming a right to use it in a commercial; that all was in the hands of the city or the artist. The merchandising chain was a stranger to the relationships surrounding both the intellectual and the tangible property rights. Since REVOK retained control over the intellectual display rights vis-à-vis all third parties, he could control how the publicly displayed images were used in ways other than the handball court wall, even if the city properly removed the graffiti.

This is an important point for all pictorial, graphic, and sculptural works. Just because someone owns the physical copy of a notable work of art, does not mean that the owner may control how the work is displayed in venues other than where it is normally kept, unless the owner also has purchased one or more of the exclusive rights in the copyright. The dilemmas for those owning art works, but not their copyrights, arise in a number of intriguing arenas—even tattoos! Video game developers using likenesses of famous athletes whose bodies are emblazoned with tattoos have discovered much to their chagrin that they cannot rely on licenses from the athletes to use computer likenesses that display their body art unless they obtain a second license from the tattooists. Similarly, museums and gallerists must be careful before they make posters or other souvenirs of works they hold if the works are still protected by copyright, and the museums or galleries have not purchased intellectual interests in

36 Copyright interests, of course, can be assigned by an artist to others. See, e.g., 17 U.S.C. § 204.
the works. To this day it is not clear that all museums and galleries fully understand the issue and cope with the legal issues in their daily activities.

2. Outdoor Sculptural Works and Use of Their Public Displays

One of the most celebrated outdoor sculptural works in the United States is Anish Kapoor’s *Cloud Gate*, colloquially known as *The Bean*, installed in 2006 in Millennium Park in Chicago. One commentator described the work as follows:

As an object, *Cloud Gate* is undeniably seductive, at once monumental and inviting. It is also willfully opaque. From a distance it looks like a droplet of mercury, blown up to immense size. Up close, it becomes clear that the droplet is arched, creating a passageway on an east-west axis, joining the city to Millennium Park and the lake further on. The space above this passageway has been hollowed out, creating a central cavity, which Kapoor describes as an omphalos or navel. From outside, *Cloud Gate* retains some Pop resonances—balloon, blood cell, mushroom, donut, UFO—while never succumbing to any one of them. Within the central cavity, though, it becomes a total environment, enveloping visitors in a silvery canopy, and at the same time breaching the boundary between sculpture and architecture.  

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Walking around and under Cloud Gate is a remarkable experience. The mirrored surface reflects other-worldly views of the sky, people wandering in the park, and surrounding buildings. Viewed from under the work, the ambience resembles a carnival hall of mirrors.

There have been two noteworthy recent controversies about Cloud Gate—one an intriguing spoof and the other a more emotional conflict. Each raises important issues about controlling the use of public displays of pictorial, graphic, and sculptural works. Not long ago, a spoof emerged claiming that Kapoor had covered Cloud Gate in a light absorbing coat of black material.
Fig. 4: Anish Kapoor’s Cloud Gate Covered in “Faux” Black

Pictures like the one above circulated supposedly showing the sculpture coated with the pigment. The spoof emerged on April Fools’ Day in 2016 after public controversy erupted over Kapoor purchasing patent rights a bit earlier that year in a black pigment called Vantablack\(^\text{41}\) that absorbs virtually all light, reflecting nothing that a human eye can detect.\(^\text{42}\)

\(^\text{40}\) Credit for the satire goes to The Editors, *Anish Kapoor Coats Cloud Gate in the Darkest Black Known to Humanity*, HYPERALLERGIC (Apr. 1, 2016), https://hyperallergic.com/287628/anish-kapoor-coats-cloud-gate-in-the-darkest-black-known-to-humanity/ [https://perma.cc/8CZ4-E2C7]. The photo just above is credited to the City of Chicago, but that must either be part of the joke or a reference to the image that the publication edited to change the color.

\(^\text{41}\) For more on the color, said at the time of its invention, to be the darkest color on earth, see *Vantablack*, SURREY NANO SYSTEMS, https://www.surreynanosystems.com/vantablack [https://perma.cc/8M8C-2RRM]. It has recently been revealed that an even darker black has been invented. Kendall Trammel, *There’s New Blackest Black Material, and it Can Even Cloak This Bright Sparkling Diamond*, CNN (Sep. 18, 2019), https://www.cnn.com/style/article/mit-new-blackest-black-material-scn-trnd/index.html [https://perma.cc/6GEZ-QG6T].

Looking at it simulates peering into a visual black hole. If the interior of a concave half-moon shape is coated with the material and you place your face inside it so that you cannot see any of the rest of the world, you will feel completely disoriented. The use of Vantablack, as in the spoof picture above, would have totally transformed *Cloud Gate*. But it was, after all, a hoax—and a good one at that.

The less humorous controversy was between Kapoor and the National Rifle Association. The N.R.A. placed a very fleeting, momentary shot of *Cloud Gate* in a nasty 2017 recruiting video variously called “The Clenched Fist of Truth” or the “Violence of Lies.”

*FIG. 5: VIEW OF CLOUD GATE IN THE N.R.A. VIDEO*
Dana Loesch narrated the piece in a deeply chilling, menacing tone. The shot of *Cloud Gate* appeared at eighteen seconds into the video and disappeared almost immediately. Though it displayed a full view of the work, its short period of visibility made it easy to miss when watching the video.

Nonetheless, Kapoor was furious, releasing an emotional condemnation of the N.R.A. for using an image of his work. The release, in part, stated:

"Cloud Gate" reflects the space around it, the city of Chicago. People visit the sculpture to get married, to meet friends, to take selfies, to dance, to jump, to engage in communal experience. Its mirrored form is engulfing and intimate. It gathers the viewer into itself. This experience, judging by the number of people that visit it every day (two-hundred million to date), still seems to carry the potential to communicate a sense of wonder. A mirror of self and other, both private and collective, "Cloud Gate"—or the "Bean" as it often affectionately referred to—is an inclusive work that engages public participation. Its success has little to do with me, but rather with the thousands of residents and visitors who have adopted it and embraced it as their "Bean". "Cloud Gate" has become a democratic object in a space that is free and open to all.

In the NRA’s vile and dishonest video, “Cloud Gate” appears as part of a montage of iconic buildings that purport to represent “Liberal America” in which the “public object” is the focus of communal exchange. Art seeks new form, it is by its nature a dynamic force in society. The NRA in its nationalist rhetoric uses “Cloud Gate” to suggest that these ideas constitute a “foreign object” in our midst. The NRA’s video gives voice to xenophobic anxiety, and a further call to “arm” the population against a fictional enemy.

The NRA’s nightmarish, intolerant, divisive vision perverts everything that “Cloud Gate”—and America—stands for. Art must stand clear in its mission to recognize the dignity and humanity of all, irrespective of creed or racial origin.

Kapoor’s demand that the fleeting shot of *Cloud Gate* be removed from the video was initially rejected. He then filed suit in Chicago seeking damages for copyright infringement. The primary allegation was that

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47 Id.
49 Complaint at 6, Kapoor, No. 1:18-cv-01320.
50 Id. at 2.
“Defendant infringed plaintiff’s copyright in CLOUD GATE by, *inter alia*, filming or videotaping it, making internal copies, incorporating it into its video ‘The Clenched Fist of Truth,’ . . . and distributing and displaying it to the public on television and through the internet.” 51 The case was later transferred to the Eastern District of Virginia where the N.R.A. is headquartered and settled near the end of 2018. 52 The settlement simply provided that the N.R.A. would remove the image of *Cloud Gate* from the video. No money changed hands.  

These two controversies over *Cloud Gate* open several windows into the scope of control copyright owners retain over use of their publicly displayed works. While the legal issues surfaced here were unlikely to provide Kapoor with any relief, some of them were fascinating and intriguing, if not difficult. The nature of copyright infringement rules and fair use are both relevant. Though REVOK obtained a favorable settlement in his dispute with H&M, that does not negate the importance of basic and important defenses in typical public display infringement cases—*de minimis* use and fair use in the case of *Cloud Gate*.

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**a. De minimis Use**

In any copyright infringement case, a plaintiff must show that the defendant’s use was substantial. Minor or trifling violations will be excused. A classic example in the public display arena is *Gottlieb Development LLC v. Paramount Pictures Corp.* 53 In the Paramount movie *What Women Want*, Mel Gibson played an advertising executive with the knack of sensing the thoughts of women. 54 In one scene, he and his co-star Helen Hunt brainstormed with other employees about marketing consumer products to women. 55 During the scene, a *Silver Slugger* pinball machine made by Gottlieb was displayed in the background as the camera panned the action. 56

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51 *id.* at 6.
54 *id.* at 629.
55 *id.*
56 *id.* at 629–30.
The court described the episode:

The three-and-a-half-minute scene depicts a brainstorming meeting in the office of the advertising agency. The meeting takes place in a large room with a relaxed and casual atmosphere—the room contains recliner chairs and bar stools, and on the far wall there is a large poster board prominently displaying the word “PLAY.” A mini basketball hoop appears on one side of the room, and a statue of a penguin appears on the other. Approximately eight people are sitting in a circle. Behind one woman is a table soccer-or “foosball”-game. As Gibson’s character pitches various ideas for advertisements, the “Silver Slugger” appears intermittently in the background, next to another pinball machine. It appears only for seconds at a time, always in the background, and always partially obscured by Gibson, a recliner chair, or a bar stool. The “Silver Slugger” does not appear in any shot by itself, nor is it part of the plot. It does not appear anywhere else in the Film, nor does any character ever refer to it. It is simply part of the background in one limited scene.58

57 Id. at 628.
58 Id. at 630.
The court concluded that the presence of the machine in the scene was *de minimis* and therefore not a substantial infringing use. A similar, and probably stronger, argument was available to the N.R.A. in its dispute with Kapoor. The use of Kapoor’s work was for less than a second—a truly fleeting glimpse. In addition, while Kapoor claimed that his work was used to signify the awful characteristics of liberalism and gun control advocacy, it is extremely difficult to glean that general message of the video as specifically referring to *Cloud Gate*. Though the entire ad certainly had that flavor, *Cloud Gate* was not specifically referenced as emblematic of any particular social or political point of view. In short, it is a strong argument maybe made that the very brief appearance of an image of Kapoor’s work in the N.R.A. clip was *de minimis*.

This contrasts in interesting ways with the REVOK dispute. Though the advertisement in which the street art appeared was quite brief (just over ten seconds) in comparison to the three-and-a-half-minute scene in *What Women Want*, the street art formed the entire background for most of the commercial video. The acrobatic dancer used the wall as a prop to plant a foot for leverage to do a somersault in midair and land with arms stretched out and a large smile on his face. In short, the art was the central focus of both the ad and its message that H&M’s “New Routine” clothing line was designed for an energetic, athletic, young population. It played on the notion that younger people appreciated street art and the vibrancy many of its compositions brought to urban life. The centrality of the graffiti and its importance in conveying a commercial message contrasted decisively with the irrelevant, incidental, and ignored presence of the pinball game in the background of the movie scene or the passing presence of Kapoor’s work in the N.R.A video. *De minimis* use, in short, measures not merely the length of a use but its significance in the overall display setting. It operates, at least in these three cases, as a first cousin to fair use.

### b. Fair Use

In addition to the use of *Cloud Gate* by the N.R.A. likely being *de minimis*, the appearance of *Cloud Gate* in both the Vantablack spoof and the N.R.A. video was likely protected by fair use under standards typically applied in that realm. Vastly over-simplifying an extraordinarily messy batch of precedents, fair use allows any of us to employ materials protected by copyright if our new use is transformative and doesn’t negatively affect

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59 Id. at 632.
61 Id. at 3–5.
The Right to Control Uses of Publicly Displayed Works

the market for the original work. Parody, for example, often qualifies as fair use. It typically is not the sort of product authors will create about their own work. And inevitably any parody must refer to a known creation and in some way transform or mock the original work in order for it to be successful and meaningful. This was recognized by the Supreme Court in 1994 in *Campbell v. Acuff-Rose Music, Inc.* As the *Campbell* court opined:

Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. * * * What makes for this recognition is quotation of the original’s most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

In the Vantablack setting, use of an image of *Cloud Gate* covered in black was wholly appropriate. It thoroughly transformed the original work’s visual appearance and had absolutely no impact on the economic value of the sculpture or on Kapoor’s art marketing prowess. When placed with tongue in cheek commentary on Kapoor’s efforts to control use of the color Vantablack, the parody is biting, obvious, and protected. In the explicitly labeled “Satire” column in Hyperallergic where the above blackened image of *Cloud Gate* was published, the editors claimed Kapoor was interviewed about the revamped sculpture, humorously stating:

"The public has had a decade to interact with the reflective surface of ‘Cloud Gate,’ and felt it was time for a change,” Kapoor told Hyperallergic. “Whereas the sculpture was originally about play and surface appearance, I think the Vantablack version is more about introspection, about becoming disoriented, lost, and enveloped in an overwhelming void of nothingness.”

Kapoor took no steps to contest the spoof. (Hopefully he chuckled instead.)

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62 The literature on the subject is enormous. Trying to provide a list of the best readings is a hopeless task. Anyone looking for a workable summary might as well check out Wikipedia. http://en.wikipedia.org/wiki/Fair_use [https://perma.cc/LJ68-CC4R].
64 Id. at 588.
65 The Editors, *supra* note 40.
The fair use issue in the N.R.A. setting also was easily resolvable under standard analysis, though for different reasons. As noted, the fleeting use likely eliminated any copyright claim, but would fair use operate if the case went forward? The glimpse of Cloud Gate in the video posed absolutely no economic risk to the value of the work. And the appearance of the work in a political recruiting video was a type of use commonly protected by fair use, even if the use seemed irrationally inappropriate to the artist and copyright owner, and to much of the public. Commentary by critics, jokes by comedians, and political controversy touch the core of practices normally protected by fair use. They traditionally are deemed to be an intrinsic part of the market’s operation in creative industries and necessary to insure energetic and widespread understanding of and discourse about the artistic community.

Hustler Magazine, Inc. v. Moral Majority, Inc. 66 was a dispute similar in many ways to Cloud Gate. In the November 1983 issue of Hustler Magazine, the scatological ad parody critical of Moral Majority’s leader Jerry Falwell pictured below was published. It contained a dialog about Falwell having a sexual experience with his mother in an outhouse. 67 Falwell and Moral Majority responded in part by creating a brochure containing an image of the Hustler ad and asking Falwell’s supporters for donations to counter the unfair Hustler critique or, as some would have it, parody. Hustler then sued Moral Majority claiming copyright infringement. The winning response, of course, was fair use. 68 In the Hustler dispute, both sides could claim that severely critical commentary and equally critical retorts were protected. Fair use was given a great deal of room to operate. The same thing probably would have happened in the Cloud Gate dispute.

67 796 F.2d at 1149–50.
68 Id.
c. Fair Use Reconsidered

This last fair use perspective, however, if subjected to some different analytical strictures, may be the most interesting and difficult aspect of the
right to control use of publicly displayed pictorial, graphic, and sculptural works. In recent years, there have been a series of disputes about organizations, politicians, and other controversial parties using copyrighted work to promote their causes without seeking permission from or over the vigorous objections of copyright owners or performers. The existence of a strong disagreement over the social and cultural meanings of a copyrighted work, as just noted, is typically a basis for granting a fair use claim, not an issue raised to undermine it. Perhaps courts shy away from initiating a destabilizing thought process that might raise concerns under the First Amendment, but it may be time to introduce the problem into fair use analysis. Rather than simply disregarding the relevance of such dyspepsia by copyright owners, however, we might do well to step into the debate.

Most of these disputes have involved music, not pictorial, graphic, or sculptural works. Many of them have been easy to resolve as an intellectual property matter, because the music was used in a forum or by an organization with a blanket license to perform the music or with permission from relevant copyright owners. In some of the cases musicians or composers aggrieved by the use of their work no longer held any copyright interests in the works used. Their complaints arose from social or political, not legal, concerns. Though some politicians stopped using work upon request in order to avoid further public controversy, commentators have struggled to find a theory allowing musicians to seek

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70 See Long, supra note 69, at 171–72.
71 See Cox, supra note 69.
72 Id.; Chao, supra note 69.
relief even in cases where use was made with appropriate copyright permissions. In such cases, fair use claims obviously are irrelevant.

In other cases, as in *Cloud Gate* where the artist held copyright in his work, the difficulties in claiming use was unfair were compounded by the now well-known Constitutional limitations on using legal norms to control highly critical or inflammatory commentary about a public person, organization, or artistic endeavor. After *New York Times v. Sullivan* and *Time, Inc. v. Hill*, publicly important personalities must demonstrate that use of allegedly defamatory statements or false light publicity must be undertaken with malice. Some might argue that a similar constraint must be imposed on any effort to limit fair use provisions in the Copyright Act in ways allowing artists to constrain grossly inappropriate displays that distort the meaning of a publicly displayed work of visual art in offensive political or cultural ways.

The theory in such a case would be that a video like that made by the N.R.A. would dramatically distort the meaning and creative content of *Cloud Gate*—suggesting in unwarranted ways either that the artist creating it supported the N.R.A.’s position or that the sculpture’s existence was emblematic of America’s moral and political decay. In this setting, such imagery might, under a revised fair use theory, be inappropriate under the

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73 Langvardt, *supra* note 69.


75 385 U.S. 374 (1967).

76 Landvardt, *supra* note 69, at 480–495. A false light cause of action alleges that a defendant publicly presented a person in a false light that would be deeply offensive or embarrassing to a reasonable person. The cases typically involve claims that the defendant wrongly said a person had a certain belief, took an action not actually carried out, or participated in certain events during their life.


> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
first fair use factor instructing courts to consider “the purpose and character of the use.” This contention, as far as I know, has not been raised to date. It not only treads closely to the sorts of tort theories involving defamation and false light publicity that invoke Constitutional limitations, but also moves beyond the standard conceptions of fair use to encompass highly insulting but culturally based uses not involving parody.

To work through some of the issues, consider a setting in which a work like *Cloud Gate* was used in a video in a substantial rather than a *de minimis* way. In addition, assume that the video was not an artistic, critical evaluation of the aesthetics of the piece, nor a parodic use, but a lengthy castigation of the sculpture in a personal diatribe or in a highly unflattering or misleading social commentary or context. Here’s a transcription of the N.R.A. verbal onslaught used during the video showing the publicly displayed *Cloud Gate*.

They use their media to assassinate real news. They use their schools to teach children that their president is another Hitler. They use their movie stars and singers and comedy shows and award shows to repeat their narrative over and over again. And then they use their ex-president to endorse “the resistance.”

All to make them march. Make them protest. Make them scream racism and sexism and xenophobia and homophobia. To smash windows, burn cars, shut down interstates and airports, bully and terrorize the law-abiding — until the only option left is for the police to do their jobs and stop the madness.

And when that happens, they’ll use it as an excuse for their outrage. The only way we stop this, the only way we save our country and our freedom, is to fight this violence of lies with the clenched fist of truth.

I’m the National Rifle Association of America. And I’m freedom’s safest place.

In the actual video *Cloud Gate*’s brief appearance occurred along with the line at the end of the first paragraph: “And then they use their ex-president to endorse ‘the resistance.” Suppose instead that the sculpture

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78 There also is an intriguing possibility that moral right provisions in 17 U.S.C. §106A protect authors from distortions or mutilations of works of visual art that are insulting depictions rather than physical alterations. Traditionally moral right in the United States has only dealt with physical distortions or mutilations. Altering or recklessly restoring a painting is one thing. Maliciously using an image of a work in a setting that an artist views as deeply insulting or inappropriate is thought to be in a different realm.


They use their media and art to assassinate real news. They use their schools to teach children that their president is another Hitler. They use their movie stars and singers and comedy shows and award shows and artists to repeat their narrative over and over again. And then they use their ex-president to endorse their cultural and political “resistance.”

Should such a display be justifiable as fair use?

While the answer is unclear, the question is worth pondering. If personal or irrationally critical depictions of a creative work are made in a cultural or political diatribe, does that mean they should almost automatically escape a copyright infringement allegation because they are fair use? In the revised Cloud Gate story just described, the longer visualization of the work was surrounded with nastily framed language intended to present the sculpture as part of a large social conspiracy to “assassinate true news” and “endorse cultural and political resistance.”

Does the first fair use factor in 17 U.S.C. §107 commanding the courts to consider “the purpose and character of the use” as one analytical factor leave room for declaring that it runs in favor of the copyright owner in a setting like this? Is a showing of malice necessary before the factor may be treated as favoring the copyright owner?

An apt comparison can be made between this example and the first major Supreme Court fair use case—Harper & Row v. Nation Enterprises. The Nation used a purloined manuscript to publish segments of Ford’s account of the 1974 pardon of Richard Nixon contained in a soon to be published Gerald Ford memoir for which Time, Inc. had agreed to pay $25,000. The Court relied heavily on the notion that authors had presumptive control over the ways their works would initially be revealed to the public and that unpublished manuscripts were therefore entitled to a high level of copyright protection—a notion vaguely rejected by Congress when it added a new sentence to the end of the fair use section in the copyright code. But the Court’s possible over-reliance on the unpublished status of the soon to be released Ford memoir must be read in light of its analysis of the first fair use factor dealing with the purpose and character of the use. In addition to the Court noting that The Nation’s intent was to scoop the main story and preempt the value paid by Time for the privilege

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81 Id.
82 471 U.S. 539 (1985). The payment was to be in two segments of $12,500. The first had been made by the time THE NATION article was released. The second payment was not made and the lawsuit resulted.
of first releasing the story to the public, it also criticized the magazine for its intentional misbehavior:

Also relevant to the “character” of the use is “propriety of the defendant’s conduct, 3 Nimmer §13.05[A] * * *. “Fair use presupposes ‘good faith’ and ‘fair dealing.’” * Time Inc. v. Bernard Geis Associates, 293 F.Supp. 130, 146 (SDNY 1968) * * *. The trial court found that The Nation knowingly exploited a purloined manuscript. * * * Unlike the typical claim of fair use, The Nation cannot offer up even the fiction of consent as justification. Like its competitor newsweekly, it was free to bid for the right of abstracting excerpts from “A Time to Heal.” Fair use “distinguishes between ‘a true scholar and a chiseler who infringes a work for personal profit.’” * Wainwright Securities Inc. v. Wall Street Transcript Corp., 558 F.2d, at 94, quoting from Hearings on Bills for the General Revision of the Copyright Law before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 3, p. 1706 (1966) (statement of John Schulman). The trial court found that The Nation knowingly exploited a purloined manuscript. Unlike the typical claim of fair use, The Nation cannot offer up even the fiction of consent as justification.*4

A fair use claimant entering the fray with a seriously tainted frame of mind, the Court suggested, cannot easily justify reliance on fair use doctrine to provide it with a defense to infringement. And note well that the Court did not impose any requirement that the taint arose from malicious actions. Although making deeply maligning claims about the meaning of a work certainly is not the same as reliance on a purloined manuscript, it does raise the same general question—the import of a party’s state of mind when using a copyrighted work and then claiming fair use. The Court’s treatment of The Nation’s misbehavior was appropriate. Since fair use analysis is an open-ended factor analysis, the nature of the defendant’s state of mind is only one of many facts that must be taken into account. It is not a highly focused issue like malice in a defamation case. It is balanced against the creativity of the defendant’s handiwork, the impact of that work on the market for the plaintiff’s copyrighted product, the scale of the copying undertaken by the defendant, and other factors the court reasonably elects to analyze. My contention, therefore, is both simple to grasp and limited in its impact. It is only that the frame of mind behind copying a work can be so problematic so as to justify a conclusion that the “purpose and character” of its use cannot easily be labeled as fair under the first factor dealing with the nature and character of the use. While stating the issue that way obviously is vague, that is no different than many other difficult line-drawing efforts made in the fair use arena. Perhaps Kapoor

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84 471 U.S. 539, at 562–563.
should be able to more easily challenge a fair use claim in the revised example at issue here.
B. Architecture

1. The Leicester Case: Sculpture or Architecture?

Andrew Leicester v. Warner Brothers85 was a fascinating case that coped with the line between sculpture and architecture and, as a result, faced the array of differences in the statutory definitions of the two forms of creativity and in the contrasting treatment of the right of copyright owners to control the ways public displays of their works are used. Sculptural objects with some utilitarian uses are protected only if the aesthetic contents are separable from their utility.86 The right of copyright owners to control uses of publicly displayed works eligible for copyright, however, is quite broad, subject of course to common defenses, such as de minimis presence and fair use. Architecture, by contrast, is defined to include its form and arrangement of spaces without regard to its usefulness.87 But control by architects over most uses of their publicly displayed, constructed works are barred.88 17 U.S.C. §120(a) provides that:

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.

The legislative history of this section clearly suggests that Congress intended to deprive copyright owners of works of architecture of the exclusive right to control most uses of their publicly displayed works.

The definitional and public display issues for both sculpture and architecture were at stake in Leicester. The complex dispute arose over the use in a super-hero film—Batman Forever—of images of a redevelopment project in central Los Angeles at Figueroa and Eighth Streets.89 The main part of the real estate venture, on land purchased from the Los Angeles Community Redevelopment Agency, called for construction of a twenty-four story office building.90 R&T Development Corporation

85 232 F.3d 1212 (9th Cir. 2000). The district court opinion is not reported but may be found at Andrew Leicester v. Warner Bros., 1998 WL 34016724 (S.D. Cal. 1998).
87 See supra note 3.
89 Leicester, 232 F.3d at 1213.
90 Id. at 1214.
("Developer") purchased the land from the agency and hired TAC International ("Architect") to serve as architect for the project. Agency rules required that a certain percentage of the cost be used for art projects. Architect commissioned Andrew Leicester ("Landscape Sculptor") to create the required artistic elements in and around a courtyard area on the south side of the planned office structure. Part of the courtyard design called for the construction of five columns or towers along Figueroa Street to maintain a streetwall effect and create a grand entrance to the courtyard and office building. Two images of the some of the towers are pictured below, the first with an image of the office building behind the towers.

**FIG. 8: THE TWO MOST IMPORTANT COLUMNS AT ISSUE IN THE LEICESTER CASE**

Replicas of the Figueroa Street development became elements of the background imagery in the *Batman Forever* super-hero film. In 1994

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91 To make the story easier to follow, I provide a brief description of each of the main actors—developer, architect, and landscape sculptor—in the creation of the project.
92 *Leicester*, 232 F.3d at 1214.
93 Id.
94 Id.
95 The images may be found at http://www.publicartinla.com/Downtown/ZanjaMadre/column2.html [https://perma.cc/NL2K-Q4TZ].
96 *Leicester*, 232 F.3d at 1215.
Warner Brothers approached Developer seeking permission to photograph the property for use in the movie. Without consulting either Architect or Landscape Sculptor, Developer granted Warner Brothers permission to make replicas and pictorial representations of the development for use in the film. Portions of the works were used in the movie, as well as in various promotional materials. The two columns pictured above with circular structures at their peaks, designed as part of the required artistic investment in the project, were among the items used in Batman Forever. Segments of Architect’s building project also showed up in the film as the Second Bank of Gotham. Here are two samples containing the work of both Architect and Landscape Sculptor.

FIG. 9: FIGUEROA STREET STREET DEVELOPMENT IMAGES USED IN BATMAN FOREVER

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97 Id.
98 Id.
99 Id.
100 Id.
2. The Legal Issues in Leicester

A series of issues surfaced in the case. First, the copyright ownership provisions in the contracts between Developer, Architect, and Landscape Sculptor were complex and ambiguous. Second, disagreements arose over whether some of the artistic aspects of the project were sculptural and others architectural or whether everything was part of the architecture associated with the main office building.\footnote{Leicester, 232 F.3d at 1215.} Controversies over the copyright relationships between the sculptural and architectural features of the development arose because of the statutory differences in the scope of protection afforded to various aspects of the project. That led to the relevance of §120(a)’s limitations on control over third party use of publicly displayed architectural works becoming a decisive arena of contention.

Without reviewing in detail all of the contractual controversies, suffice it to say that their resolution led to a strange set of relationships between Developer, Architect, and Landscape Sculptor. First, the trial and appellate courts found that different provisions of the agreements governed the rights of Warner Brothers to make two- versus three-dimensional likenesses of the Figueroa Street project.\footnote{Id. at 1215, 1220.} Based on construction of the contractual terms, the court concluded that Developer had an exclusive right to make or grant others the right to make three-dimensional replicas or models of the buildings and related structures.\footnote{Id. at 1220.} Exclusive control over two-dimensional
images, however, remained in the hands of Architect and Landscape Sculptor as joint authors\(^{105}\) of the streetwall towers. Though Architect’s non-exclusive grant of authority to Developer to use the joint works in two-dimensional imagery was valid,\(^{106}\) Developer’s attempt to reassign the same license to Warner Brothers failed. The court held that non-exclusive assignees like Developer could not further transfer those rights; that authority remained with Architect and Landscape Sculptor as joint owners of the exclusive rights in two-dimensional images.\(^{107}\) The result meant that the only real dispute in the case was over Developer’s invalid grant of authority to Warner Brothers to make two-dimensional images of the Figueroa Street development for use in the movie and in advertising. Warner Brothers was free to make only three-dimensional replicas.

Whether certain features Landscape Sculptor worked on with Architect were distinct, separate sculptural works or part of the architectural contours of the larger office building project turned out to be the crucial issue in the case. The only features of the development Landscape Sculptor worked on that Warner Brothers used in two-dimensional imagery were the towers or columns along Figueroa Street pictured above.\(^{108}\) If those columns were separate sculptural works, then the exclusive right to control use of publicly displayed works was controlled by the straightforward terms of 17 U.S.C §106(5), the statute’s exclusive right to control public display and associated uses as discussed in reviewing the disputes over REVOK’s graffiti and Kapoor’s *Cloud Gate*. If the towers were part of the architecture, however, then the broad exception to control over use of publicly displayed works embedded in 17 U.S.C §120(a) governed.

3. *Sculpture or Architecture?*

The court opined that the streetwall columns were architectural—a result that certainly is questionable. According to the court, several features

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\(^{105}\) The copyright statute provides that two or more authors will hold a joint interest in a work if they intend “that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. §107. The court concluded that such an intention was present because Leicester and TAC worked closely together in designing the streetwall portion of the project. *Leicester*, 232 F.3d at 1215.

\(^{106}\) Leicester did not participate in these negotiations. But like tenants in common in tangible property law, joint authors of exclusive rights in copyright each have the right to assign their interests to a third party. While they have the obligation to share royalties and other benefits, the transfers are valid. That meant that R&T could assign a non-exclusive right to Warner Brothers without Leicester’s participation. *Leicester*, 232 F.3d at 1215.

\(^{107}\) *Leicester*, 232 F.3d at 1220.

\(^{108}\) *Id.* at 1216.
of the columns led to this result. First, they were deemed to be part of a “streetwall” concept integrated into the overall architectural scheme. The Community Redevelopment Agency plan for the area required that the building line along Figueroa Street be maintained. Second, Architect and Landscape Sculptor worked together to plan the elements of the streetwall; that is why they were deemed to be joint authors of the work. Third, though the interior elements of the courtyard behind the streetwall, gate, and fencing were part of an overall artistic design created solely by Landscape Sculptor, the columns and other elements of the structures along Figueroa Street were said by the court to serve separate purposes and different aesthetic goals from the courtyard features. The courtyard plan, called Zanje Madre (or Mother Ditch), “tell[s] an allegorical story of Los Angeles,” the court said, by visualizing the developments that brought water to the city. Fourth, the height, materials, and elements of the columns echoed similar features of the office building and were, therefore, well-integrated into the overall architectural design and quite separate from the Zanje Madre. Finally, Landscape Sculptor’s contention that various decorative elements of the columns making up the streetwall should be separated from the features deemed by the court to be architectural, and therefore, provided their own display rights was rejected. It was deemed not possible to rationally make such a separation from the architectural plan. Since the statutory definition of a sculptural work in 17 U.S.C. §101 requires that the artistic expression of a work be separable from any utilitarian content—here the building—in order to obtain protection, Landscape Sculptor could not claim any intellectual property rights.

Not surprisingly there was a dissent in the case on the final conclusion that the sculptural elements of the columns could not be conceptually separated from the overall architectural design. Judge Fisher accused the majority of misreading the district court opinion by concluding that the lower court decided as a factual matter that the design elements of Landscape Sculptor’s work could not be conceptually severed from the building plan. Fisher was correct in claiming that the lower court actually

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109 Id. at 1217–19.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id. at 1214.
115 Id. at 1217–19.
116 Id.
117 Id. at 1225–1236.
118 That is, in fact, what the majority did. See id. at 1219.
concluded that no sculptural work that was part of a building could be treated as a pictorial, graphic, or sculptural work. District Judge Hupp wrote:

[T]he intent of Congress was to substitute the new protection afforded architectural works for the previous protection sometimes provided under the conceptual separability test for non-utilitarian sculptures (such as gargoyles and stained glass windows) incorporated into a work of architecture. If this construction is correct, the enactment of Section 120(a) had the effect of limiting the conceptual separability concept to situations not involving architectural works.119

Judge Hupp’s construction of §120(a) was illogical at best. If taken literally it would mean that murals, sculptural reliefs, and other items long thought to be protected as pictorial or sculptural works when lodged in a building have lost their separate copyright status. Moreover, his opinion is entirely inconsistent with the moral right protections for works “in or made part of” a building embedded in 17 U.S.C. §113(d).120 It is difficult to imagine that moral right provision was totally repealed by 17 U.S.C. §120(a) when protections for buildings in which sculptural works are embedded gained copyright protection. Judge Fisher’s conclusion that a sculptor and an architect might own separate copyrights for two different kinds of works—one for sculpture embedded in a building and the other for the building—seems indisputably correct.121 And it is worth noting that the towers, along with the Zanje Madre courtyard features, were design features that fulfilled the Los Angeles Community Redevelopment Agency requirement that a portion of the development cost be devoted to artistic endeavors.122

Concurring Judge Tashima, in a somewhat cryptic opinion,123 reached an intermediate position but thought the result reached by Judge Rymer was proper. Tashima apparently agreed that a sculptural work that was part of an overall architectural design should be treated as part of the building without regard to its conceptual separability, but he was unwilling to conclude that all sculptural works embedded in a work of architecture met that test. What it meant for a work to be part of an overall architectural design was left open in his opinion. The bottom line was that the sculptural elements of the columns along Figueroa Street were not subject to the

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119 The unreported opinion may be found at Andrew Leicester v. Warner Bros., 1998 WL 34016724 *6 (S.D. Cal. 1998).
120 See supra note 27.
121 Leicester, 232 F.3d at 1229–30.
122 Id. at 1214.
123 Id. at 1220.
traditional test for determining the copyrightability of a sculptural work embedded in a utilitarian object or architectural work.

4. Different Norms for Sculpture and Architecture

The problem in *Leicester* arose largely because of illogical distinctions in the basic terms of copyright protection for sculpture and architecture. As previously noted, the definitions in the act for pictorial, graphic, and sculptural works, and works of architecture are significantly different. The former “include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” A work of architecture, however, “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.”

To explore the potential consequences of these definitions, apply them to I.M. Pei’s East Wing of the National Gallery of Art in Washington, D.C. and to Frank Gehry’s well-known Pritzker Pavilion in Millennium Park in Chicago, not far from Anish Kapoor’s *Cloud Gate*. Images of the two structures are below.

124 See supra note 3.
125 Id.
126 Id.
FIG. 10: I. M. PEI’S EAST WING OF THE NATIONAL GALLERY AND FRANK GEHRY’S PRITZKER PAVILION IN MILLENNIUM PARK
Are these designs sculptural works or works of architecture? Could they (or should they) be both? The Leicester court seemed to reflexively conclude that the two categories are mutually exclusive. However, there is nothing in the code justifying that conclusion.\textsuperscript{128} They will qualify as a “sculptural work only if, and only to the extent that . . . sculptural features . . . can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”\textsuperscript{129} Just because something is large, capable of accommodating use by human beings, and designed by an architect doesn’t mean it lacks separable sculptural qualities. But if the East Wing is considered “utilitarian,” as architecture generally was prior to its addition as a separate category of protected copyrightable work in 1990\textsuperscript{130}, it may not be possible to meet the pictorial, graphic or sculptural work test. It is very difficult to identify any sculptural elements of I. M. Pei’s architectural design that are separate in any conceptual or actual way from the building’s utility as a museum. No particular part of the design can be removed without dismantling the exterior shape or the interior flow. While it is possible to remove all two- and three-dimensional artistic artifacts contained in the museum’s collection and other features of the museum from the building and think of it as a sculpture, that is not really a separation of utility and sculptural design for it leaves the basic features of the building totally intact. Unless the entire design is considered to be a sculpture as well as a work of architecture, certainly a plausible conclusion, it can only be the latter.

On the other hand, it may be easier to treat the Pritzker Pavilion as a sculpture, at least in part. The various curved metallic features surrounding the stage area are “separable”—hung on a metal support frame that also encloses many of the various utilitarian parts of the pavilion serving orchestras and other performance groups that make use of the facility. An image from behind the building, displayed below,\textsuperscript{131} makes this quite clear.

\textsuperscript{128} There is ambiguity about this point in the history of the code. Some legislative history suggests the two categories must be kept separate. But the code language itself does not automatically yield that result. See Vanessa N. Scaglione, Note, \textit{Building upon the Architectural Works Protection Copyright Act of 1990}, 61 FORDHAM L. REV. 193, 201–04 (1992).

\textsuperscript{129} 17 U.S.C. § 101 (2010).


These images suggest the major problem with the definition of a pictorial, graphic, and sculptural work in the Copyright Act—that sleek, modern building designs or parts of those designs struggle to meet the definitional test of sculpture; while appliqué or other features that may easily be conceptually or actually removed from buildings, leaving the utilitarian features behind, are easier to protect as sculptural. The same problem exists in the industrial design arena. Consider two industrial designs from famous cases—the Ribbon bicycle rack denied copyright protection in *Brandir International, Inc. v. Cascade Pacific Lumber, Co.*[^132] and the lamp base granted protection in *Mazer v. Stein*.[^133] The idea for use of the ribbon shape for securely storing bicycles actually arose from a wire sculpture.[^134] Nonetheless, the court concluded that its utilitarian aspects could not be separated from its sculptural qualities.[^135] Compare this with the classic case of *Mazer v. Stein* from which the wording of the present statutory definition of pictorial, graphic, or sculptural works was derived.[^136]


[^134]: *Brandir*, 834 F.2d at 1143.

[^135]: Id. at 1147.

In *Mazer*, lamp bases, pictured below, were deemed to be copyrightable—separable from their utilitarian functions as lamps by simply removing all the electrical parts.\(^\text{137}\) The two cases vividly demonstrate the differences in judicial treatment of sleek, modern designs and traditional shapes and imagery.

**FIG. 12: STATUARY LAMP BASES IN MAZER V. STEIN**

In *Leicester* the utility/expression dichotomy inherent in the definition of sculptural works was used as a baseline by all three judges for arguments over whether the design of the columns on Figueroa Street could be treated as sculptural. For the majority, they could not be separated from the utility of the building itself because they were closely integrated into the overall design of the project.\(^{138}\) For the dissent the outcome was dependent on application of the traditional test described here, a test that allowed the columns to be treated as separable from the design of the building itself and for various features of the towers such as the circular elements at the peaks to be treated as discrete from the bodies of the towers.\(^{139}\) Gaze again at the images of the Figueroa Street project above.\(^{140}\) The relevant columns are those with circular structures at the top. The majority relied upon the use of similar materials in the columns and building, and on the streetwall impact of the columns and fencing.\(^{141}\) The dissent, on the other hand, found it relatively easy to separate the novel features of the column tops from the rest of them.\(^{142}\) The fact that the columns were separated by a significant distance from the building itself contributed to his conclusion that sculptural works were present.\(^{143}\) Partial

\(^{138}\) Andrew Leicester v. Warner Brothers, 232 F.3d 1212, 1215 (9th Cir. 2000).
\(^{139}\) *Id.* at 1225.
\(^{140}\) See Fig. 9.
\(^{141}\) *Leicester*, 232 F.3d at 1218.
\(^{142}\) *Id.* at 1221–22.
\(^{143}\) *Id.*
use of the same materials as the main office buildings didn’t automatically
negate the sculptural qualities of the shapes used in the column, shapes that
were quite distinct from anything in the office structure. The dissenting
judge understood much more about the nature of sculptural endeavors and
the variety of ways they can be linked to structures without being
subsumed by them.

But once the Leicester court concluded that the columns were
architectural and that their sculptural elements could not be separated from
the rest of the project, the plaintiffs had to lose. The broad exemption from
control over use of publicly displayed architecture in §120(a) rendered the
claims hopeless. Since the section precluded owners of architecture
copyrights from pursuing licenses from those making, distributing, or
publicly displaying images of the structures, there was nothing Landscape
Sculptor, now labelled as a part designer of a building, could do to require
payment from Warner. Put Anish Kapoor’s Cloud Gate in the same spot,
however, and the result would have been transformed. For none of the
factors leading the Leicester majority to conclude the towers were
architectural would be present if Kapoor’s work was part of the street wall
concept mandated by the Los Angeles Community Redevelopment
Agency. And that’s the point. It is irrational that two copyrightable works
publicly displayed in virtually identical ways end up with wholly different
protective envelopes. It is clear that the Copyright Act must be revised to
either protect both from use as significant backdrops in audiovisual works
or to protect neither one.

II. THE DENOUEMENT: IRRATIONALITY RESOLVED

Several important aspects of the exclusive right to publicly display
copyrighted works have already been discussed—the contours of
controlling the display right itself, the differing definitions of sculptural and
architectural works, and the impact of the public display exemption for
architectural works. And some conclusions have been suggested. First,
aspects of the standard defenses to allegations that the public display right
has been violated—most notably fair use—could stand a closer look.
Declining to consider irrationally demeaning displays of works as less
likely candidates for fair use seems inappropriate. Second, the definition of
a work of architecture as encompassing only “buildings” should be
reconsidered. Architecture encompasses a range of elements beyond those
usable by people. It is irrational to exclude non-habitable structures from
coverage. That becomes painfully apparent when it is recognized that the
moral right provisions for works associated with buildings in 17 U.S.C. §113(d) do not apply at all to graffiti or other works on constructed features of our environment that are not buildings. That conclusion leads to a result most will find strange—that the same moral rights applicable to classical paintings and sculpture on traditional surfaces hanging in museums also apply to graffiti painted without permission on structures that are not buildings.

There are other anomalies exposed in this essay, however, that are both more important and more difficult to resolve. First, the definitional differences between sculpture and architecture created part of the tension in the resolution of Leicester. That tension should be resolved. Second, the principal reason for writing this essay—the irrational differences in the display rights of pictorial, graphic, and sculpture work on the one hand and architecture on the other need to be reconceived.

A. Protecting Rights in the Use of Publicly Displayed Sculpture and Architecture

Copyright in a sculptural work is dependent on finding that its “sculptural features . . . can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” In contrast, a work of architecture is a building and “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.” The differences are profound. Separating design and utility is an entirely different enterprise from discerning the overall form and arrangement of spaces and elements of a building. The former requires an inquiry that is incompatible with the goals of many artists and industrial designers. The latter, on the other hand, fits nicely with the predilections of both artists and architects and should become the basic definitional standard for sculpture, industrial design, and architecture.

The very notion that aesthetics and function, or in copyright vocabulary, expression and utility, should be split apart when legal protection is considered has been anathema to many artists and architects for decades—long before the present statutory definition of pictorial, graphic, and sculptural works was adopted in 1976. While the ways expression and utility are envisioned have been a subject of debate since the advent of culture, they came into special focus in the late nineteenth century with the rise of modern art and architecture. The phrase form follows function, initially written as “form ever follows function,” was coined by the famous architect Louis Sullivan shortly after his landmark
Wainwright Building was constructed in St. Louis in 1891. He was a member of the Chicago School of Architecture that, stimulated in part by the Great Chicago Fire of 1871 that demolished large sections of the central city, revolutionized commercial construction at the end of the nineteenth and beginning of the twentieth centuries. In a famous essay Sullivan wrote:

Whether it be the sweeping eagle in his flight, or the open apple-blossom, the toiling work-horse, the blithe swan, the branching oak, the winding stream at its base, the drifting clouds, over all the coursing sun, form ever follows function, and this is the law. Where function does not change, form does not change. The granite rocks, the ever-brooding hills, remain for ages; the lightning lives, comes into shape, and dies, in a twinkling.

It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things superhuman, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function. This is the law.

As can be seen from the pictures below of the Wainwright Building and some of its beautiful cornice detail work, Sullivan’s ideas did not mandate the elimination of all ornate features. Quite the contrary, once the basic function of a building was established, both its engineering and shape became determinable. In this case, a steel frame allowed the shape and fenestration of the building to reflect its function as an office container. Crafting designs taken from nature—here floral filigree and other natural sculptural shapes in the cornice and other areas of the building—reflected Sullivan’s desire to integrate the inherent function of a building into the nature and essence of human existence. Indeed, many of the most famous early skyscrapers built in Chicago, New York, and other cities featured the same aesthetic. The early years of Frank Lloyd Wright’s career were in Chicago, including a stint at the firm of Adler & Sullivan between 1888 and 1893 as the Wainwright Building was being designed. Many of Wright’s early buildings reflected some of the same stylistic features. While it is possible to think of aspects of the Wainwright Building’s ornate, sculptural facade as separable from the rest of the shape of the building, and therefore sculptural for copyright purposes, Sullivan (and Wright) would have rebelled at the idea that the work mimicking aspects of nature

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145 Id.
was merely conceptually separable appliqué. Rather it was inherent in the way nature, form, and function worked together in the process of designing and using a building, just like they worked together in nature.
Others worked with related ideas, but reduced form and function to minimalist designs—a natural outgrowth of architectural theories like Sullivan’s. One of the primary goals of the famous Bauhaus School—the creative force behind much of early twentieth century art, industrial design, and architecture—was to craft designs that were simple, useful, and beautiful. While some of those working there early in its history used various crafts in their designs that followed closely in the footsteps of the Chicago School of Architecture’s use of natural motifs, others such as Le
Corbusier, Mies van der Rohe, and Walter Gropius\textsuperscript{147} developed a much sparer architectural style; painters at the school like Paul Klee and Wassily Kandinsky followed suit in their early careers.\textsuperscript{148} When Corbusier designed a model house called Villa Savoye a generation after the construction of the Wainwright Building, he opined that it was a “machine for living.”\textsuperscript{149} Designed with thin cement support columns and largely unobstructed floors, it allowed for maximum flexibility and modification over time as families or owners changed. Heavily influenced by the Bauhaus School and other modernists of the time, he developed a style that intimately wove together the functionality, purpose, and beauty in buildings and useful designs.

\textsuperscript{147} Walter Gropius left Germany in 1934 after Hitler’s rise to power and came to the United States in 1937. He continued to design many buildings, including his own house in Lincoln, Massachusetts outside of Boston. It is a fine example of his design style. Images of the house available at https://www.historicnewengland.org/property/gropius-house [https://perma.cc/UJ53-N94F].


\textsuperscript{149} The house was constructed between 1928 and 1931. A nice summary of Le Corbusier’s ideas may be found in Kurt Kohlstedt, \textit{Machines for Living In: Le Corbusier’s Pivotal “Five Points of Architecture”}, 99\% INVISIBLE (Feb. 19, 2018), https://99percentinvisible.org/article/machines-living-le-corbusier-pivotal-five-points-architecture/ [https://perma.cc/X8WB-UUA9].
From the image of Villa Savoye above\textsuperscript{150} it is easy to see why Le Corbusier’s aesthetic was so closely related to other well-known painters, sculptors, and industrial designers of the early twentieth century. Various aesthetic media were culturally tightly linked, both at the Bauhaus and in the larger culture. Many of the designs at the famous Bauhaus School, where Le Corbusier worked for a time, were specifically oriented toward the merger of aesthetics and function in easily identifiable, highly useful designs. Some of their most famous objects were chairs by Marcel Breuer and Mies van der Rohe. Two are pictured below, the first by Breuer and the second by Mies.\textsuperscript{151} While the contemporary copyright definition of sculptural works may well have excluded these designs from coverage for lack of separability were it applicable a century ago when they were created, the present architecture definition fits them to a tee. A similar

\textsuperscript{150} Available at https://en.wikipedia.org/wiki/File:VillaSavoye.jpg [https://perma.cc/2LBE-DNVZ].
\textsuperscript{151} The image of the Breuer on the left is available at https://www.moma.org/collection/works/2851 [https://perma.cc/GUN6-EFP4]; the Mies image is available at https://www.metmuseum.org/art/collection/search/482117 [https://perma.cc/54XP-EAL4].
conclusion applies to a Bauhaus designed lamp \(^{152}\) pictured to the right below.

**FIG. 15: CHAIRS BY BREUER (LEFT) AND MIES (CENTER); BAUHAUS LAMP (RIGHT).**

The powerful influence of the form/function movement is reflected in two images of other creations—one of the 1902 Ward Willits House by Frank Lloyd Wright\(^ {153}\) and the next of a 1936 Piet Mondrian painting\(^ {154}\). In both designs the desire was to achieve a statement of basic form and line. In the house, of course, there is a function; it is revealed in the form and shape of the dwelling. But the overall appearance of the two is quite similar—the use of simple lines to demarcate fields of visual interest, the classic rectangularity of the compositions, and the overall similarity in aesthetics. Imagine the Willits House on a very snowy day. The black and white composition created by such weather would mimic the Mondrian work in many ways. A vague idea of that result is provided by the image of just the central portion of the Willits House, displayed just below the Mondrian painting.

\(^{152}\) Available at https://www.moma.org/collection/works/1546 [https://perma.cc/9TB9-ZPQR]. It is not attributed to a particular craftsperson but is listed as a 1928 creation of the Metal Workshop at the Bauhaus School.

\(^{153}\) Available at http://www.greatbuildings.com/buildings/Ward_Willits_House.html [https://perma.cc/CSZZ-Z4S7].

One of my favorite useful design advertisements that communicates the same set of Bauhaus-based ideas is for a set of bathroom sink fixtures. The caption for the 1979 advertisement pictured above, “SHERLE
WAGNER ERASES THE LINE BETWEEN FUNCTION AND ART,” captures perfectly the aesthetic of much art, architecture, and industrial design since the turn of the twentieth century.\footnote{Available at http://www.archive.sherlewagner.com/legacy/ [https://perma.cc/W5WT-XP9X].} While certain features of these fixtures, such as the bulbous faucet handles, might be thought of as separable from their utility and therefore protectable as sculptural works under the Copyright Act, it defies the goals of the manufacturer—to say nothing of much of the rest of the industrial design world—to require that step in order to obtain protection.

While there are no obvious aesthetic reasons why different standards should apply to the various designs of buildings, works of art, and useful articles, revising the law to treat them in similar ways is not a straightforward proposition. First, protection of industrial designs as a separate class of intellectual property objects was specifically rejected by Congress when the 1976 code revamping the law was adopted.\footnote{For a fulsome history of Congressional consideration of industrial design protection in the Copyright Act see Industrial Design Protection: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary, 101st Cong., 2d Sess., on H.R. 902, H.R. 3017 and H.R. 3499, at 436–91 (1991) (statement of Ralph Oman, Register of Copyrights).} Later proposals have also failed to pass, except for a very limited set of provisions protecting vessel hulls adopted in 1998.\footnote{17 U.S.C §§ 1301–1332 (2000).} Reviewing the reasons for removal of design protection from the 1976 Act is important. Second, copyrights generally last for a period of life of the author plus seventy years for individually crafted works or ninety-five years from publication for works for hire.\footnote{17 U.S.C. § 302 (2012).} While that period is surely too long for all copyrights,\footnote{Though my concerns were brushed aside by the United States Supreme Court in Eldred v. Ashcroft, 537 U.S. 186, 194 (2003) by the tribunals giving broad authority to Congress to determine the appropriate duration for copyrights, the result has been harshly critiqued. See Qianwei Fu, Eldred v. Ashcroft: Failure in Balancing Incentives and Access, 38 U.C. DAVIS L. REV. 1755 (2005).} it becomes clearly objectionable for industrial designs.\footnote{A similar issue arises with respect to the present use of copyright law to cover software, now often called “firmware” because it is designed into the electronics of devices. It has become so much a part of modern digital technology that such long-term protection is out of place. Technology changes much too quickly for any long duration period to be rational in this arena.} Is it possible to both change the definitional standard for sculptural works to encompass industrial designs while denying such works long-term protection? Can the definitions of sculpture and utilitarian articles be made to mesh coherently?

When the copyright law was rewritten in 1976, the Senate passed industrial design provisions as a separate part of their version of the
It was stripped out by the House before adoption. The Senate proposals contained two different definitions—one for pictorial, graphic, and sculptural works and another for useful articles. The former lacked any language about separability, leaving only a simple definition of such works as “two-dimensional and three-dimensional works of fine, graphic, and applied art.” The latter merged the content of utility and various aspects of the design into a single definition, reproduced below. That language, together with the duration proposals, are critically important for purposes of this essay. When the House removed design protection from the legislation, the separability language of the definition of pictorial, graphic, and sculptural was inserted into the code to preserve copyright as a distinct arena from industrial design. That left designs covered under copyright law only if they had sculptural features separable from the object’s utility. In hindsight, that move was an error of judgment.

The covered useful designs were described in the failed Senate proposal as follows:

DESIGNS PROTECTED

Sec. 201. (a) The author or other proprietor of an original ornamental design of a useful article may secure the protection provided by this title upon complying with and subject to the provisions hereof.

(b) For the purposes of this title—

(1) A “useful article” is an article which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article which normally is a part of a useful article shall be deemed to be a useful article.

(2) The “design of a useful article”, hereinafter referred to as a “design”, consists of those aspects or elements of the article, including its two-dimensional or three-dimensional features of shape and surface, which make up the appearance of the article.

(3) A design is “ornamental” if it is intended to make the article attractive or distinct in appearance.

(4) A design is “original” if it is the independent creation of an author who did not copy it from another source.

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162 See supra note 156.
164 Id. at 3.
165 Id. at 4.
166 Both may be found in S. REP. NO. 94–473.
DESIGNS NOT SUBJECT TO PROTECTION

Sec. 202. Protection under this title shall not be available for a design that is—

(a) not original;

(b) staple or commonplace, such as a standard geometric figure, familiar symbol, emblem, or motif, or other shape, pattern, or configuration which has become common, prevalent, or ordinary;

(c) different from a design excluded by subparagraph (b) above only in insignificant details or in elements which are variants commonly used in the relevant trades; or

(d) dictated solely by a utilization function of the article that embodies it;

(e) composed of three-dimensional features of shape and surface with respect to men’s, women’s, and children’s apparel, including undergarments and outerwear.167

There are several very notable features of these proposals to protect “an original ornamental design of a useful article.”168 First, according to §201, the utility and design of a useful article are treated as a single entity.169 In contrast to the present definition of a sculptural work, there is no requirement that aesthetics and function be split.170 Such an item has “an intrinsic utilitarian function” not constructed “merely to portray . . . [its] appearance.”171 The “ornamental design of a useful article”—the expression protected by the scheme—“consists of those aspects or elements of the article, including its two-dimensional or three-dimensional features of shape and surface, which make up the appearance of the article” and is “intended to make the article attractive or distinct in appearance.”172 And §202 excludes from coverage “a standard geometric figure . . . motif, or other common shape . . . which has become prevalent, or ordinary.”173 In essence these provisions function much like the definition of architecture which includes the overall form and composition of spaces, while excluding standard features. Its use would dramatically simplify the question as to whether a three-dimensional object with useful attributes could be treated as a sculptural work. Any original attractive aspect of a useful item, whether easily considered to be a separable aspect of the piece

168 Id.
169 Id.
172 Id.
173 Id.
or not, would be capable of receiving protection. The definition would have the substantial impact of treating any three-dimensional item with a utilitarian function as an ornamental design rather than a sculpture. The esoteric and often difficult task of splitting apart the various aspects of a three-dimensional object that has useful functions would end.

The term provisions in §205 (not quoted here) are equally intriguing.\footnote{Id. at 40.} Protection would begin on the date of publication of the registration and run for a maximum of ten years, divided into an initial term of five years and a renewal term for another five. While the renewal provisions are cumbersome and unnecessary, the basic idea that design protection should be short-lived makes imminently good sense. But is it possible to mesh such provisions into the overall copyright scheme covering sculpture, design, and architecture? Can article design protection for ten years (or any other short term that might be proposed) work with the term for sculpture and architecture lasting for life plus seventy years for individual or joint works or ninety-five years for works for hire?

On the surface it can be argued that the terms of protection for architecture—basically another form of ornamental design of useful objects—and useful industrial designs should be similarly treated. But in reality it makes a great deal of sense to treat them quite differently. Major architectural works tend to be unique or near-unique, expensive to design and construct, and unlikely to be market dominating products. It is unnecessary to treat them differently from other unique aesthetic designs. While the general copyright term is too long, that applies equally to both architecture and most other expressive undertakings covered by the act. Neither needs that long a term to create incentives for their introduction into the culture. Industrial designs, however, are much more often subject to short term fads—a basic reason for providing protection—and short-term market utility. Both their design and utility fashions frequently come and go with some rapidity. There is no reason to protect them for a long time—one that extends well beyond their typical economically useful life. All the industrial designers really need is a reasonable market head start in order to protect their investment and create incentives for well designed products. In addition, in those atypical settings where industrial designs become ubiquitous parts of our environment for significant periods of time, there are good reasons to open up the market to competition after a fairly short period of time to lower the risk of market dominance for a popular
product—a risk not nearly as likely for architectural works or other standard works covered by copyright.\footnote{Note that most types of copyrighted works compete with each other. Novels contest market share with other novels or books. The same is true of movies, television shows, dances, and pictorial, graphic, and sculptural works. There is very little likelihood of market dominance by a single work. One exception may be computer software and firmware—an area which in many ways is analogous to industrial design and should be granted a duration much like industrial design.}

The shorter term of protection for useful designs would create a new split in protection—one between sculpture and useful products ornamentally designed. The former would retain the present lengthy term of protection; the latter would be quite short. The boundary line between the categories can be drawn as tightly as possible to reduce conflict and litigation. The simplest path is to treat all products with a utilitarian use as designs and not sculpture. The test for protection should not be separability of form and function, but a test far simpler to administer about whether utility exists at all. Such a test already exists in the copyright statute. The limited design protections for boat vessel hulls adopted in 1998 apply to “an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public.”\footnote{176 17 U.S.C. § 1301(a)(1) (2000).} The same definition should be extended to cover other useful industrial designs.\footnote{177 A related possibility would be to consider the import of design patents. 35 U.S.C. § 171(a) protects an “ornamental design for an article of manufacture.” A full description of the requirements for obtaining such a patent are described in Andrew Beckerman-Rodau, Design Patent Evolution: From Obscurity to Center Stage, 32 SANTA CLARA HIGH TECH. L.J. 53 (2015). Like utility patents, applications must be made to the Patent & Trademark Office and reviewed to ensure that the design is novel and non-obvious. That process takes about fifteen months. Id. at 57. If granted, the patent extends only to the design, not to the underlying article of manufacture. And it is likely that a design patent could be held in addition to a copyright. Id. at 74–75. This suggests that further analysis here is not really necessary. Since the two are not mutually exclusive, my goal to ensure greater consistency within the structure of copyright law is not really affected by the existence of design patent protection. In addition, the length of time and the expense required to obtain a design patent suggest that the likelihood that many industrial designers would prefer to rely on easily obtained copyright protection than the more cumbersome patent system. That would be particularly likely if the reforms suggested here are put into effect.}

### B. Public Display Controls

It already has been suggested that there is something deeply inconsistent in allowing artists control over the use of public displays of their works while wholly denying that right to architects. Using utility as a dividing line or excuse for distinguishing between some of these works makes neither aesthetic nor legal sense. Working through the issues requires three steps. First, Congress presented some rationales for the provisions in 17 U.S.C. § 120(a) rejecting control over public displays of architecture when it was adopted. Those rationales require review. Second,
are there other justifications for treating sculpture and buildings differently not mentioned during Congressional consideration of the provision? And finally, if, as I have stated, the present provisions are unfair, what is the best way to solve the problem?

When 17 U.S.C. § 120(a) was adopted the House Report provided the following analysis of the provision:

Similar exceptions are found in many Berne member countries, and serve to balance the interests of authors and the public. Architecture is a public art form and is enjoyed as such. Millions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip. Additionally, numerous scholarly books on architecture are based on the ability to use photographs of architectural works.

These uses do not interfere with the normal exploitation of architectural works. Given the important public purpose served by these uses and the lack of harm to the copyright owner’s market, the Committee chose to provide an exemption, rather than rely on the doctrine of fair use, which requires ad hoc determinations.178

Much of this commentary is perfectly legitimate. Architecture, at least in its constructed versions, is a public art form. Photographs taken by tourists in outdoor public spaces routinely contain images of buildings. And scholarly works on architecture virtually always contain pictures of the buildings under discussion. None of this forms a justifiable basis for total exclusion of control over use of a publicly displayed piece of architecture. All of these actions are typically treated as fair use for public sculpture; no one would quarrel about them for public architecture either.

But the final use mentioned—posters—does not fall into the same category. It is not an incidental consequence of the obvious visibility of architecture. It does have a potential impact on the economic value of copyrighted works and is not supported by the traditional settings in which fair use is routinely found—de minimis use,179 critical commentary, educational undertakings, and similar activities that have no significant commercial impact on the value of an architectural work or of markets for the architectural design. There is no logical reason for concluding that sale

178 H.R. REP. NO. 101–735, at 22 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6953. The report contains materials on a number of acts that were merged together prior to enactment, including the Copyright Amendments Act of 1990.

179 Another example of de minimis use would be taking skyline pictures a distance away from any particular structure. In that setting no particular work of architecture is the centerpiece of attention. And to the extent such images are sold, as souvenirs for example, the market is not based on a building but on a cityscape.
of posters of well-known paintings by museums should routinely be treated as royalty producing events while sales of similar items picturing well-known buildings are not. Indeed, it may be the case that poster sales are the only important potential money making potential available to many architects for exploiting the value of already constructed buildings. Though the report was correct that fair use disputes sometime fall into open-ended "ad hoc determinations," that is not always so. And in this case, it is not difficult to describe most of the settings in which granting architects an exclusive right to control use of buildings’ public display would lead to justifiable calls for licensing. None of them involve “horror stories” like private citizens being asked to pay for the privilege of taking family pictures in front of the East Wing of the National Gallery of Art. Indeed, these cases would come out pretty much the same as disputes over picture-taking taken in front of Cloud Gate! Surely no one is going to be held liable for snapping a family image while cavorting in the belly of that beast!\(^{180}\)

And, assuming the basic structure of definitions of sculpture, industrial designs, and architecture are merged, posters of industrial designs made without permission also should be royalty producing events.

When buildings play an important role in movies, there is nothing imaginary or fleeting about the money that architects could have demanded. The architecture problem has been visible in many films, though Leicester is the most important case in which the issues were seriously litigated. Some very famous buildings have been significant features in important films. They include The Dakota\(^{181}\) in *Rosemary’s Baby*, The Bradbury Building\(^{182}\) in *Blade Runner*, and The Stanley Hotel\(^{183}\) in *The Shining*, to name just a few.\(^{184}\) Many others also have played important roles.\(^{185}\)

\(^{180}\) And the enormous numbers of people visiting Cloud Gate take enormous number of pictures and videos when they visit. Just take a look at this video of a crowd of people milling about the work on a beautiful day. https://www.youtube.com/watch?v=VQbztwiojIQ [https://perma.cc/6FPA-JTRQ].

\(^{181}\) Completed in 1884, The Dakota was the first apartment building constructed on the upper west side of Manhattan. John Lennon lived there when he was murdered in 1980, and his wife, Yoko Ono, still makes it home.

\(^{182}\) The Bradbury Building was constructed in 1893 and is the oldest remaining building in central Los Angeles. Its Victorian central atrium is a classic of late nineteenth century architecture.

\(^{183}\) The Stanley Hotel, located in Estes National Park in Colorado, opened in 1907. It is a grand, beautiful building in an extremely scenic place.


movie makers access to their property or to the inside of their buildings, that does nothing for the architects or other parties holding the copyright in the building. Indeed, it only emphasizes the strangeness of the rule.

These outcomes create my angst over the differences in treatment of publicly displayed pictorial, graphic, and sculptural works, including industrial designs with separable aspects, versus works of architecture. The use of Cloud Gate as a significant part of the background setting of Batman Forever would surely require payment of a royalty. Even though the exact same statements in the House Report about works of architecture could be made about famous outdoor sculptural works,186 no one could justifiably claim that Anish Kapoor should be reme diiless under the statute. Or if the work of REVOK used by H&M was painted on a famous building, rather than a handball court wall, should there really be a major difference in the way the graffiti and the building are treated? That is hard to rationalize. The same dilemma, of course, played out in the Leicester litigation. Because of fame generated by its appearance in Batman Forever, fans of the film surely take random pictures of the Figueroa Street development and Landscape Sculptor’s interior courtyard that everyone agreed was separate from the architectural design of the office building itself.187 Should the sculpture and the interior courtyard receive different treatment just because one is deemed sculptural and the other architectural? That conclusion too is very difficult to support.

What is the solution? The best result would be to handle the right to exploit publicly displayed copyrighted sculpture, industrial designs, and architecture under the same standard. In the cases discussed here, fair use defenses would be raised. A central feature of that jurisprudence is the strong tendency to deny fair use when the alleged infringing activity is highly commercial in nature.188 In the examples raised in the House Report supporting the enactment of 17 U.S.C. § 120(a), none were likely to have a commercial impact except the making of posters. In the absence of that

187 Leicester v. Warner Bros., 232 F.3d 1212, 1214 (9th Cir. 2000).
188 That’s been true for quite some time. The decision, for example, in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984) relied heavily on analysis of the economic impact of the video tape recorder on the market for movies and television. Concluding that the time delay feature of the then new technology had no significant impact on the market for the shows taped, the Court refused to label the machine makers as secondary infringers. Id.
section, the same examples would lead to the same conclusions about picture taking of buildings. And many other occurrences in which images of publicly visible sculpture, designs, or buildings might be made also would probably be fair use. Quick scans of street scenes, museum galleries, and industrial design convention halls provide only a small sampling of uses likely to be deemed fair, even in audio visual works. On the other hand, more intense use of images of sculptural works, industrial designs, or works of architecture as backgrounds for movie settings would rely upon the creative talents of others to make money—a use highly unlikely to be protected as fair use. That is as it should be. Copyright law has long been premised on the assumption that economic incentives to produce creative works are a principal reason for enacting intellectual property protections. And those incentives are traditionally deemed to include not only the right to demand fees for the transfer of the work itself, but also for commercial uses that others might wish to indulge in that make use of the original work. That is exactly what was at stake in *Leicester*. Denying those owning rights in either a sculptural or architectural work the right to receive such payments is contrary to the basic spirit and purposes of copyright law.