DESIGNED LANDS©APES—AR©HITECTURE, S©ULPTURE, VISUAL ART, SHAPE, PI©TORIAL WORK, OR . . . NOTHING AT ALL?

by RICHARD CHUSED[1]

This article arises from the saga of the construction and eventual destruction of a landmark landscape architectural work by the well-known artist Mary Miss that was constructed adjacent to the Des Moines Art Center called Greenwood Pond: Double Site. The project's demise is emblematic of the remarkably ambiguous copyright problems that surround such artistic creations. They do not neatly fit into any category of copyrightable works. Though they may contain sculptural works, their overall designs are rarely totally sculptural. While architects typically draw plans and "sculpt" a landscaped space, the results usually are not "buildings," as required by the definition of architecture in the copyright code. For purposes of moral rights protection, they are rarely works of "visual art" as mandated by the statute. In short they are in a copyright black hole, presenting work that may be just as creative and worthy of protection as art, sculpture, and architecture, but lacking intellectual property recognition. After surveying the surprising status of landscape architecture, I suggest some changes to the copyright code to ameliorate problems.

INTRODUCTION: MARY MISS V. DES MOINES ART CENTER

A series of news stories in 2024 piqued my interest. They described the deterioration and planned destruction of an installation designed by Mary Miss—a well-known landscape architect. The project—Greenwood Pond: Double Site—was constructed at the

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behest of the Des Moines Art Center between 1989 and 1996[2] under terms of a contract[3] between Mary Miss, the Art Center, and the City of Des Moines—owner of the site adjacent to the museum's property in Greenwood Park where the work was located.[4] Below is a partial view of the installation.[5]

Figure 1: Partial Aerial View of Greenwood Pond: Double Site

Over time, parts of the work, especially the wood elements, deteriorated. The Museum eventually removed segments of the walkways deemed especially hazardous

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[2] Julia Halperin, *A Leading Art Installation is Imperiled. By Its Patron.*, N.Y. TIMES, https://www.nytimes.com/2024/01/22/arts/design/mary-miss-land-art-des-moines-museum.html (last visited Aug. 2, 2024). The request for preliminary relief and complaint in the case of Mary Miss v. Edmundson Art Foundation, Inc., d//b/a as Des Moines Art Center, filed on April 4, 2024, is available at https://www.tclf.org/sites/default/files/2024-04/Miss%20complaint%20and%20application%20for%20temporary%20restraining%20order.pdf (last visited Jun. 10, 2024). A gallery of images of the site is available at https://www.tclf.org/greenwood-pond-double-site (last visited Jun. 21, 2024). For a brief history of the site, see the landscape artist's webpage at http://marymiss.com/projects/greenwood-pond-double-site/ (last visited Jun. 21, 2024).

[3] The contract is Exhibit 1 appended to the complaint filed in Mary Miss v. Edmundson Art Found., Inc., d/b/a/ Des Moines Art Center, Case No. 4:24-cv-00123, (S.D. Iowa Apr. 4, 2024) [hereinafter Complaint]. Many of its terms are described in the court's Order Granting Motion for Temporary Restraining Order, Mary Miss v. Edmundson Art Foundation, Inc. d/b/a/ Des Moines Art Center, No. 4:24-cv-00123-SHL-SBJ (S.D. Iowa, Central Division, Apr. 8, 2024), 2024 WL 2164648 [hereafter TRO Grant], and in the Order Granting Motion for Preliminary Injunction, Mary Miss v. Edmundson Art Foundation, Inc. d/b/a/ Des Moines Art Center, No. 4:24-cv-00123-SHL-SBJ (S.D. Iowa, Central Division, May 3, 2024), 2024 WL 2169445 [hereinafter PI Grant].

[4] *Visitor Map*, DES MOINES ART CENTER, https://desmoinesartcenter.org/wp-content/uploads/2025/04/Art-Center_visitor-map_English_2025.pdf (last visited Dec. 9, 2025).

[5] Julia Halperin, *Des Moines Art Center to Demolish Work and Pay Land Artist $900,000,* N.Y. TIMES, https://www.nytimes.com/2025/01/14/arts/design/des-moines-art-center-mary-miss-settlement-land-art.html. (Jan. 14, 2024).

and, as the image below indicates, barred entry to portions of the site.[6] They also made plans to disassemble the entire landscape project.[7]

Figure 2: The closed-off "Greenwood Pond: Double Site" in Greenwood Park. Barraza/The Register

Miss sought and obtained a preliminary injunction restraining its destruction, primarily on the ground that the contract between Miss and the Art Center barred such a step without her permission.[8] But Miss lost her initial effort to compel the Museum to repair the Greenwood Pond project. The court concluded that the contract ceded virtually complete authority over rehabilitation to the Art Center. That decision left the work in suspended animation.[9] The opinion, in part, read:

The Art Center cannot demolish the artwork without Miss' consent (which she will not grant) because the Art Center promised in a contract not to do so. The Court therefore must grant Miss's Motion for Preliminary Injunction insofar as it seeks to prevent the Art Center from tearing down the artwork. Miss cannot, however, force the Art Center to repair or restore the artwork to its original condition because the same contract gives the

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[6] The image is in Addison Lathers, *Des Moines Art Center, Artists Say They're Near Agreement on Disputed Greenwood Installation*, Des Moines Register , https://www.desmoinesregister.com/story/money/business/development/2024/11/22/des-moines-art-center-greenwood-park-mary-miss-agreement-nearly-reached/76483603007/ (last visited Dec. 9, 2024).

[7] HALPERIN *supra* note 2.

[8] HALPERIN *supra* note 2.

[9] Julia Halperin, *A Land Artist's Work Evades Demolition*, N.Y. TIMES (May 7, 2024), https://www.nytimes.com/2024/05/07/arts/design/temporary-injunction-iowa-artwork.html (last visited Jul. 10, 2024).

Art Center unilateral discretion to decide whether to undertake repairs or restoration, and the Art Center has reasonably decided the cost is too high.[10]

In addition to the contract issues,[11] Miss argued that the Visual Artists Rights Act of 1990 (VARA) protected her work from both demolition and modification without her permission.[12] The museum took down parts of the installation and therefore modified it before she filed her complaint, and, as already noted, wished to demolish the entire work. The court, however, refused to grant any relief under VARA, concluding it was unlikely that her installation was a "work of visual art" as required by the statute.[13]

The legal dispute was settled early in 2025. The Art Center agreed to pay Miss $900,000 in return for her allowing the destruction of the installation.[14] The case prompted me to think about a series of irrational distinctions in copyright law between architecture, sculpture, pictorial works, landscape architecture, site-specific projects, and other unprotected constructions. Both the contours of various statutory definitions and their interpretation by courts and the Copyright Office made it quite challenging for Miss to prevail in her moral right claims. Depending on how the works of Miss and others are characterized, disputes about the demolition or modification of similarly situated but creatively varied designs might well result in different outcomes. Her contract claims, though very interesting, are reviewed in Part I to set the factual stage underlying the far more complex artistic, copyright, and moral right discussion that follows.

This brief description of the Miss—Des Moines Art Center legal dispute sets the parameters for the copyright problems explored here. The felt needs of the parties to contractually memorialize—though somewhat ineptly—the nature of the planned project and the rights of the actors suggests that a vacuum exists in the contours of copyright law. Simply put, what is landscape architecture for legal purposes? There is no category in the copyright statute that covers this creative activity. In its various modalities it can take on characteristics of pictorial, graphic, or sculptural works, architectural design of structures, a completely sui generis creative form, or a mixture of all of these possibilities. The unfolding of the Mary Miss dispute creates room for exploring the consequences of this statutory vacuum, lamenting the ambiguous legal standing of landscape architects in comparison to other creative souls, and suggesting ways of modifying the copyright statute to heal some of the wounds that may impose on those who dedicate their lives to this enterprise.

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[10] *Id*.

[11] *Id*.

[12] 17 U.S.C. § 106A.

[13] 17 U.S.C. §101 defines a work of visual art, in part, as follows:

> A "work of visual art" is—
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> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
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> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

[14] *Supra* note 4.

Part I reviews the contractual arrangements between the museum and Miss to set out in greater detail and legal and factual background of the controversy. Part II compares the Miss dispute with other important landscape architectural settings such as the Vietnam Veterans Memorial in Washington, DC, and the Holocaust Memorial in Berlin to lay out in some detail the boundaries of the statutory vacuum surrounding landscape architecture. And concludes with discussion of some proposed amendments to the copyright code to fill in the legal vacuum.

I. GREENWOOD POND PROJECT PLANNING: THE CONTRACT

The most relevant parts of the contract between Miss and the Art Center involved three paragraphs about alteration, maintenance, repairs, and restoration. They read as follows:

8.2 Alteration of the Work or of the Site.

(i) Art Center agrees that it will not internationally damage, alter, relocate, modify or change the Work without the prior written approval of the Artist.

(ii) Art Center shall notify the Artist of any proposed alteration of the Site that would affect the
intended character and appearance of the Work and shall consult with Artist in the planning and execution of any alteration and shall make a reasonable effort to maintain the integrity of the Work.

8.3 Moral Right. Art Center will use the Work in any manner which would reflect discredit on the Artist's name or reputation as an Artist or which would violate the spirit of the Work.

* * * *

9. ARTIST'S RIGHTS

9.1 Signage. * * *

9.2 Maintenance. ART CENTER recognized [sic] that maintenance of the Project on a regular basis is essential to the integrity of the Project. ART CENTER shall reasonably assure that the Project is properly maintained and protected, taking into account any instructions provided by the Artist, and shall reasonably protect and maintain the Project against the ravages of time, vandalism and the elements.

9.3 Repairs and Restoration.

(i) ART Center shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Project will be made. During the Artist's lifetime, the Artist shall have the right to approve all repairs and restorations,

provided, however, that the Artist shall be paid a reasonable fee for any such services, provided that the ART CENTER and the Artist shall agree in writing, prior to the commencement of any significant repairs or restorations, upon the Artist's fee for such services.

The court construed Section 9.3(i) very broadly, stating that the agreement "unambiguously gives[s] the Art Center the right to refuse to repair or restore it, particularly when, as here, the cost to do so is prohibitively high."[15] While the court agreed that Section 9.2 of the contract required the museum to regularly maintain the site, it criticized Miss for failing to produce evidence suggesting that the Museum failed to fulfill this obligation. It went on to note that "The far more plausible explanation [rather

[15] HALPERIN *supra* note 2.

than neglect] for the Site's current condition is the cumulative impact of twenty-five plus years of weather and public use on exposed wood. This is not the Art Center's fault, nor is the Art Center obligated under the Artist Agreement to replace or restore it."[16]

These conclusions were questionable.[17] The court probably misconstrued the impact of Section 9.2. That clause required the museum to "reasonably protect and maintain the Project against the ravages of time, vandalism, and the elements." There is no exception for wood, deterioration of cement, public use, or weather, and the maintenance obligations are continuous and unlimited in duration. Nor is the permission or request of Miss required to perform such routine maintenance. Those sorts of issues were clearly predictable in a project like this, where wood and water are in close proximity or where wood is exposed to the elements. To court's conclusion that the museum had no obligation to account for the ways wood deteriorates when exposed to the elements as part of the regular and routine maintenance obligations under the contractual obligation to "[p]rotect against the ravages of time * * * and the elements" was inappropriate. Any reasonable curator of public, unsheltered artwork with exposed wood and with water and wood in close proximity should know that deterioration over time is inevitable. While the weather and passage of time were not the museum's fault," paying little or no attention to their impacts was. Though the language in the contract differentiating "maintenance" from "repairs" is certainly ambiguous, it hardly is as one-sided as the court opined. The museum also claimed that it had the right to remove the work. It maintained that standard deaccessioning rules outside the terms of the contract allowed for removal of the Miss work because its decay had reached the point where repair was no longer practicable and the cost of returning it to an acceptable state was prohibitive—well over $2 million.[18] But even if these claims had some rational basis in fact, the court's one-sided construction of the contract made it virtually impossible for Miss to raise a viable factual counterargument beyond what was actually presented.

It was, indeed, misleading to say that Miss produced no information on the maintenance issues. Evidence was explored during the preliminary injunction hearing, suggesting that the museum largely ignored Miss' work after it was completed.[19] Mickey Ryan, the museum director of Registration and Collection Management, testified that the Art Center did not "have precise records of ordinary maintenance for the installation." Nor did the museum have any routine maintenance guidelines for taking care of the work. Kelly Baum, the institution's director, did not even "become aware of the installation until" after her arrival on the job eleven months before the hearing. In addition, Baum and the museum's Board of Directors were willing to spend $350,000 to remove the work

[16] *Supra* note 3.
[17] *See Miss v. Edmundson Art Found., Inc.,* No. 4:24-cv-00123 (S.D. Iowa Apr. 4, 2024) [hereinafter Opposition to Modify Preliminary Injunction].
[18] *Supra* note 6.
[19] There is some difficulty in trying to mesh the provisions of sections 9.2 and 9.3. While the contract imposes an apparently binding obligation on the museum to "maintain" the project, it is given significant discretion in deciding when to make "repairs." The most rational description of the story suggests that fixing wood rot would require regular maintenance under section 9.2. Allowing the problem to grow by doing little or no maintenance might seem to require "repairs." But if that is required as a result of failure to maintain, the provisions of section 9.2 should dominate resolution of the issues.

but refused to spend additional funds to preserve it.[20] The museum claimed that it had not ignored the work and had already spent about $1 million making repairs.[21]

In addition to the potentially erroneous contractual interpretations and factual conclusions, the cultural importance of Miss' work imposed non-legal institutional responsibilities to protect and maintain it. The renown of Mary Miss as one of the most notable women landscape and environmental artists of the last century placed significant cultural burdens on the museum that undermined its claim that demolishing the work was standard deaccessioning practice. Miss' importance is well documented in recent exhibitions and literature.[22] It is reasonable to claim that museums in particular have trustee-like duties to protect their collections.

In addition, the Des Moines Art Center is a member of the American Alliance of Museums. The alliance has promulgated a set of standards for Collection Stewardship.[23] The standards,[24] among other things, require Alliance members to maintain systematic

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[20] A summary of the hearing was posted on the site of The Cultural Landscape Found., a long-time supporter of Miss' work. The text above reports on some of the evidence. TCIF, *Surprising Revelations At "Greenwood Pond: Double Site" Court Hearing*, TCLF (Apr 22, 2024), https://www.tclf.org/surprising-revelations-greenwood-pond-double-site-court-hearing (last visited Dec. 5, 2024).

[21] *Supra* note 4; *see also supra* note 6.

[22] *See,* e.g., LEIGH A. ARNOLD (ED.), GROUNDSWELL: WOMEN OF LAND ART (2023). GROUNDSWELL is the catalog for an exhibit of the same name mounted by the Nasher Sculpture Center in Dallas from September 2023 to January 2024. There also was a fascinating online panel discussion about Mary Miss's place in the history of landscape architecture moderated by Charles A. Birnbaum, President and CEO of the Cultural Landscape Foundation in which Miss has long been prominently involved. See *Art world Leaders on the Importance of Land Art Leader Mary Miss' "Greenwood Pond: Double Site,"* https://www.youtube.com/watch?v=gScy6la8Tn8 (last visited Dec. 22, 2024).

[23] Collection maintenance standards are routinely promulgated by museum organizations. *See* Richard Chused, *Art ©aches*, 13 N.Y.U. J. INTELL. PROP. & ENT. L. 269, 295-298 (2024), https://jipel.law.nyu.edu/wp-content/uploads/2024/07/JIPEL-Volume-13-Number-2-Chused.pdf

[24] *See Ethics, Standards, and Professional Practices*, AMERICAN ALLIANCE OF MUSEUMS, https://www.aam-us.org/programs/ethics-standards-and-professional-practices/collections-stewardship-standards/ (last visited Dec. 9, 2024). Emphasis has been added below.

> To meet these a museum must have:
>
> > A current, approved, *comprehensive collections management policy* is in effect and actively used to guide the museum's stewardship of its collections.
> >
> > The sufficient human resources and staff with the appropriate education, training and experience to fulfill the museum's stewardship responsibilities and the needs of the collections.
> >
> > Staff delegated with responsibility to carry out the collections management policy.
> >
> > A *system of documentation, records management and inventory* is in effect to describe each object and its acquisition (permanent or temporary), current condition and location and movement into, out of and within the museum.
> >
> > *Processes that regularly monitor environmental conditions* and have proactive measures to mitigate the effects of ultraviolet light, fluctuations in temperature and humidity, air pollution, damage, pests and natural disasters on collections.
> >
> > An appropriate method for identifying needs and determining priorities for conservation/care is in place.
> >
> > Safety and security procedures and plans for collections in the museum's custody are documented, practiced and addressed in the museum's emergency/disaster

maintenance records and procedures, and to monitor environmental conditions.[25] Though the museum claimed it was following the guidelines by seeking to dismantle the Greenwood Pond site,[26] there certainly was evidence to the contrary.

Julie Halperin, in one of the first news articles about the legal dispute and the significance of Miss' Des Moines work,[27] described its importance in the history of urban landscape architecture:

> Created between 1989 and 1996, "Greenwood Pond: Double Site" is one of the very few environmental installations in the collection of any American museum and is considered to be the first urban wetland project in the country. Its imminent demolition has angered landscape architecture advocates and upset Miss, who is part of a generation of pioneering female land artists receiving renewed scholarly attention.

The things that have become so important in my later work—engagement of communities, collaboration with scientists, being able to take on something like climate change as an artist and have a seat at the table with politicians and educators—it started there," Miss, 79, said by phone from her home in Manhattan. With its wooden boardwalk and concrete walkways that curve along the edge of the water and its cantilevered bridges, "Greenwood Pond: Double Site" invites passers-by to explore the landscape; viewers can climb up a tower to see the water from above or descend into a sunken structure to experience it at eye level.[28]

Halperin also noted that other Miss projects constructed with materials similar to those in Des Moines and installed in moist environments have been well maintained over the years, including replacement of segments of the works when necessary, in line with the American Alliance of Museums standards. The most prominent repair project is probably one completed in 2019 at the South Cove Jetty at Battery Park City in lower

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preparedness plan.
Regular assessment of, and planning for, collection needs (development, conservation, risk management, etc.) takes place and sufficient financial and human resources are allocated for collections stewardship.
Collections care policies and procedures for collections on exhibition, in storage, on loan and during travel are appropriate, adequate and documented.
Both the physical and intellectual control of its property.
Appropriate museum policies and procedures that incorporate ethical considerations of collections stewardship.
Considerations regarding future collecting activities are incorporated into institutional plans and other appropriate policy documents.

[25] *Des Moines Art Center Receives Highest National Recognition*, Des Moines Art Center, https://desmoinesartcenter.org/news/des-moines-art-center-receives-highest-national-recognition/ (last visited Dec. 9, 2024).
[26] *Supra* note 6.
[27] *Supra* note 1.
[28] *Supra* note 6.

Manhattan.[29] Two images of the Hudson River shoreline site displaying the use of materials much like those in Des Moines are below.

Figure 3: Kirsten Swenson, *Earthworks by Women in Cities Have Been Less Visible Than Heizers and Smithsons in Remote Locales. That's Changing*. ARTNEWS, (September 9, 2024).[30]

Figure 4: Jasmine Sanchez, What is the South Cove? LinkedIn (Feb. 20, 2020)[31]

As with the Des Moines site, the timber decking and structural supports at the site rotted over time. And portions of the foundation piles in the Hudson River needed replacement. Significant expenditures were undertaken to ensure the park's survival and to preserve access to the important urban landscape project for both visitors to the area and those living nearby. Organizing the funding of the South Cove rejuvenation among

[29] Some of the origin history of the site is recited in Tony Hiss, *At Land's Edge, a Contentment of Light and Shape,* N.Y. TIMES, https://www.nytimes.com/1990/10/19/arts/at-land-s-edge-a-contentment-of-light-and-shape.html (last visited Nov 4, 2024). *See also* South Cove, MARY MISS, https://marymiss.com/projects/south-cove/ (last visited Nov. 4, 2024).

[30] Kirsten Swenson, *Earthworks by Women in Cities Have Been Less Visible Than Heizers and Smithsons in Remote Locales. That's Changing*, ARTNEWS, https://www.artnews.com/t/mary-miss/ (last visited Nov. 4, 2024).

[31] Jasmine Sanchez, *What is the South Cove?*, LINKEDIN, https://www.linkedin.com/pulse/what-south-cove-jasmine-sanchez (last visited Nov 14, 2024).

the various governmental and private parties with a stake in the park was, like so many other projects in New York City, complex.[32] But there was widespread agreement that the site's importance justified the efforts. While the parties in the Des Moines dispute expressed a desire to preserve the site, both the city and the museum claimed they lacked available funding for the work. Some repairs were undertaken in 2014.[33] But successful fundraising for the more extensive restoration required now was not forthcoming.[34] In addition, as already noted, the vagueness of portions of the original contract between Miss, the Des Moines Art Center,[35] and the city of Des Moines made judicial resolution of the dispute challenging.

Despite the problems embedded in the Miss/Art Center contract and the various factual disputes in the case, the agreement did embody a significant effort to memorialize obligations similar to those in portions of VARA, guaranteeing some control to certain artists over alterations, modifications, or destruction of a "work of visual art."[36] Given the terms of the contract and the litigation problems, therefore, it is not surprising that Miss also included moral right claims in her complaint.

The foundation for Miss' moral right claims is found in §106A(a)(3) of the Copyright Act. Using language similar to some of the terms of the Miss contract, it provides that the author of a work of visual art:

> (3) * * * shall have the right—
> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

But these provisions apply only to a "work of visual art." The statute defines that category in a limited way by including traditional art and sculpture while excluding architecture or other forms of aesthetic shaping.[37]

I suspect the statutory moral right claim result reached by the trial court would not have been reversed on appeal in the absence of a settlement. Miss' work was probably not a work of visual art.[38] In addition, given the factual findings in the preliminary injunction opinion, prevailing in an appeal of the contract claims was quite challenging. Reversing findings of fact made by a trial court judge is always a difficult obstacle to

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[32] Chuck King, *South Cove Jetty: Decking Replacement and Bracing Restoration*, https://urbanengineers-staging.apos.dev/projects/south-cove-jetty-decking-replacement (last visited Nov. 17, 2024).
[33] *Supra* note 3.
[34] *Supra* note 3. (It is not clear from any of the extant documents in the case whether the Art Center made any efforts to raise the necessary funds. The museum has claimed that it would cost $1 million dollars to fix the Miss project.)
[35] Formally, the Art Center operates as the Edmundson Art Foundation, Inc.; hence the name of the legal dispute is *Miss v. Edmundson Art Found*., Inc., d/b/a Des Moines Art Center.
[36] 17 U.S.C. § 106A(a).
[37] For the definition of a work of visual art, *supra* note 13.
[38] Perhaps some of it was sculptural but the entire work was almost surely not a work of visual art.

overcome.[39] There were, therefore, good reasons for Miss to settle. The museum also had reasons to give way. The costs of a Miss victory were substantial.[40] The museum was caught between a rock and a hard place. They could not demolish the work without Miss' permission and, given the substantial cost, had no desire to fully repair it. In addition, insurance costs were probably high given the lack of railings on pathways in and around the pond. The costs might well have risen without repairs. The city did not require the museum to repair the installation, but if the work was done, insurance still had to be maintained.[41]

The obstacles to settlement gradually ebbed as the serious problems in maintaining the installation and litigating the dispute emerged for all the parties. It is understandable why an agreement was eventually reached. But the issues in the dispute, especially about the moral rights and other related copyright issues it raises, are fascinating. They certainly suggest that there were weaknesses in the Miss/Des Moines Art Center contract. However, Miss' story also strongly suggests that both VARA and some other terms in the copyright statute need revision. These and other related issues about the scope of the copyright statute in general, and VARA in particular, are the focus of the rest of the discussion.

II: ©ONTRASTS AND ©ONFUSION: GREENWOOD POND, CLOUDGATE, AND THE VIETNAM WAR MEMORIAL

For copyright purposes, what is Miss' Greenwood Pond: Double Site? Why might different legal results arise in disputes about other well-known public art and landscape projects? Is Miss' work copyrightable as a sculpture? As a work of architecture? As both? As neither? Like Anish Kapoor's Cloudgate in Chicago's Millennium Park, Maya Lin's Vietnam Veterans Memorial[42] on the Mall in Washington, DC, or any number of other creative public art projects in the midst of landscape plans, Miss' project could be labeled in varying ways. The shapeliness of various parts of it is sculptural in form, especially the undulating walkways coursing through the area and the sunken well for viewing the site from water level.[43] That, however, does not guarantee protection of the whole as a copyrightable work. Parts of it are also architectural in their design. The canopied

[39] The standard rule is that the findings of a trial court must be clearly erroneous in order to gain a reversal.

[40] While the case was largely in abeyance between the issuance of the preliminary injunction and resumption of settlement discussions in November 2024, the museum did file a motion seeking to modify or dissolve the injunction. Among the issues raised was the high cost of making repairs. Though the city did not require that the installation be fixed it did seek either demolition or repair because of the serious hazards presented to those visiting the area. *See* Declaration of Dr. Kelly Baum in Support of Motion to Dissolve or Otherwise Modify Preliminary Injunction, *Miss v. Edmundson Art Found., Inc.*, No. 4:24-cv-00123 (S.D. Iowa July 26, 2024). An exhibit in this document was a letter from Scot E. Sanders, the Des Moines City Manager noting the structural issues, with a report from Brian Bishop, a city building official. A photograph in Bishop's report shows significant problems with the wood walkways in the installation.

[41] Telephone interview with Ben Arato, attorney for Ms. Miss (Jan. 17, 2025).

[42]The memorial was completed well before the effective date of VARA. But for analytical purposes I will write about it here as if it is subject to the act.

[43]It is visible just to the right of the tree in the center of the image supra p. .

viewing spot may qualify. But here, too, that doesn't guarantee full coverage. Even if it is thought of as a compilation,[44] that may not overcome the omission of landscape architecture as a copyrightable class of works. It is a category not specifically protected by the Copyright Act, either under the list of standard categories in 17 U.S.C. § 102(a),[45] or the specialized moral rights provisions of 17. U.S.C § 106A protects only works of visual art.[46] The Miss project is also site-specific—a relevant characteristic if such projects are excluded from moral rights protection as some have suggested.[47] Finally, it is not at all clear that a work can simultaneously or partially be both a sculpture and a work of architecture or that a work may simultaneously obtain the benefits of more than one class of protected creations.

Miss created a multi-disciplinary design that ennobled a quite specific site in a public park adjacent to an art museum. As a matter of cultural imperative, it surely should qualify in some way as a copyrightable work and as a work of visual art. That is also true of the Vietnam Veterans Memorial. That design, like Miss', has architectural and sculptural qualities, as does Anish Kapoor's renowned Cloudgate "bean" in Chicago's Millennium Park. The etched names on the black granite walls of the Vietnam Veterans Memorial, listed in order of their deaths in the conflict, might also qualify it as a pictorial or graphic work. The use of words in art is a common feature of many contemporary projects. The array of possibilities for these important creative works symbolizes the difficulties outlined in the introduction. Is Miss' work protected in any way?[48] And, even

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[44]A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works. 17 U.S.C. § 101.

[45]17 U.S.C. 102(a): * * * Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

This list does not exclude the possibility of protecting other original works fixed in a tangible medium of expression.

[46]*See supra* note 12.

[47]At least one court has done so. *See,* e.g., Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 (1st Cir. 2006). While *Phillips* stated categorically that site-specific work is excluded from VARA protection, the 7th Circuit Court of Appeals left the question somewhat open. While the latter court allowed the destruction of a planned garden arrangement in Chicago's Grant Park, the opinion was not stated with the certitude of *Phillips*. Kelley v. Chicago Park District, 635 F.3d 290 (7th Cir. 2011). This exclusion strikes me as irrational. Can it really be the case that a sculpture intentionally and specifically placed in a particular public spot is not treated as a work of visual art under VARA?

[48]I previously wrote about the difficult interfaces between architecture, landscape architecture, and sculpture in a discussion of the varying and conflicting provisions of the copyright act governing the reproduction and copying of publicly displayed works. Making and using images of architecture in public spaces may be freely done, while similar actions involving sculpture are restricted. When

more challenging, what is the ideal way to handle the desire of the Des Moines Art Center to modify or dismantle the entire project? Similarly, what would happen (other than an uproar) if the National Park Service decided to alter or remove the Vietnam Veterans Memorial, or if Chicago planned to remove Cloudgate from Millennium Park? Would (or should) VARA provide protection for any or all of the projects?

The raft of confusion about these and so many other works arises largely from a series of terms in the Copyright Act itself. In addition to the limited contours of the "visual art" category under VARA,[49] the statute defines works of architecture and sculptural works in ambiguous and different ways. Architectural works are defined in Section 101 of the Copyright Act as:

> 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.[50]

The Copyright Office issued a regulation attempting to elucidate the meaning of the term "building" in that definition:

> The term building means humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos, and garden pavilions.[51]

This regulation might protect the shelters or porches in the Greenwood Pond project, assuming they are original and fixed in a tangible medium of expression for more than a period of transitory duration.[52] But other aspects of the project would be less likely to fit.

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both aspects of creativity are involved in the same work, problems inevitably emerge. See Richard Chused, *Sculpture, Industrial Design, Architecture, and the Right to Control Use of Publicly Displayed Works*, 17 NW. J. TECH. & INTELL. PROP. 55 (2019); https://scholarlycommons.law.northwestern.edu/njtip/vol17/iss1/2/ (last visited Nov. 15, 2024).

[49] *Supra* note 13.

[50] 17 U.S.C. § 101.

[51] 37 C.F.R. § 202.11(b)(2) (1997). The regulation follows the contours of the House Report on the Architectural Works Copyright Protection Act fairly closely. That report claimed that the word "building" encompassed habitable structures as well as structures that are used but not inhabited by people. H.R. Rep. 101-735, 1990 U.S.C.C.A.N. 6935, 6951 [hereinafter House Report].

[52] These criteria are critical parts of any work for which copyright is sought. 17 U.S.C. § 102(a) provides;

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
>
> (2) musical works, including any accompanying words;
>
> (3) dramatic works, including any accompanying music;
>
> (4) pantomimes and choreographic works;

And the Vietnam Veterans Memorial, on the surface of the extant statutory and regulatory language, seems to be excluded from the architecture category altogether. The work does not appear to be humanly occupiable in the standard meaning of that terminology. The famous Cloudgate work of Anish Kapoor in Chicago's Millennium Park also presents challenges if thought of architecturally.

In addition to the various statutory problems, does the Copyright Office regulation appropriately construe the "work of architecture" definition in 17 U.S.C. §101 of the copyright code? And even if it does, did Congress strike an appropriate balance in using the word "building" rather than the term "structure" in the statutory definition? In contrast to the regulation, the definition of an architectural work in the statute does not refer to the use or occupancy of a building by people.[53] Should, therefore, some works that may not be categorized as "buildings" under the regulation still find shelter under the language describing the architecture category in the Copyright Act?

The legislative history of the legislation is somewhat convoluted and confusing. The House Judiciary Committee report noted that an earlier version of the proposed statute included protection of a "three-dimensional structure." It was removed because of fears that it covered too much—things like highway bridges, dams, and pedestrian walkways.[54] Yet the report goes on to suggest that "structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions might be included." Does that mean that curved walkways, or even bridges, might be protected because they may be "used" by people? If a gazebo is a building, then why not include some or all of both Miss' and Kapoor's projects in the category?[55] Or what of a jungle gym like the one pictured below that is quite large and capable of human use in passages and shelters?[56] Is it Architecture? Sculpture? Neither? Might a bridge be a building, a possibility raised shortly? After all, like a gazebo, it may be used by people. The attempt to distinguish protected buildings and unprotected structures certainly left room for speculation.

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(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

17 U.S.C. § 101 defines "fixation" as follows:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration

[53] 17 U.S.C. U.S.C. § 101 defines "architectural work" as:

> [T]he 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.

[54] House Report, *supra* note 50 at 20.

[55] As will be noted shortly, people may actually go under the "shelter" of *Cloudgate*.

[56] Backyard Showcase, https://www.thebackyardshowcase.com/blog/outdoor-design/unleash-their-imagination-with-these-5-backyard-jungle-gym-sets (last visited Dec. 24, 2024).

Figure 5: Jungle Gym Architecture or Sculpture?

There are concerns suggesting that the regulatory effort to define "building" may be out of line with the statute. In addition to the problems with the words "structure" and "building," another part of the statutory definition of an architectural work excludes things called "individual standard features." Large segments of many structures—bridges, dams, and similar everyday projects—that the Judiciary Committee was concerned about may be excluded by the "standard features" wording in the definition. So why worry about the use of the term structure rather than building? If the entire structure is made of standard features and the shape is largely dictated by engineering considerations, then maybe they would not be protected.[57] But if the structure's overall design and form are original, despite being made of various assembled standard features, is it protected anyway? The code does not preclude standard features from contributing to the design and form of a building; it just says they may not be protected in their own right. In addition, if some structures like bridges are, on infrequent occasions, copyrightable, what public policies would be threatened by protecting them?[58]

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[57] Think of suspension bridges. Their shape—a catenary curve—is dictated by engineering considerations. It is the shape that a chain or cable takes when its ends are held in the hair. When hung from tall supports it is the curve that directs the most pressure directly downward, a critical factor in designing a suspension bridge. It may be a "standard feature" of such bridges.

[58] Also note that it would be quite difficult to win an infringement suit about a bridge. Suspension bridges, for example, are all built by hanging a roadway or other passage on a catenary curve. This curve arises when its two end points are suspended in air, as when people hold a piece of rope between their two hands or drape it over two supports. That turns out to be the curve that concentrates the most force at its end points, or when draped at the top of the support structure. When turned upside down it is also the curve that drives the greatest force straight down at its end points. That is how the Gateway Arch in St. Louis was constructed as a catenary curve. See Robert Osserman, *Mathematics of the Gateway Arch,* 57, NOTICES OF THE AMERICAN MATHEMATICS SOCIETY 220 (Feb. 2010), https://www.ams.org/notices/201002/rtx100200220p.pdf (last visited Feb. 20, 2024). In any case all suspension bridges are therefore use the same basic structure. The only potentially copyrightable features would be the decorative features of the two support structures. The same would be true of the newer style cable-stayed bridges.

Ambiguity also arises when beautiful or shapely features are attached to or related to a building or when an entire building is itself quite beautifully shaped. Such characteristics suggest that architecture may have sculptural features or itself be sculptural.[59] And many things that might be "standard features" in one setting could be significant aesthetic aspects in another.[60] Certainly, many architects think of themselves as artists. I. M. Pei, for example, behaved as a sculptor as well as an architect in designing the East Wing of the National Gallery of Art in Washington D.C [61] Can well-crafted and beautifully shaped walkways like those at Greenwood Pond be treated as either an architectural or a sculptural art form, or as both? Can a structure not intended for human use still be thought of as a sculpture if the architecture category is inapplicable?

The Chicago "bean," formally named Cloudgate by its creator Anish Kapoor, raises these sorts of questions in stunning ways. Its height easily allows people to walk under it, where they can wander about and view "hall of mirror" types of reflected images. This prospect is easily discerned in the image below.[62] Is it humanly habitable architecture, sculpture, or both?[63]

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[59] Common features of this sort are decorative motifs on the surface of stonework and columns.

[60] Think if Mies van der Rohe's Lake Shore Apartments in Chicago. These world famous buildings are supported by a steel grid. On the vertical steel supports, "I" beams are attached on the outside. They have no support function. Rather they serve as a decorative motif. For a good image *see* Hernan Pablo*, Metaphors in Design Problem Solving: Implications for Creativity,* INTERNATIONAL JOURNAL OF DESIGN (August 2007), https://www.researchgate.net/figure/Lake-Shore-Drive-Apartments-Chicago-Illinois-1948-51-by-Mies-van-der-Rohe-View-of_fig6_256503979 (last visited Jan. 21, 2025)

[61] For a summary of the development and design of the building along with some images *see A Design for the East Building,* National Gallery of Art, https://www.nga.gov/features/slideshows/a-design-for-the-east-building.html (last visited Jan. 2, 2024).

[62] The image is at: *The Bean (Cloud Gate) in Chicago*, CHOOSE CHICAGO, https://www.choosechicago.com/articles/tours-and-attractions/the-bean-chicago/ (last visited Dec. 5, 2024). When I visited this site, the experience under the "bean" with kids running around and posing with joy was remarkable—a special treat.

[63] The House Report also notes that the committee intentionally created a new separate category for architecture because it wanted to avoid the vagaries of the requirement that functional aspects of sculptural works have to be excluded from consideration in evaluating whether the rest of the work is sculptural. House Report, note 50 supra, at 20. And this result does not help much because the notion of a "standard feature" is just as vague as the notion of utility. And creating two categories does not automatically mean that a structure cannot be both architecture and sculpture if the standard features are not considered and its utility can be separated from its shape.

Figure 6: Anish Kapoor's Cloudgate ("The Bean") in Chicago

Even if the definition of a pictorial, sculptural, or graphical work may, in theory, occupy part of the world of structures that are or might be architecture, reaching that conclusion is sometimes quite challenging because of another ambiguous feature of the copyright statute. Only shapes that can be "identified separately from, and are capable of existing independently of, the utilitarian aspects of [an] article" are protectable as sculpture![64] Architectural works are typically useful, and many sleek, modern buildings are designed in ways that make it difficult to separate their sculptural from their useful features, even if the separation test only requires a mental image that separates the "art" from its utility. The East Wing of the National Gallery, for example, may not have separable sculptural characteristics. Since the building itself is the potentially protected sculpture, how can it be separated from its utility? Can it be thought of without its qualities as a museum?

The utility issue is hardly limited to sculpture that is architecture in form. All sorts of useful appliances and other items have quite pleasing shapes that are difficult to think of as separable from their utility.[65] The statutory terms protecting architecture attempt to

[64]The full definition of a sculptural work is in 17 U.S.C. § 101:

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

[65]The issue has been bedeviling copyright law at least since Marcel Duchamp placed a urinal on a pedestal and called it *Fountain* in 1917. For a review of some of the issues about *Fountain* see Richard Chused, *Protectable "Art": Urinals, Shredders, and Bananas,* 31 Fordham Intell. Prop., Media & Ent. L. J. 166, 174-191 (2020), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1767&context=iplj. Another example of his work—a snow shovel hanging from a ceiling entitled *In Advance of the Broken Arm*—was recently auctioned off at Christies for the tidy sum of $3,075,000. *See* https://www.christies.com/en/lot/lot-6509395 (last visited Dec. 21, 2024). One of the most famous cases involved a curvilinear bicycle rack that was a partial copy of a sculpture. The court concluded that its utility could not be separated from its utility. Really? *See* Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987)

compensate for that issue by omitting language about utility and replacing it with the exclusion of "individual standard features" from protection.[66] And, as previously noted, this class of features need not always be deemed separable from the underlying shape of an architectural work for the shape and form of the work to be protected. Might the use of similar language be appropriate in defining sculptural works?

Where do beautiful structures like certain bridges or memorials that accommodate human use fit into this architectural/sculptural schema? What, for example, if a beautiful walkway or pedestrian bridge was lifted from its moorings by a crane or imagined rising toward the sky as in a dream? Would such physical or mental gymnastics suffice as separation from utility for sculptural purposes? And if a bridge capable of use by pedestrians is largely constructed of non-standard features, can it be architecture? Look at the Gateshead Bridge that spans the Tyne River in Newcastle, north of London. It brings the rising bridge in a dream example to life. Here are two images, the left one when it is lowered for pedestrian use and the other when it is raised for a boat to pass underneath.[67] Is it architecture when it is lowered but sculpture when it is raised? This would not be a building and therefore not architecture according to the Copyright Office. But should it still be protected? Doesn't it also have the aesthetic sensibility of a beautiful sculptural work? And so it goes. The copyright code and regulations are infected with ambiguity, if not a direct assault on commonly accepted theories of aesthetics.Author: should we add a subsection here?

Perhaps the best-known public architectural/sculptural monument, at least in the United States, is the Vietnam Veterans Memorial on the mall in Washington, DC.[68] Ponder it too as a contrast with Miss' work in Des Moines and Kapoor's Cloudgate in Chicago. Though the Vietnam Veterans Memorial was created before VARA went into effect, it is a profoundly beautiful, sculpture-like work with significantly different characteristics from both Miss' landscape project and Cloudgate.


[66]The definition provides:

> An "architectural work" is the design of a building as embodied in any tangible medium of expression * * *. 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.

Individual standard features might include bricks, common windows and doors, steel support systems, or fire stairwells.

[67] Both are at https://en.wikipedia.org/wiki/Gateshead_Millennium_Bridge (last visited Nov. 14, 2024).

[68] Other memorials certainly could be mentioned at this point. The Lincoln Memorial, The Washington Monument, and the Jefferson Memorial come immediately to mind. But those memorials are all regularly used by people in a sheltered space. Even the Washington Memorial has an elevator allowing tourists to go to a small viewing area near the top.

Figure 7 and 8: Is a Beautiful Bridge Outside of London Architecture or Sculpture?

I lived in Washington, DC, when it was formally opened in 1982, not quite a decade before VARA was adopted. A huge crowd of veterans came to participate in the dedication.[69] Prior to the celebration, however, the monument's modern, non-heroic, perhaps funereal, design provoked significant controversy.[70] Some preferred a much more traditional memorial with sculptures of soldiers and evidence of war. But after a compromise was reached with various interest groups to install a more standard sculpture nearby, the debates waned. The memorial maintained its status as a deeply powerful site not only for the veterans of the war and their families, but also for the millions of visitors who regularly stroll along the path at the base of the V-shaped, black granite walls bearing the names of those who died in the conflict.

Figure 9: Taking a Name Rubbing at Vietnam Memorial in Washington DC

[69] Lynn Rosellini, *Salute Opening for Vietnam Veterans,* New York Times (Nov. 10, 1982), https://www.nytimes.com/1982/11/10/us/salute-opening-for-vietnam-veterans.html (last visited Jun. 9, 2024). A gallery of images of the memorial is available on the National Park Service website at; https://www.nps.gov/media/photo/gallery.htm?pg=6445408&id=65D0AF7A-F5EB-4215-8E55-8917225728FB (last visited Jun. 9, 2024). I have discussed the memorial in a related setting. See *Charging Bull, Fearless Girl, Composition, and Copyright*, 10 N.Y.U. J. Intell. Prop. & Ent. L. 43, 69-70 (2020); https://jipel.law.nyu.edu/charging-bull-fearless-girl-artistic-composition-and-copyright/

[70] Paul Goldberger, *Vietnam Memorial: Questions of Architecture; An Appraisal*, N.Y. Times (Oct. 7, 1982), https://www.nytimes.com/1982/10/07/arts/vietnam-memorial-questions-of-architecture-an-appraisal.html (last visited Jun. 9, 2024; Elizabeth Wolfson, *The "Black Gash of Shame"—Revisiting the Vietnam Veterans Memorial Controversy*, Art21 Magazine (Mar 15, 2017), https://magazine.art21.org/2017/03/15/the-black-gash-of-shame-revisiting-the-vietnam-veterans-memorial-controversy/ (last visited Jun. 9, 2024). A more traditional sculpture of soldiers was placed at the top of rise facing the memorial wall as a compromise.

Shortly after it opened to the public, my wife and I visited the site on a beautiful day. We walked the full length of the wall on a dirt path that had quickly formed as the unexpectedly heavy foot traffic along the base of the wall decimated the grass originally sown there. A short time later, a stone path was installed.[71] After we walked along the wall, we sat silently in front of the memorial at the high point of the gentle grass slope designed by Lin as part of the overall landscape project. We watched an unending stream of visitors stroll alongside it. Some touched familiar names. A number made "temple" rubbings of the etched letters.[72] Others stood arm in arm or hugged while looking at the wall. Many left mementos behind, a habit not anticipated by anyone before the memorial opened.[73] Most simply moved slowly, reverently, and silently along its V-shaped wall. They acted as if they were in a cemetery or a place of worship. We, like many of them, were deeply moved by both our stroll and our witnessing. Though neither of us served in the conflict and both of us actively participated in the anti-war movement, our visit was still a deeply powerful reminder of the war's tragedies, the deep political turmoil it created both here and abroad, the scale of death it generated, the deeply scarred families it left behind, and the valor of the many who served. That visit to the memorial left me permanently in awe of its majesty.[74]

Figure 10: Slope Leading Down to Vietnam Memorial in Washington DC

The gravitas of Maya Yang Lin's memorial design—both the wall itself and the sculpted grounds in which it sits—loudly shouted at me: "THIS IS ART!"[75] If that reaction was (and is) appropriate, there is much irony in the seeming hopelessness of the challenging, interesting, and perhaps irresolvable problems provoked by the way

[71] It is visible in the picture of the memorial below.
[72] Image at https://www.veteransmemorialparkpensacola.org/donations-name-rubbings, (last visited Dec. 20, 2024).
[73] The story of this history and the project to protect and store the tributes is available at Jane Folkerts, *Caring for Mementos left at the Vietnam Veterans Memorial*, National Park Service, https://www.nps.gov/articles/000/caring-for-mementos-left-at-the-vietnam-veterans-memorial.htm (last visited Dec. 26, 2024.
[74] The image below is on the Park Service website for the memorial, https://www.nps.gov/vive/index.htm (last visited Jun 9, 2024).
[75] The design's origin story has become famous. The competition held to select the memorial design was anonymous and open to all. The winner, Maya Yang Lin, was then an unknown architecture student at Yale. *See* Wolfson, *supra* note 69.

copyright law embeds it and related works in a sea of uncertainty. Artistically creative peoples' ideas about their crafts are replaced in the copyright code by the apparent need of intellectual property mavens to categorize and define works that refuse to conform to traditional labels. Over time, those lawyerly instincts have led to a complex, irrational set of norms dealing with "sculpture," "architecture," "works of visual art," "landscapes," and "site-specific work." The results have become so complex and incoherent that the time for change has long since passed.[76]

Lin's magnificent work embodies this legal ambiguity. Is it a building and therefore a work of architecture, or does the lack of a gazebo-like "roof" doom its fate? Should the Vietnam Veterans Memorial really be denied the protection granted to "architecture" because people cannot go "into" or use it? Or may I perversely ask if we actually went into it or used it as we walked along the wall? At its base, where the two walls of the V meet, it is just over 10 feet high[77]—significantly above the heads of people standing or walking there. Are people in that place justified in feeling they "occupy" a physically "covered" space? Do they feel surrounded, if not overwhelmed, by the black granite as they stare at the names etched there? When in that spot and looking at the wall, I felt surrounded by the physical, majestic, and sensory power of the experience.

I had a similar reaction when visiting Berlin's Holocaust Memorial in 2010. Located just east of the Brandenburg Gate, it contains a large field of tomb-like cement blocks of varying heights. At the outer rim of the area, none of the "tombs" rise more than a small distance from the ground. It did feel like a cemetery when walking by. But as I strolled down a gentle slope into the middle of the field, the cement blocks rose to a height well above my head. I lost sight of the surrounding city—"buried" in a massive funereal sea of finely "sculpted" cement tombstones. I also felt like I had become surrounded by and buried in an enormous mausoleum "building" much taller than me. Here are two images I took during that visit—one near the outer edge of the memorial and the other in the midst of the monumental cement blocks. Are the Vietnam and Holocaust memorials "merely" landscape architecture and therefore unprotected even as sculpture? Must we really think that large structures designed and built as architecture or landscape architecture may not also be sculptures?

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[76]Indeed, it probably is time to rewrite the code again. The last time such a project began was in the 1950s and the present code did not go into effect until 1978-now almost half a century ago. I tackled some of these category issues in an article about conflicts in rules dealing with the rights of display for sculpture and architecture. See Richard Chused, *Sculpture, Industrial Design, Architecture, and the Right to Control Use of Publicly Displayed Works*, 17 NW. J. TECH. & INTELL. PROP. 55 (2019), https://scholarlycommons.law.northwestern.edu/njtip/vol17/iss1/2/ (last visited Jun. 10, 2024).

[77]At the apex, the wall is 10' 1.5" high. Vietnam Veterans Memorial, "About the Wall," https://www.vvmf.org/About-The-Wall/ (last visited Jan. 21, 2025).

Figure 11 and 12: Holocaust Memorial in Berlin

Or, add one more complexity. Is the Vietnam Veterans Memorial a pictorial work? That question may seem silly. But given the tens of thousands of names of those who gave their lives during the war etched on its walls, it certainly is not silly. Much recent art relies on words and language, whether in two-dimensional pictorial works or three-dimensional shapes, to convey its meaning and significance. Lists of names on memorials have become more common since the Vietnam Memorial was built. Each such monument conveys deep meanings—mourning, celebration, memory, and reverence.

To push the issue further, what might or should be the legal difference (if any) between the Vietnam Veterans Memorial and the well-known Today Series by On Kawara or Barbara Kruger's ongoing installation at the Hirshhorn Museum[78] in Washington, D.C.? Part of the Today Series is on long-term display at the Dia Beacon in Beacon, New York. Sotheby's also has auctioned some of the works, including those displayed here.[79]

Figure 13: Images From On Kawara' s Today Series

The Dia Beacon describes the Today Series on its website:

[78]Barbara Kruger: *Belief + Doubt*, Hirshhorn Museum and Sculpture Garden (Aug 20, 2012–Ongoing), https://www.si.edu/exhibitions/barbara-kruger-belief-doubt:event-exhib-4801 (last visited Feb. 12, 2025).

[79] Sotheby's, *Revisiting the 1990s with On Kawara*, (May 18, 2017), https://www.sothebys.com/en/slideshows/revisiting-the-1990s-with-on-kawara (last visited Dec. 21, 2024).

> On Kawara was deeply concerned with the ways humans experience and record time. Kawara began his Today Series of paintings on January 4, 1966, and continued to work on them until his death in mid-2014. Adhering to a rigorous set of rules that he established, Kawara required that each painting be completed on the date depicted on its surface and in the language and grammar of the country in which it was completed. In addition to these formal conventions, the Today Series paintings are stored in handmade cardboard boxes along with a clipping from the local newspaper. Occasionally, these boxes are exhibited, and particularly in earlier works, phrases or text from the clippings would form part of the title as well. Combining the individual with the universal, the Today Series is both a deeply personal journey (asserting that I was here on this day), but also the story of humanity and struggles experienced on a much larger scale, as captured through the lens of daily newspaper reportage.[80]

Aren't these sentiments tightly related to the listing of names on a memorial in the order they died in service of their country? And aren't the On Kawara paintings displayed at Dia Beacon clearly protected as pictorial works?

Or think about the well-known text-based artistic works of Barbara Kruger.[81] The long-term installation of Belief+Doubt in the basement level of the Hirshhorn Museum on the Mall in Washington, DC, is partially pictured here:[82] Walking around, in, and on it demands your attention and contemplation. Is a project like this, clearly protected as a pictorial work, quite similar to the Vietnam Memorial in its use of "walls" as canvases to provoke thoughtful responses from viewers? Should it really make a difference that Lin used an outdoor wall as a "canvas," On Kawara used canvas as a canvas, and Kruger used the interior surfaces of a building as a "canvas?"[83]

Figure 14: Partial View of Barbara Kruger's Belief+Doubt in Hirshhorn Museum

[80]On Kawara—Long-term view, Dia Beacon,https://www.diaart.org/exhibition/exhibitions-projects/on-kawara-exhibition (last visited Dec. 21, 2024).

[81]For images of some of her work, see her page on the site of the Museum of Modern Art at: https://www.moma.org/artists/3266-barbara-kruger#works (last visited Feb. 26, 2025)

[82]Hirshhorn Museum, *Barbara Kruger: Belief+Doubt* (Aug 20, 2012–Ongoing), https://hirshhorn.si.edu/exhibitions/barbara-kruger-beliefdoubt/ (last visited Dec. 22, 2024).

[83]Ironically Kruger's work probably qualifies as a work of visual art protected by VARA. And since it is in and on a building it has special protections under the statute in 17 U.S.C. § 113(d).

The variety of instances of incoherent complications resulting from various confusing statutory definitions also extends to differences in rights granted to various sorts of works. Authors or owners of something styled as a "sculpture" or a "pictorial work," for example, have almost total control over the public display and use of their work.[84] With a work of "architecture," however, such control is severely limited for its entire copyright term.[85] What is the Vietnam Memorial? "Sculpture" or "architecture" or both? Can a souvenir store market plastic versions of the wall with the names finely embedded in the object? If the memorial is a sculpture, then the answer may be "no." But if it is architecture, the opposite may be the case.

If a work is something called a "work of visual art,"[86] the original author retains certain "moral rights" under VARA[87] to control alteration or destruction of the work even after transfer; but "visual art" does not include "architecture," or "sculpted landscapes."[88] The Vietnam Veterans Memorial may well exemplify all three of those categories.[89] Some courts also have excluded "site-specific works" from the "work of visual art" category.[90] Something legally called a "work of architecture" must probably be a "building" accommodating use by people, but many architecturally designed "structures" that do not accommodate occupancy are omitted from protection unless they are treated as sculptures.[91] What does that do to the Vietnam Memorial or the Lincoln Memorial, or the Washington Monument with its elevator? Are these monuments "sculptural," architectural," "site specific," or all of the above? Or to the idea of "visual art" if it is site-specific? What if words or symbols are used in or on a work? Does that turn it or part of it into a pictorial work? Why can't a work simultaneously occupy more than one category of protected works? Next, this essay ventures to suggest ways to resolve at least some of these conundrums. Wish me luck.

III. RETHINKING ART, ARCHITECTURE, LANDSCAPES, AND COPYRIGHT

A. Refining the Issues

The image below is one of the copyright-related, advertisement images I enjoy most.[92] In a single phrase, it captures one of the central ideas of this essay—that the

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[84] *See* 17 U.S.C. § 106(5), 109(c).
[85] *See* 17 U.S.C. § 120.
[86] The definition may be found in 17 U.S.C. § 101.
[87] The primary section of the act is 17 U.S.C. § 106A.
[88] 17 U.S.C. § 101.
[89] But note that VARA did not take effect until 1991, sometime after the Vietnam Memorial was completed.
[90] *See supra* note 46.
[91] The definition of a work of architecture may be found in 17 U.S.C. § 101. The Copyright Office limits the word "building" contained in this definition to a structure that people my enter and use. See C.F.R. § 202.11 Architectural works.
[92] This image is part of a poster from a 1979 ad campaign by the plumbing fixture designer firm Sherle Wagner. I found the poster on an eBay page offering copies of the poster for sale. https://www.ebay.com/itm/325166901192 (last visited Dec. 26, 2024). By the time this essay is published it may well have disappeared from the web.

copyright statute no longer (if it ever did) captures the ways many artistically inclined, creative people or institutions think about their work. For Sherle Wagner and many other enterprises and artists, the very idea that utility and aesthetics are separable is at a minimum puzzling, and at most heretical. The company appears to have taken great delight in skewering the very legal norm of separability in sculptural works of utility that they might later have needed to rely upon in copyright litigation.

Figure 15: Plumbing Fixtures Sculptural?

The faucets and spout in this image are a perfect example of why the definition of a sculptural work is both difficult to apply and out of line with the aesthetic preferences of many.[93] As noted, the statutory terms describing protection for a three-dimensional work are applicable "only if, and only to the extent that, such design incorporates * * * sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." Are the faucet knobs copyrightable if you visualize them removed from the rest of the plumbing fixture? How about the faucet spout? What of each fixture as a whole, separated from the sink and plumbing system?

Famous cases illustrating the difficulties inherent in this definition of a sculptural work are legion.[94] A fascinating, but unlitigated setting, is presented by these bike

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[93] *See supra* note 63

[94] Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142, 1146 (2d Cir. 1987) is one of the best examples. It involves the copyrightability of a bike rack that was designed to mimic a sculpture! The court wrote:

> Turning now to the facts of this case, we note first that Brandir contends, and its chief owner David Levine testified, that the original design of the RIBBON Rack stemmed from wire sculptures that Levine had created, each formed from one continuous undulating piece of wire.

Nonetheless the court concluded that the bike rack was not copyrightable! Stunning. The classic case is about lamp bases. *See* Mazer v. Stein, 347 U.S. 201 (1954). The definition of sculptural works in the statute is largely taken from language in this opinion. For the most recent

rack/sculptures pictured here made by Francis Bitonti.[95] On the left is a "squiggle rack," as he calls these objects, placed on an art display base and on the right is another in use as a bike rack. Separating art from utility here is certainly difficult, perhaps impossible.

Figure 16 and 17: Squiggle Racks as Sculpture or Bike Rack

One, perhaps inane, way out of the definitional paper bag may depend on what the "artist" says the object is. In this setting, if Bitonti says the shape is a sculpture while on a display stand, maybe it is, especially if it is on display for sale in an art gallery. But if he says it's really a bike rack when in use, then maybe that's what it is in that environment. Would a bike rack copycat infringe the sculptural version of the original? Does the creator's state of mind create the necessary separation even when the object may not easily be separated into artistic and utilitarian parts? Does reliance on intention lead to crazy results?! But might Bitonti also be correct in his preferences?[96] If he is, does that suggest that the utility separability standard is irremediably incoherent? Shouldn't the squiggle racks, though sometimes used in a utilitarian way, always be considered sculptural?

pronouncement on separability *see* Star Athletica, LLC v. Varsity Brands, Inc., 580 U.S. 405 (2017).

[95] *Squiggle Rack*, Francis Bitonti, https://cargocollective.com/FADstudio/Squiggle-Rack (last visited Jan. 2, 2024).

[96] There is some precedent for such a result, though in a different copyright arena. *See* A. A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980). In this case the plaintiff alleged that his version of the Hindenburg Disaster claiming that the dirigible that was sabotaged was copied by other works about the events. The plaintiff lost. His claim that sabotage happened was taken as factual even though most recognized scholars on the subject concluded otherwise. A claim of truthfulness turned what might well be a great book of fiction into a work of factual history. *See also* Yiwei Jiang, Note, *Ninth Circuit Renames Copyright Estoppel the Asserted Truths Doctrine*, 1/9/2021 U.Chi. L. Rev. Online 1 (2021).

Figure 18: Le Corbusier's Villa Savoye: A "Machine for Living"

A somewhat different dilemma plays out with architecture. Le Corbusier, one of the most famous architects of the twentieth century, designed the iconic house—Villa Savoye—at Poissy France displayed here[97] and called it a "machine for living."[98] Though it is a French structure, think of it under American copyright standards. While sculptural in many ways, it probably does not qualify for protection because the useful attributes of the entire house may make the difficulties of separating the modern design of a building like this from utility intractable.[99] I guess you could in theory remove all of the parts of the house that make it possible to actually live in it and argue that the remaining shape and form is sculptural. But again, that result is difficult and torturous to reach.[100]

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[97] Wikipedia, the Free Encyclopedia, Villa Savoye, https://en.wikipedia.org/wiki/Villa_Savoye (last visited Jan. 6, 2024). Image by Valueyou, photograph of Villa Savoye, https://en.wikipedia.org/w/index.php?curid=19648390 (last visited Jan. 6, 2024). The architect is also controversial because of his links with Fascism during World War II. *See, e.g.*, Rachel Dinadio, *Le Corbusier's Architecture and His Politics Are Revisited*, N.Y. Times (July 12, 2015), https://www.nytimes.com/2015/07/13/arts/design/le-corbusiers-architecture-and-his-politics-are-revisited.html . Lucy Williamson, *Do Fascist Links Discredit Architect Le Corbusier?*, BBC News (May 5, 2015), https://www.bbc.com/news/world-europe-32546182

[98] Le Corbusier, Toward a New Architecture 93 (Frederick Etchells trans. 2014) (1927).

[99] I certainly am not suggesting that such tight linkage between form and function is mandated by all theories of architecture. Both before and after the time of Le Corbusier and Mies van der Rohe a number of styles have emerged that celebrate forms and designs which certainly function well but celebrate the form, shape and decorative qualities of buildings as essential. Decorative motifs were central to the emergence of the Chicago style that emerged in the late nineteenth century. Many contemporary buildings by the likes of Frank Gehry challenge our sensibilities about what a building should look like. A riveting and recently published biography of Philip Johnson explicates not only his deep Nazi sympathies during World War II, but also the ways many architects of more recent vintage have rejected the International Style he often represented in the middle of the last century. *See* Mark Lamster, The Man in the Glass House (2018).

[100] Another famous architect—Mies van der Rohe—developed his style at about the same time as Le Corbusier. But he did not frame his approach in the industrial vernacular of his contemporary. While he too searched for ways to design buildings eschewing traditional forms, he was more interested in the humanity and flow of interiors, the use of a variety of modern materials including

If it is thought of as architecture, does it fare any better? What does the copyright statute mean when it says that only the design and form, but not the standard features of a work, are protected?[101] The phrasing is different from the utility/expression dichotomy of sculpture but, I posit, easier to apply. For in the definition of architecture, nothing is said about standard features being separable from the work. Though they may not be considered as part of the design and form of the work in their own right they still may participate in the creation of form and design. An I-beam, for example, is just an I-beam. But the design and form need not be separable from the standard features of an I-beam. Indeed the standard features may contribute to the originality of the design and form by providing an aesthetically important part of an original part of a form or shape.

Figure 19 and 20: Mies van Dere Rohe's Lake Shore Apartments in Chicago

One of the most famous examples of this idea is visible at the Lake Shore Drive Apartments in Chicago, pictured just above, designed by Mies van der Rohe and constructed between 1949 and 1951.[102] They were an early example of International

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wood and stone, and the careful use of color. One of his most important houses, Vila Tugendhat in Brno Czechoslovakia, is just as historically important as Villa Savoye though less frequently written about. It is a beautiful, but more humanely designed home than Villa Savoye. For more about the Mies house, including a number of images, refer to VILLA TUGENDHAT, https://www.tugendhat.eu/en/ (last visited Feb. 27, 2025). It raises the same sort of copyright issues, however, as Villa Savoye.

[101] The definition of an architectural work in 17 U.S.C. § 101 provides:

> 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.

[102] The image on the left is © Jeremy Atherton, 860-880 Lake Shore Drive (photograph 2006) on Wikipedia at https://en.wikipedia.org/wiki/860–880_Lake_Shore_Drive_Apartments#/media/File:860-880_Lake_Shore_Drive.jpg (last visited Jan. 24, 2025). The picture on the right is by Herman Casakin, photograph of Lake Shore Drive Apartment Building at: https://www.researchgate.net/profile/Hernan-Casakin/publication/256503979/figure/fig6/AS:297998081904648@1448059687729/Lake-Shore-Drive-Apartments-Chicago-Illinois-1948-51-by-Mies-v

Style, rectangular, steel post and beam buildings constructed in the United States where metal structural aspects seemed to be visible but were not. These two apartment buildings actually are very subtly decorated by what might be called "standard features." As the picture above on the right shows, the surface aspects of the apartment buildings appear to be structures built of steel. But the supporting beams are hidden beneath coverings on the ground level floor and are hidden behind plaster columns inside the apartment interiors above. Most interesting for my purposes, standard I-beams are vertically attached to the frames surrounding the windows. They serve only decorative functions, creating imagery of support while enhancing shadows and variations in the appearance and shadowing on the buildings. They also draw one's eyes up, as features of many well-designed skyscrapers are wont to do. These standard features are not protected in their own right as I-beams under the copyright definition of a work of architecture, but they do enhance the overall design and form. They have to be if the protection of architecture in the statute means anything at all.

For purposes of moral right protection the squiggle rack is covered, at least when thought of as a sculpture and therefore as a work of fine art.[103] But the Villa Savoye house and the Mies apartments are not, even if both were American and built recently. Is it rational to treat the squiggle rack different from the Savoye House and the Lake Shore Apartments, either for copyright protection generally or for moral right protection specifically?[104] It is worth noting that many well-known architects also did a significant amount of work as sculptors, including le Corbusier, and Frank Gehry.[105] They rejected the idea that sculpture and architecture are very separate enterprises.

Gehry has not only crafted some of the most well-known sculpturally influenced buildings, but like many other famous architects, has also made a large number of sculptural works.[106] One of his best known buildings in the United States is the Walt Disney Concert Hall in Los Angeles, pictured just below.[107] Although it might seem possible to separate the exterior sculptural forms from the interior spaces in order to treat

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an-der-Rohe-View-of.png (last visited Jan. 25, 2025).

[103] This assumes that the number of each squiggle is made in an edition of 200 or less as required by the definition of a work of fine art in 17 U.S.C. § 101.

[104] The most trenchant objection, to be taken up in the text shortly, arises from treating architecture as protected by moral right. Since the statute prevents modification or destruction it takes on a role similar to historic preservation legislation. That may not actually matter very much since the reputational limitation for modification and the recognized stature requirement for destruction would place significant limitations on the application of moral right rules to architecture in ways that are quite similar to landmark preservation statutes.

[105] *See, e.g.*, Jinal Bhatt, *Architects who are sculptors - Famous Architects*, RETHINKING THE FUTURE, https://www.re-thinkingthefuture.com/know-your-architects/a2135-architects-who-are-sculptors-famous-architects/#google_vignette (last visited Jan. 25, 2025).

[106] For images of some of his work, *see Frank Gehry*, GAGOSIAN GALLERY: ARTISTS, https://gagosian.com/artists/frank-gehry/ (last visited Mar. 10, 2025).

[107] A few of his best works, including the concert hall, are pictured *in* Will Hearst, *Portrait of the Architect: Frank Gehry*, ALTA (Nov. 2, 2017), https://www.altaonline.com/dispatches/a2509/portrait-architect-frank-gehry/ (last visited Mar. 10,2025). The image in the text is from Lizzie Crook, *Frank Gehry's Walt Disney Concert Hall is "a living room" for Los Angeles*, DE ZEEN (May 27, 2022), https://www.dezeen.com/2022/05/27/frank-gehry-walt-disney-concert-hall-deconstructivism/ (last visited Mar. 10, 2025).

it as a sculptural work, it is actually quite difficult since the interior also has many sculptural features. But at a deeper level, his work is a perfect example of why sculpture and architecture should not be treated as separate creative enterprises.

Figure 21: Photo © Tuxyso.
Courtesy of the Los Angeles Philharmonic Association

Spanish architects, notably Santiago Calatrava and Antoni Gaudi, have been particularly important exemplars of the overlap between sculpture and architecture. One of Calatrava's recent projects—the World Trade Center Transportation Hub in downtown Manhattan—vividly displays the overlap between the two forms of art.[108]

Figure 22: Calatrava's World Trade Center Transit Hub in New York City

[108] *World Trade Center Transportation Hub*, SANTIAGO CALATRAVA ARCHITECTS AND ENGINEERS,https://calatrava.com/projects/world-trade-center-transportation-hub-new-york.html?view_mode=gallery (last visited Feb. 4, 2025).

Gaudi is particularly relevant to the issues in this essay. His buildings and public projects are notorious for their sculptural appearance and contents. Among the most important are Casa Pedrera,[109] Basilica de la Sagrada Familia,[110] and the Parc Güell.[111] The first two demonstrate significant ways in which structures may beautifully embody sculptural instincts emphasizing the ways sculpture and architecture often overlap in sophisticated ways. But as the images below confirm, Gaudi's Parc Güell takes the next step—demonstrating the remarkable ways sculpture, architecture, and landscape architecture may be integrated. Everywhere you wander in the park, you see sculptures, mosaics, artistically shaped portals, beautiful retaining walls, and buildings exuding sculptural forms.[112] As an aside, Gaudi's work belies the notion that aesthetic work need be serious and lacking in good humor. Kids, at least during my visit years ago, often love the place. It has some of the sensibilities of an amusement park.

Figure 23: Gaudi's Parc Guell in Barcelona

[109] La Pedrera, https://www.lapedrera.com/en (last visited Jan. 25, 2025). This and the following two sites have visual tour links.

[110] Sagrada Familia, https://sagradafamilia.org/en/ (last visited Jan. 25, 2025). This work is festooned with both sculptural works and sculptural features in the shape and design of the church.

[111] *Barcelona.cat*, Park Guell, https://parkGüell.barcelona/en?q=en (last visited Jan. 25, 2025).

[112] The two images in the text are from History of Parc Güell, Origins of Parc Güell, https://www.barcelona-ticarkkets.com/park-Güell/history/; The Complete Guide To Park Güell In Barcelona (photograph),THROUGHETERNITY.COM (last visited Feb. 3, 2025) , https://www.throughetternity.com/en/blog/things-to-do/barcelona-park-Güell-gaudi-guide.html Wandering around online for other images will demonstrate the astounding breadth of Gaudi's work in integrating sculpture, architecture, and landscape design, along with a healthy dose of humor or playfulness.

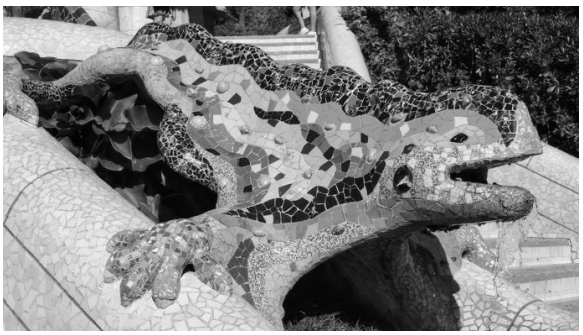

Figure 24: Figure 234 Gaudi's Parc Guell in Barcelona

The sensible way forward is to revise the definitions of various copyrightable works to make them more compatible, to add a provision for protecting landscape architecture, and to provide that works may simultaneously be eligible for protection under more than one category at a time. For purposes of this essay, the most significant required changes would treat sculpture, architecture, and landscape architecture in similar ways by utilizing definitional language quite comparable to that now used for architecture. Adding architecture and landscape architecture to the moral rights provisions follows naturally in order to treat comparable kinds of work similarly. In addition, allowing works to gain protection in multiple ways as simultaneously meeting the requirements of various types of copyrightable works would reduce ambiguity and make it much easier for creative artists to insure copyright and moral right protection for their works. The major objections, treated last in this essay, may be the risks of applying the long term of copyright protection and the historic preservation protection aspects of moral right law to all of these aesthetic disciplines. Fear of monopolies and of stagnation of urban development need to be considered.

As already noted, there is one more glaring contradiction in the treatment of sculpture and architecture. The inconsistent way the right of public display of pictorial, graphic and sculptural works on the one hand and architecture on the other needs to be repaired.[113] Copyright owners in architecture have no control over the display of works located in a public place,[114] while owners of rights in pictorial and sculptural works do.[115]

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[113] *See supra* note 47, *see also supra* note 75 and accompanying text.

[114] For architecture:

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.

[115] For pictorial, graphic and cultural works:

17 U.S. Code § 106 - Exclusive rights in copyrighted works

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:

* * * *

While it makes perfect sense to allow images of architectural works to be made by passersby, tourists, or other incidental persons for non-commercial purposes, allowing use in motion pictures or other significant profit seeking endeavors allows inappropriate exploitation of architecture. And when a sculptural work tightly related to a building becomes part of a movie set, the code has been construed to allow its use without compensation. This irrationality also needs repair.[116]

B. Proposed Statutory Revisions

Section 102 and several definitions in Section 101 are the ones most in need of revision. The sections dealing with rights of public display and moral right in architecture and landscape design also need alterations. Below are proposed rewordings of these sections to reflect the aesthetic drive to largely merge the treatment of sculpture, architecture, and landscape design. Proposed additions are in underlined, bolded, italics. Eliminated material is marked by double strikethroughs.

> 17 U.S. Code § 101 – Definitions
>
> An "architectural work" is the original design of a building structure as embodied in any tangible medium of expression, including a structure 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 unless they serve visible aesthetic rather than or in addition to engineering or mechanical purposes in the arrangement and composition of spaces and elements in the design.
>
> "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 a work must evidence original artistic features including but not limited to their overall form or appearance as well as the arrangement and composition of spaces and elements in the design, but does not include any standard mechanical or utilitarian features; 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 are either not necessary for utilitarian aspects of the article to successfully function or consist of features important to the artistic design of the useful article. 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.
>
> A "work of landscape architecture" is an original, planned environment that consists of aesthetically designed features located primarily in the open air that consists of alterations in the contours of land, selective use and placement of various plants, the siting of sculptural works, or other aesthetically planned objects in or alterations to the

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> (5) in the case of * * * pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly

[116] Detailed analysis of these issues is found in the sources cited *supra* note 112.

open air environment. A pre-existing or new pictorial, graphic or sculptural work or a work of architecture may, but need not be, present in the open air environment and be considered a part of a work of landscape architecture if it is an integral part of the aesthetic features of the landscape architectural plan. The work of landscape architecture 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 unless they serve visible aesthetic rather than or in addition to engineering or mechanical purposes in the arrangement and composition of spaces and elements in the design.

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author; or

(3) a work of architecture or of landscape architecture.[117]

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire;[118] or

(C) any work not subject to copyright protection under this title.

Comments: These proposals change the definitions of pictorial, graphic or sculptural works, and of architectural works, as well as add a new category called "works of landscape architecture" to the list of categories in Section 102. The changes modify the definition of sculptural works with useful attributes to use a standard quite similar to that now in use for works of architecture. In addition it alters the definition of works of architecture by replacing the word "building" with "structure" and by ensuring that standard features contributing to the overall form, shape and design of the structure are not eliminated from all consideration simply because they may be used in a different work of architecture for standard structural or practical purposes.

As noted in this essay, the present definition of sculptural works requires that all utilitarian purposes be separable from the artistic features of the object. That dichotomy is difficult to apply and contrary to the aesthetic designs of a multitude of useful products.

[117] This change also required an amendment to 17 U.S.C. § 120(b).

[118] Though I think this exclusion of works for hire is irrational, I consider that issue to be beyond the scope of this essay. In general, however, if a work is culturally worthy of being protected from unapproved modifications, alterations, or destruction the characteristic of its author is unimportant. The cultural value of protecting an important work exists independently of the party or parties who conceived of and created it.

The architecture standard used as here a model for altering the pictorial, graphic and sculptural work definition does not require such a difficult to follow requirement by simply asking that standard features, when not used for aesthetic purposes, be excluded consideration of the copyrightability issue. The baseline example used in the essay to demonstrate the comparative simplicity of using this standard is the Lake Shore Drive Apartments in Chicago. The use of standard I-beams cannot be excluded from the design because they serve critical aesthetic goals in the way Mies designed the structures. A similar standard is proposed for the definition of works of landscape architecture for similar reasons.

The definition of a work of visual art has been enlarged to include architectural and landscape architectural works. Some may fear that such an addition will hobble future construction of structures and landscape projects by imposing unnecessary costs on efforts to remodel or replace projects with better and more up to date designs. That concern may be justified in some circumstances. The issue is treated in detail in the next section.

> 17 U.S. Code §102 - Subject matter of copyright: In general
> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works,
> (9) landscape architectural works.
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.
> (c) Any work, including a compilation, may be simultaneously copyrightable in whole or in part in more than one category listed in §102(a) and gain the rights attributable to each category for which it qualifies.

Comments: Two major changes are proposed for Section 102. The first is the addition of works of landscape architecture to the list of protected categories ins subsection (a). The reason for that proposal arises naturally from the central focus of the essay on the work of Mary Miss. The second amends subsection (b) by ensuring that a work may obtain protection simultaneously in more than one of the categories listed in subsection (a). While this issue has never been decided definitively by the courts, there are decisions described in the text,[119] that limit works to one category. Such a limit is artificial and harmful to the often expressed desire to craft the copyright statute in ways that encourage

[119] *See supra* note 47 at 75.

the creation of original aesthetic works. Authors working in multiple disciplines may be frustrated if the code limits their creativity in ways they find artificial.

> 17 U.S. Code § 113 - Scope of exclusive rights in pictorial, graphic, and sculptural works
> (d) (1) In a case in which—
> (A) a work of visual art other than a work of architecture or a work of landscape architecture has been incorporated in or made part of a building work of architecture or a work of landscape architecture in such a way that removing the work from the building work of architecture or the work of landscape architecture 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 a work of visual art other than a work of architecture or a work of landscape architecture the work in the building as part of a work of architecture or a work of landscape architecture 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 work of architecture or the work of landscape architecture 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 work of architecture or a work of landscape architecture wishes to remove a work of visual art which is a part of such building a work of architecture or a work of landscape architecture and which can be removed from the building work of architecture or the work of landscape architecture 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.
> (3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building work of architecture or a work of landscape architecture, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

Comments: Much of the commentary in this essay contends that the difference in moral treatment between pictorial, graphic and sculptural works on the one hand and architectural and landscape architectural works on the other is inappropriate. The proposed changes to Sections 106A and 113(d) respond to that concern. They are very straight forward—simply adding the newly protected sorts of works to the moral right provisions and making their inclusion consistent with other parts of the moral right provisions.

> 17 U.S.C. §120 - Scope of exclusive rights in architectural and landscape architectural works:
> (a) Pictorial Representations Permitted.—The copyright in an architectural work or a work of landscape architecture 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 structure or landscape in which the work is embodied is located in or ordinarily visible from a public place, provided that another work with significant use of pictorial, graphic, sculptural or audio visual images of a work of architecture or a work of landscape architecture made for commercial purposes may be made only with the permission of the copyright owner in the work of architecture or of landscape architecture.
> (b) Alterations to and Destruction of Buildings Structures and Landscapes.—Notwithstanding the provisions of section 106(2), the owners of a building structure embodying an architectural work or of a work of landscape architecture may, without the consent of the author or copyright owner of the architectural work or the work of landscape architecture, make or authorize the making of alterations to such building a work, and destroy or authorize the destruction of such building a work, provided that the alterations or destruction of the work do not violate the provisions of sections 106A or 113(d) regarding works of visual art.

Comments: One frustrating feature of the present statute is its dramatically different approaches to the public display rights for pictorial, graphic and sculptural works as opposed to works of architecture. The former are protected; the latter are not. As noted in the text, there are occasions when that is inappropriate—especially when commercial enterprises such as film makers use architectural works as settings for film scenes. The proposed changes in Section 120 attempt to rectify that unfairness. In addition, it treats works of landscape architecture in a similar way. By and large should treat pictorial, graphic, sculptural, architectural, and landscape architectural works quite similarly to standard fair use understandings. Personal or non-commercial public displays of all of these works in homes, restaurants, or other decorative uses are highly unlikely to be deemed infringing.

C. Objections to the Proposed Amendments

There are a number of critiques that might surface to the proposals made here. But I will confine myself to three that I think are the most likely—the way definitions of pictorial, graphic or sculptural works may conflict with the long-term desire of many to avoid use of copyright protection for industrial designs, the monopoly concerns raised by lengthy copyright protection for useful works, and the potential for conflict with various historic preservation regimes created by applying moral right law to architecture and landscape architecture.

1. Design Patents, Industrial Designs, Copyright and Market Dominance

When the Copyright Act was under consideration in the 1970s, there was a major debate over the wisdom of including a separate title to protect industrial designs. The Senate version of the bill contained a Title II for Protection of Ornamental Designs of

Useful Articles.[120] The proposal to protect industrial designs also limited the term of protection to an initial term of five years with the ability to renew for another five years.[121] The obvious concern, though it was not articulated in the Senate Report, was to limit the possibility of long term protections, if not monopolies, for useful products. It was removed when the bill was considered by the House. Instead of adopting a specific provision for designs of useful articles, the definition of pictorial, graphic, and sculptural works was modified to its present form by inserting the language dealing with separability of utility and design. It was composed in this way to minimize the likelihood

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[120] *See* S. REP. NO. 94-473, at 39 (1975). The proposal contained the following provisions of note here:

> SEC. 201. Designs Protected:
> (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.
> SEC. 202. Designs Not Subject To Protection:
> 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.

[121] The proposal read as follows:

> SEC. 205. Term of Protection:
> (a) Subject to the provisions of this title, the protection herein provided for a design shall continue for a term of five years from the date of the commencement of protection as provided in section 204, but if a proper application for renewal is received by the Administrator during the year prior to the expiration of the five-year term, the protection herein provided shall be extended for an additional period of five years from the date of expiration of the first five years.
> (b) Upon expiration or termination of protection in a particular design as provided in this title all rights under this title in said design shall terminate, regardless of the number of different articles in which the design may have been utilized during the term of its protection.

Id. at 40.

of monopolies arising by segregating most useful products outside of the copyright regime.

I am suggesting in essence that a substantially revised version of the Senate provisions be restored inserted in the copyright system. The desire of the House to limit overlap has not met with much success. Many marketers of useful products now seek multiple forms of protection under trademark, design patent, and copyright law.[122] The effort to distinguish copyrightable objects from works of utility has not been very successful. The Copyright statute defines a useful article as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[123] It is from such an object that copyrightable characteristics must be separable. It is easy to see why such separability is often easy to find, especially since conceptual rather than physical severance carries great weight in the caselaw.[124]

The large scale overlap does not ameliorate the concern some may have over providing copyright shelter to useful designs for the extraordinarily long term provided by copyright law—often as long or longer than a century.[125] A design patent lasts for only fifteen years.[126] The debate may be resolved in at least two different ways. We could insert a provision in the copyright statute limiting protection of designs of useful objects to a much shorter term of protection than now provided, or we could ignore the issue. I prefer the second solution for two primary reasons. First drafting a provision carving out designs of useful items from other copyrightable works is extremely difficult and potentially futile. The most logical way to try would be to grant shorter terms to works that are "primarily" utilitarian or that contain only a small proportion of non-utilitarian features. Decision-making in such an environment would be extremely difficult. Doing so would lead us back into the same quagmire we now cope with in the separability regime.

Second, for virtually all designs of useful works, it is easy to avoid copyright infringement of a protected work. Recall the revised definition of a pictorial, graphic, or sculptural work proposed here. That proposal provides that

> a pictorial, graphic, or sculptural work [is protected] only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that are either not necessary for utilitarian aspects of the article to successfully function or are deemed to be features important to the artistic design of the useful article.

It should not be difficult to design a useful product with similar functionality but with different artistic characteristics. Indeed, because of the presence of design patent protection, many useful product makers will take steps to avoid copying anyway. Bitonti's squiggle racks discussed earlier are a perfect example. There are an infinite number of ways to make bicycle racks with sculptural features that do not infringe his

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[122] A thorough review of the overlapping operations of trademark, design patent, and copyright law is available in Jeanne C. Fromer & Mark P. Mckenna, *Claiming Design*, 167 U. Pa. L. Rev. 123 (2018).

[123] 17 U.S.C. § 101.

[124] *See* Star Athletica, L.L.C., v. Varsity Brands, Inc., 580 U.S. 405 (2017).

[125] 17 U.S.C. § 301 creates a term of life plus 70 years to individual authors and 120 years for works for hire made by enterprises.

[126] 35 U.S.C. § 173.

work. The "idea" of storing bikes in sculptures is not protectable. Only the shape is. If this is correct, then fears of monopoly are overstated.[127]

2. Historic Preservation and Moral Right

Moral right law provisions limiting or barring alterations or destruction of pictorial, graphic, sculptural, architectural, and landscape architectural works are based on at least two theories. One finds inherent value in preserving worthy aesthetic works of the mind. It is part of human sensibility to value things of beauty, cultural meaning, and educational value. The other views those who produce such things with special gratitude and thanks. The former operates to protect our cultural inheritance. The second functions as a reward system for those who bring such items into the public eye. The same goals lie behind adoption of historic preservation laws. The notion that moral right and historic preservation laws somehow serve conflicting goals is misplaced. It only demonstrates that there is more than one way to protect valuable cultural artifacts.

There is one aspect of present American moral right and preservation law that operates quite differently. Moral right protection begins with the creation of a copyrightable work but lasts only for the life of the author. It also is limited by limiting constraints on modification to settings where the change "would be prejudicial to * * *[the author's] honor or reputation" and on destruction to settings where the work is "of recognized stature."[128] Historical preservation law generally does not take effect until some period of time has elapsed between construction and administrative historic designation of a building to ensure that it is worthy of long term imposition of limits on modification or destruction. Though framed differently, the two sets of provisions operate in similar ways by barring modification or destruction in relatively minor cases. The main difference is timing. Moral right begins and ends sooner than historic preservation. But concerns of property owners and developers about limitations on the operation of their assets are present in similar ways in the two schemes. If anything, the shorter term of moral right protections limits possible concerns about its impact on property rights.

CONCLUSION

The major concern voiced here is the incoherent way copyright law treats similarly situated creative works—especially sculpture, architecture, and landscape architecture. While you may not agree with the specific solutions suggested, it is difficult to deny that the existing statute needs revision. This is not a problem unique to the specific areas discussed here. There are many other challenging problems that have arisen, particularly since the arrival of the internet, and now, the appearance of AI systems. Either the Copyright Office or a Congressional committee needs to seriously consider creating a revision commission to undertake a thorough review of the present statute. Taking such a

[127] In addition, a product with a particularly popular design may well draw a higher price. That may be a self-correcting phenomenon if others produce a product with similar functionality but a somewhat less pleasing design. Apple computers may be the best example of this syndrome. Others may be barred from copying its appearance but they are generally not prevented from making devices with quite similar functionality.

[128] 17 U.S.C. § 106(A)(a)(3).

step is not at all out of line with the timing of the last major rewrite of the copyright statute. The present code was passed in 1976, sixty seven years after the last major revision was adopted in 1909. And consideration of that revision began years earlier in the middle of the twentieth century. Time to get to work.