

UCLA

UCLA Public Law & Legal Theory Series

Title

Narrativizing the Architectural Copyright Act: Another View of the Cathedral

Permalink

<https://escholarship.org/uc/item/65523335>

Journal

Texas Intellectual Property Law Journal, 21(1)

Author

Tang, Xiyin

Publication Date

2013

Narrativizing the Architectural Copyright Act: Another View of the Cathedral

Xiyin Tang*

I. Introduction.....	34
II. At War with Itself: Is the Architectural Copyright Act Against or for Conceptual Separability?.....	37
A. Architecture and the New “Functionally Determined” Standard.....	37
B. Comparing the “Useful Articles” Doctrine	40
III. Current Case Law: Abstraction/Filtration vs. Total Concept and Feel	42
A. One Side of the Divide: <i>Trek</i> ’s “Abstraction-Filtration-Comparison” Standard and the “Supersubstantial Similarity” Test	42
B. <i>Shine v. Childs</i> : A Promising Future	45
IV. Alternative Narratives: Vernard Tschumi, Peter Eisenman, and the “Dutch School” (or, Functionality Rebuked)	47
A. Bernard Tschumi: Useless Architecture.....	47
B. Likewise, Peter Eisenman: Alienation Game	48
C. The “Dutch School”: Inevitability as Aesthetic Mantr	50
V. Total Concept and Feel, Reworked	53
A. The Case for Broader Protection: Demoralization Costs and Expressive Content.....	53
B. Likewise, Peter Eisenman: Alienation Game	55
V. Conclusion.....	57

* Yale Law School, J.D. 2012; Columbia University, B.A. 2009. Thank you to Barton Beebe, for his helpful commentary, to Ariane Lourie Harrison, for a wonderful class on architectural theory, to the editors of the *Texas Intellectual Property Law Journal*, for their amazing editorial assistance, and to Paul Laskow, who continues to surprise me each day with his insight and infinite patience. This Article benefited greatly from comments received at the Yale Law Teaching Series Workshop. An earlier version of this Article won the Yale Law School Nathan Burkman Memorial Prize for Best Paper(s) on Copyright Law. For details, see <http://www.law.yale.edu/intellectuallife/xtang.htm>.

I. Introduction

*"We tell ourselves stories in order to live."*¹

Joan Didion wrote the above in 1979, the first of many lucid lines about the need for narrative as part of the human condition. And of course, why wouldn't we? Narrative is what makes order possible, and without some form of order, life would be chaos, and hence, to many, unimaginable, undesirable, impossible. Didion was a writer, but writers, like lawyers, rely on narrative to order their universe, to inject sense and stability into an otherwise unstable world. Surprisingly, both narrative and law have much to do with a third form of ordering: architecture. The architect Peter Eisenman wrote that we "assume the metaphysics of architecture . . . to have the status of natural law."² And, in that sense, perhaps architecture, more so than law and literature, reassures us that the world is *not* blighted with relativity or arbitrariness, but instead the *real*, for:

[I]t is the nature of architecture, unlike any other discipline, to establish center, to manifest presence, to be the agent of reality Architecture, because it is bricks and mortar, holds out the promise of reality, authenticity and genuine truth in a surreal world where truth is a managed item developed by committees, produced by writers, and sold by media spokesmen.³

Given architecture's claim on our collective need for stability, shelter, and aesthetic pleasure, perhaps it is both apt and surprising that architecture was not given official status in the United States as a valid, copyrightable art form until just under 20 years ago. Even then, it acquired this status as a necessary prerequisite to our country's ratifying the Berne Treaty, the world's most important copyright convention.⁴ In contrast, Europe had recognized copyrights in architecture for quite some time.⁵ Nevertheless, in 1990, the 101st Congress passed the Architectural Works Copyright Protection Act (hereinafter "the Act"),⁶ for which the subcommittee held a legislative hearing with witness testimony.⁷ These witnesses were: the Register of Copyrights' Ralph Oman, an Administration witness (Jeffrey M. Samuels), the American Institute of Architects' David Daileida, the Managing Trustee and Chief Executive Officer of The Frank Lloyd Wright Foundation

¹ JOAN DIDION, *THE WHITE ALBUM* 11 (1979).

² Peter Eisenman, *Architecture and the Problem of the Rhetorical Figure*, in *THEORIZING A NEW AGENDA FOR ARCHITECTURE: AN ANTHOLOGY OF ARCHITECTURAL THEORY 1965–1995*, at 174, 176 (Kate Nesbitt ed., 1996).

³ *Id.*

⁴ H.R. REP. NO. 101-735, at 10–11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6941–42.

⁵ For signatories of the Berne Convention (all of whom recognize architectural copyright), see, for example, *ARCHITECT'S LEGAL HANDBOOK: THE LAW FOR ARCHITECTS* 371 (Anthony Speaight ed., 9th ed. 2010).

⁶ Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 701–06, 104 Stat. 5133 (codified in scattered sections of 17 U.S.C.).

⁷ H.R. REP. NO. 101-735, at 6, 1990 U.S.C.C.A.N. at 6937.

(Richard Carney), and an American Institute of Architects fellow (Michael Graves).⁸ Of all the witnesses, only one—Graves—was a practicing architect.

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

Since the passage of the Act twenty years ago, there have been as many law review articles as there have been cases addressing the Act, all of which seem split on which standard to apply in determining copyrightability.⁹ The divide is best summed up as those who would prefer the standard to be the same as that for "useful articles" (i.e., filtering out all components that have some "utilitarian" aspect) versus those who want a "total concept and feel" test (i.e., that uncopyrightable elements can come together to form a copyrightable whole). The former camp views the copyrighting of architecture as going strictly *against* the Constitutional prerogative of encouraging progress in the field and thus would prefer to have the scope of protection as limited as possible, akin to that of computer software,¹⁰ while the latter camp ignores the useful article and progress issue all together.¹¹

⁸ *Id.*

⁹ See Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering out "Total Concept and Feel,"* 101 NW. U. L. REV. 1851, 1865 (2007) (citing lack of "consistent approach to infringement analysis" in current case law).

¹⁰ See, e.g., *Dream Custom Homes, Inc. v. Modern Day Constr., Inc.*, 773 F. Supp. 2d 1288, 1308, (M.D. Fla. 2011) (setting out a strict substantial similarity test for architecture copyright infringement); *Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC*, 716 F. Supp. 2d 428, 444 (E.D. Va. 2010) (holding that where an idea can only be expressed in very limited ways, it has "merged" with expression; in such cases, expression is excluded from copyright protection); *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 17 (2005) (ruling that where a plaintiff's copyright in architectural work was only "thin," the work was only protected in the case of nearly verbatim copying or a showing of "supersubstantial similarity"); Todd Hixon, Note, *The Architectural Works Copyright Protection Act of 1990: At Odds with the Traditional Limitations of American Copyright Law*, 37 ARIZ. L. REV. 629, 658 (1995) (stating that the potential for creating an architectural monopoly undermines the essence of copyright law of protecting personal expressions rather than useful qualities); Su, *supra* note 9, at 1878–83 (discussing the limited scope of protection).

¹¹ See, e.g., *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 110 (1st Cir. 2006) (stating that while individual standard features are not copyrightable, the combination of such standard features may be copyrightable); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (stating that the substantial similarity determination requires comparison not only of the two works' individual elements in isolation, but also their "overall look and feel"); *Shine v. Childs*, 382 F. Supp. 2d 602, 612–15 (S.D.N.Y. 2005) (holding that an architect's original scale models of skyscrapers were copyrightable under the AWCPA, regardless of whether a building could actually be constructed from the models); Vanessa N. Scaglione, Note, *Building upon the*

This Article argues that the latter stance misreads the legislative history of the Act, and that the former stance is simply wrong. First, this Article examines how the House Report unfairly endorses Graves's mode of storytelling about architecture, inadvertently resulting in a preference for his strain of postmodern building,¹² codified via the Act, to the detriment of all other architectural styles that avoid such populist, decorative symbolism. Consequently, those who have internalized such arguments cling to the idea that any architectural element that is shaped in some way by efficiency or economic concerns is patently uncopyrightable because it lacks choice.¹³ However, such deterministic views are overly simplistic and patently wrong—a dodged adherence to just *one* view of the so-called “cathedral.”

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

Above all, this Article argues that to deride architectural protection as merely a necessary evil—a by-product of the Berne Convention—that is at odds with the traditional limitations against copyrightability of useful articles is to restrict the very definition of architecture *itself*. That is, the argument (which Congress equivocally adopts) necessarily rests on a specific notion of what architecture is and promotes a definition that relies wholly on just *one* narrative of architectural design and meaning-making. By widening our understanding of architecture beyond that of the legislative history, this Article also hopes to reconcile the current split in the courts (as well as within the scholarly literature) between progress and protection

Architectural Works Protection Copyright Act of 1990, 61 *FORDHAM L. REV.* 193, 205–13 (1992) (positing that the functionality test is inappropriate, as it does not accomplish the Act's goal of avoiding problems previously encountered by using the separability test).

¹² This style of architecture is best exemplified in the works of Robert Venturi and Denise Scott Brown (who wrote the definitive book about how architects can learn much from the billboards and strip malls of Las Vegas, *see infra* note 34 and accompanying text), as well as from the neoclassical style of Robert A. M. Stern (the current dean of the Yale School of Architecture).

¹³ *See Hixon, supra* note 10, at 658 (arguing that the “potential for creating an architectural monopoly for intrinsically utilitarian articles undermines the very essence of copyright law of protecting the personal expressions . . . of the author”); Su, *supra* note 9, at 1881–83 (urging that “the ideal scope of protection for architectural works is narrow” and should be determined using a “variant of the ‘abstraction-filtration-comparison’ test,” which has as a premise “that ‘functionally required’ design elements are unprotectible”).

by showing that the two, like Graves's man vs. machine dichotomy, are not mutually exclusive.

II. At War with Itself: Is the Architectural Copyright Act Against or for Conceptual Separability

A. Architecture and the New "Functionally Determined" Standard

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

Embodied in Article I, Section 8, Clause 8 of the U.S. Constitution, the Copyright Clause grants Congress the power to protect the "writings" of authors in order to "promote the progress of Science."¹⁴ Thus, it was important for the passage of the Act that architectural works themselves (and not just the drawings, which were already protected) qualify as "writings."

The idea of architecture as text has been written and theorized about extensively in the architectural field. However, Congress visibly struggled to fit architecture into such a definition¹⁵—if it were not for the U.S. interest in joining the Berne Convention (in order to protect against foreign piracy¹⁶), Congress might not have even tried. In order to do so, Congress needed a champion. Enter notorious postmodern architect Michael Graves (I mention that he was postmodern because Graves's distaste for the Modernist idealization of the machine [think Le Corbusier's 'machines for living'¹⁷] becomes part of the narrative he sells, and the one that Congress inadvertently codifies). Congress draws particularly and extensively on Graves's 1982 essay, *A Case for Figurative Architecture*.¹⁸ It is easy to see why. For one, Graves began his essay with a direct analogy between architecture and literature (this is in service of a broader point, which I will get to). He writes, "Literature is the cultural form which most obviously takes advantage of standard and poetic usages, and so may stand as a model for architectural dialogue."¹⁹ His use of the "poetic" is perfect, as it turns out, for Congress itself

¹⁴ U.S. CONST. art. I, § 8, cl. 8.

¹⁵ H.R. REP. NO. 101-735, at 12 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6942.

¹⁶ See EDMUND W. KITCH & HARVEY S. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 571 (4th ed. 1991) (maintaining that U.S. copyright law includes elements that intend to keep it in conformity with the requirements of the Berne Convention).

¹⁷ See GEORGE H. MARCUS, LE CORBUSIER: INSIDE THE MACHINE FOR LIVING 8 (2001) (illustrating Le Corbusier's rational approach to architecture that is based on strict conceptions of utility and typology).

¹⁸ H.R. REP. NO. 101-735, at 18–19.

¹⁹ Michael Graves, *A Case for Figurative Architecture*, in BUILDINGS AND PROJECTS 1966–1981, at 11, 11 (Karen Vogel Wheeler et. al. eds., 1982).

goes on to state that “[a]rchitecture is not unlike poetry, a point made by renowned critic Ada Louise Huxtable, who wrote that architects can make ‘poetry out of visual devices, as a writer uses literary or aural devices. As words become symbols, so do objects; the architectural world is an endless source of symbols with unique ramifications in time and space.’”²⁰ This was enough to convince the Congressional committee that an architectural work qualifies as a “writing” under the Constitution.²¹

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

Architecture plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a work of art. It is an art form that performs a very public, social purpose. As Winston Churchill is reputed to have once remarked: ‘We shape our buildings and our buildings shape us.’ We rarely appreciate works of architecture alone, but instead typically view them in conjunction with other structures and the environment at large, where, at their best, they serve to express the goals and aspirations of the entire community.²²

Congress’s emphasis on the social and the community-oriented role of architecture may serve the purpose of convincing the public that architecture is valuable enough to society to achieve copyright protection, but in doing so, it vaunts about a specific *kind* of architecture—the kind that operates with man at its center—as the most desirable, most valued form of architecture.

As it turns out, Graves is the perfect frontman for this call to architecture’s social goal. In *A Case for Figurative Architecture*, Graves distinguishes between what he terms “standard” usage and “poetic usage,” or the internal and external manifestations of architectural culture.²³ Modernism, on the other hand, according to Graves, did not preoccupy itself with “this debate about standard and poetic language,”²⁴ choosing instead to base itself largely on other terms:

[T]echnical expression—internal language—and the metaphor of the machine dominated its building form. In its rejection of the human or anthropomorphic representation of previous architecture, the Modern Movement undermined the poetic form in favor of nonfigural, abstract geometries. These abstract geometries might in part have been derived from the simple internal forms of machines themselves.²⁵

Graves rejected the Modernist ideal. Instead, Graves favored anthropomorphic work because he claims that “[u]nderstanding the building

²⁰ H.R. REP. NO. 101-735, at 12–13.

²¹ *Id.*

²² *Id.* at 12.

²³ Graves, *supra* note 19, at 11.

²⁴ *Id.*

²⁵ *Id.*

involves both association with natural phenomena (for example, the ground is like the floor), and anthropomorphic allusions (for example, a column is like a man).²⁶ Unsurprisingly, Graves's preferred architecture sees *man* both as the *center* of this space and as the architectural referent (he sees the "tripartite division of [a] wall into base, body, and head," while not "literally imitat[ing] man," as "nevertheless stabiliz[ing] the wall relative to the room, an effect we take for granted in our bodily presence there").²⁷

In turn, Congress internalized and then codified this dichotomy quite well. "The intent of the legislation is to protect only what Mr. Graves calls 'poetic language,'" the Report says, embodied in architecture that is "responsive to issues external to the building, and incorporates the three-dimensional expression of the myths and rituals of society."²⁸ Thus, "internal language"—what the House quotes Graves as calling the "basic form—determined by pragmatic, constructional, and technical requirements," is patently uncopyrightable.²⁹ This point is further backed up by the House's quoting of Huxtable, who says:

[T]echnology is not art, and form only follows function as a starting point, or life and art would be much simpler than they are. The key to the art of architecture is the conviction and sensitivity with which technology and function are interpreted aesthetically, in solutions of a practical social purpose.³⁰

What Congress has done here, in effect, is to bring back the headache-inducing "separability test," albeit in a new format: unlike for pictorial/graphic/sculptural works, in which the work is subjected to a test of whether or not the "design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences,"³¹ architectural copyright rests on whether a design element is *functionally determined* (presumably, the copyrightable aspect, i.e., "poetic" language, must in some way implicate the social, as well).³²

²⁶ *Id.* at 12.

²⁷ *Id.*

²⁸ H.R. REP. NO. 101-735, at 19 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6950 (internal quotation marks omitted).

²⁹ *Id.* (internal quotation marks omitted).

³⁰ *Id.* (emphasis added) (quoting ADA LOUISE HUXTABLE, *ARCHITECTURE, ANYONE? CAUTIONARY TALES OF THE BUILDING ART* (1986)).

³¹ *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (denying copyright protection to the "RIBBON" bike rack because of inability to separate aesthetic and functional concerns); *see also* *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 419 (2d Cir. 1985) (interpreting the separability test as asking whether the aesthetic features are mandated by the utilitarian functions of the article).

³² H.R. REP. NO. 101-735, at 20–21. Aside from this restriction, perhaps architects and judges alike will take heart in knowing that, like the rest of copyright law, architectural copyright has a rather low bar when it comes to originality (which, as Justice O'Connor wrote in the seminal copyright case *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), is the *sine qua non* of copyright law)—it does not require a showing of "novelty, ingenuity, or [a]esthetic merit." H.R.

This is ironic because Congress then goes on to acknowledge that “[t]here is considerable scholarly and judicial disagreement over how to apply the separability test, and the principal reason for not treating architectural works as pictorial, graphic, or sculptural works is to avoid entangling architectural works in this disagreement.”³³ Yet requiring courts to determine whether an architectural element is “functionally required” opens the gates to just such a separation between functionality and form, which more often than not could be impossible to apply in architecture—and has been, expanded drastically to encompass all elements determined by external factors. Interestingly enough, of all the various architectural styles, Graves’s specific strain of postmodern building is *most* hospitable to such a test. The architects Denise Scott Brown and Robert Venturi, in defining and launching the “postmodern” architectural style, focused on decorative appendages—exterior signage, fancy facades, columns, and the like—as ambassadors of the style.³⁴ Such design elements present little challenge to the “functionally determined” test, as they are necessarily decorative add-ons to the main building, wholly ornamental in function. However, as I will later discuss, most other styles of architecture today are not such easy cases.

B. Comparing the “Useful Articles” Doctrine

While the so-called separability test is no doubt exasperating for its various formulations (courts have applied tests of physical separability, conceptual separability, and Nimmer’s marketability test³⁵), it nonetheless earmarks an important attribute of intellectual property law. The Copyright Act of 1976 defines a useful article as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”³⁶ Useful articles are denied copyright protection because there is another avenue available to designers of such items: patent law—specifically, a design patent.³⁷ Because of the power of a monopoly on useful items, patent law’s term of protection is shorter than copyright’s, yet is much stronger (copyright, after all, has built-in defenses to would-be infringers like fair use³⁸).³⁹ Accordingly, the hurdles an inventor needs to jump through to secure a patent are much higher than copyright (which merely

REP. NO. 94-1476, at 51 (1976). Congress acknowledges that “[s]ubjective determinations of artistic or aesthetic merit are inappropriate and contrary to fundamental principles of copyright law”—presumably, at least, as long as the work shows some poetic soul. H.R. REP. NO. 101-735, at 21.

³³ *Id.* at 20.

³⁴ ROBERT VENTURI, DENISE SCOTT BROWN & STEVEN IZENOUR, *LEARNING FROM LAS VEGAS: THE FORGOTTEN SYMBOLISM OF ARCHITECTURAL FORM* 51 (1977).

³⁵ See Barton R. Keyes, *Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law*, 69 OHIO ST. L.J. 109, 125–27 (2008) (discussing the various separability tests).

³⁶ 17 U.S.C. § 101 (2006).

³⁷ 35 U.S.C. § 171 (2006).

³⁸ 17 U.S.C. § 107.

³⁹ 35 U.S.C. § 289.

requires a showing of a modicum of originality): a hopeful design patent holder must prove that his invention is novel, original, *and* ornamental. The process is time-consuming and expensive, ensuring that a patent holder's rewards do not exceed his effort, which would create a windfall to the owner.

Thus, in many ways, the copyrightability of architecture is at least, superficially, as questionable as the copyrightability of fashion⁴⁰—the latter of which has yet to achieve copyright status. The war regarding whether fashion should be copyrighted centers mainly around whether such protection would increase or decrease innovation/progress in the fashion industry, which is, of course, an industry centered around planned obsolescence and consumption.⁴¹ And if architecture, too, like one commentator notes, is entrenched in a market model of supply-and-demand—that is, if architects only create because of a client's demands—then surely, the incentivizing aspect upon which the Constitution's grant of copyright power rests is nullified.⁴² But, as I argue in Part III, such a simplistic view of the architectural field lacks imagination, taking account only of the service architect but not the speculative one.⁴³ Further, such an argument is akin to arguing that we need not grant copyright protection to the fine arts because there will always be market demand for the original painting (unlike in film or music, in which copies are fungible).⁴⁴ But these arguments are unpersuasive, for they assume that incentivizing innovation depends only on economic costs gained (or lost), absent of demoralization costs or subjective value. I will address this point in Part IV.

For now, it suffices to note that the House Report is a text at war with itself. It wants to go beyond the idea that architecture is a mere useful article (for useful

⁴⁰ C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1184–85 (2009) (making a direct comparison between the copyrightability of fashion designs and architectural works and suggesting a similar solution for fashion, i.e., carving out a new statutory right).

⁴¹ See *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 88 (2006) (arguing that copyrighting fashion has no impact on innovation in the fashion industry); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691–92 (2006) (advancing the “induced obsolescence” model to argue that copying may actually promote innovation); Hemphill & Suk, *supra* note 40, at 1152–53 (positing that fashion should gain legal protection against close copying).

⁴² James Bingham Bucher, Comment, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 39 EMORY L.J. 1261, 1268 (1990).

⁴³ See *infra* Part III.

⁴⁴ See Bucher, *supra* note 42, at 1268–69 (“As long as there is a demand for architecture, there will be a demand for architects. Considering the wide diversity of architectural works in our society, it is evident that the market values creativity. . . . Thus, architects have a natural incentive to be creative; those architects who exhibit creativity will be rewarded with new commissions.”). One starts to wonder if that same argument wouldn't apply to the fine arts.

articles are patently uncopyrightable) due in no small part to the belief that to do so would allow monopolies on functionally useful forms. On the other hand, Congress does not know how to extend protection, and falls back on the old belief that architecture exists to serve mankind, as shelter. If that is the case, then it is easy to challenge Congress by asking whether anyone should be allowed to have a monopoly on such a socially beneficial form. And, in adopting Graves's rhetoric about the easy partition between the "poetic" and the "standard," Congress makes the case for the importance of architecture's social functions as it exacerbates the fight for limited protection to just those anthropomorphic works. The "two-step" test that Congress envisions is as follows: first, determining if there are original design elements present, and second, asking whether such elements are "functionally required."⁴⁵ This test once again shows Congress unable to escape the useful articles doctrine. Thus, on its face, Congress has complied with the Berne Convention. But a closer reading of the legislative history leaves reason to seriously doubt whether most architectural works can make the cut. As we will see, Congress's equivocating will result in a split between the courts.

III. Current Case Law: Abstraction/Filtration vs. Total Concept and Fee

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

As predicted, a look at a recent case addressing the Act brings the idea of "functionally determined" to the point of existential absurdity. In *Trek Leasing, Inc. v. United States*, the plaintiff, an architecture firm, attempted to sue for copyright infringement when the defendants, another architecture firm, built a similar post office in a nearby town (both were commissioned by the United States Postal Service).⁴⁶ The Federal Claims Court stated that, "[a]ccording to 17 U.S.C. § 101, an architectural work 'includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.'"⁴⁷ The court goes on to state that the plaintiff "admits that some of its decisions were influenced by economic concerns instead of aesthetic ones. These elements raise serious questions about the copyrightability of Plaintiff's work."⁴⁸ In a section of the opinion devoted exclusively to "Efficiency, Necessity, and External Factors," the court, in complying with consistent analysis from other circuit courts in which "elements dictated by efficiency, necessity, or external factors must also be filtered out of the court's infringement analysis," points out that, for example, the plaintiff's decision to use faux stone was dictated by economic concerns (real stone would have been too cost-prohibitive), as was

⁴⁵ H.R. REP. NO. 101-735, at 20–21 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6951–52.

⁴⁶ 66 Fed. Cl. 8, 10 (2005).

⁴⁷ *Id.* at 12 (quoting 17 U.S.C. § 101 (2006)).

⁴⁸ *Id.* (internal citation omitted).

their decision to use concrete masonry units for the exterior walls.⁴⁹ Further, the court points out:

[The plaintiff] could not use real (structural) wood lintels to secure a faux stone structure due to building codes. . . . Furthermore . . . the parapet must be placed along the roof's edge, and the placement of that edge is determined by the location of the walls, which is determined by the USPS drawings. Therefore, the parapet placement is also unprotectable expression (as is the location of the cap, which sits atop the parapet).⁵⁰

Essentially, the court, rather than look at the work *as a whole*, chooses to view *any* element of the work that is necessarily dictated by another (presumably, unprotected) element of the work—in other words, an element that logically follows or is dependent on another unprotected element—as therefore somehow “necessarily, efficiently, or externally” dictated, and thus unworthy of protection.

In doing so, the court applies yet another dubious test: the so-called “abstraction-filtration-comparison” test, which has been applied to another controversial field of copyrightability work: computer software.⁵¹ That is, rather than examine how the whole of the work could be an original, the court instead embarks upon a *separation* of the unprotectable aspects of plaintiff's work from the protectable elements (sound familiar?⁵²). Thus, once the court filtered out any element dictated by “external factors,” what was left was “necessarily a ‘thin’ [copyright].”⁵³ Often, the court noted, “this results in the organization of the elements being the only protectable aspect of the copyrighted work.”⁵⁴ Yet not only does this test fly directly in the face of Congress's other dictate in the Act, which is a recognition that “creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible [sic] elements into an original, protectable whole,”⁵⁵ it also circumvents the statutory language of the Act, which provides that an architectural work “includes *the overall form as well as the arrangement and composition of spaces and elements* in the design.”⁵⁶ How could the court have made such a mistake? Perhaps because the equivocating wording of the Act, which also states that “individual standard features” are not included in the

⁴⁹ *Id.* at 16.

⁵⁰ *Id.* at 16–17 (internal citation omitted).

⁵¹ See *id.* at 12 (noting that while the abstraction-filtration-comparison test is normally applied to computer programs, the D.C. Circuit “applied a similar analysis to an architectural work case”); see also *Berne Convention Implementation Act of 1987: Hearing on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 679 (1988) (testimony of Paul Goldstein) (testifying that protecting architectural works by following the Berne Convention would lead to the same complications as applying copyright protections to computer software).

⁵² See *supra* note 35 and accompanying text.

⁵³ *Trek*, 66 Fed. Cl. at 17.

⁵⁴ *Id.*

⁵⁵ H.R. REP. NO. 101-735, at 18 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6949.

⁵⁶ 17 U.S.C. § 101 (2006) (emphasis added).

overall protectable work,⁵⁷ could just as easily lend itself to the filtration test as it resists it. But how do we determine what “standard” is? Not only does *Trek* conjure up Graves’s definition of “standard” as any building component touched by technology or practical concerns, but its result is also very much dependent on a narrative of architecture as one of creative resolution to functional and social problems (as indicated by Congress’s so quoting Huxtable⁵⁸). In this light, architecture has much in common with computer software, and thus could conceivably be evaluated under the same standard.⁵⁹

This determination in turn led the *Trek* court to apply a more stringent test to evaluate similarity. While the traditional test for determining infringement is the “ordinary observer” test, the court decided to apply the “more discerning” observer test, which requires a showing of “supersubstantial similarity” in order to constitute infringement.⁶⁰ This is a pernicious standard, if for no other reason than that it makes it vastly easy for would-be infringers to find a loophole around the law by changing small details, such as the color or size of building material (in fact, the *Trek* court suggests that the “Plaintiff’s choices regarding the color and type of faux stone” constituted its few “original” elements;⁶¹ presumably, had defendant used a different color of stone, there would have been no finding of supersubstantial similarity).

Of course, to be sure, a post office that worked in part off of USPS building plans⁶² is not exactly the high mark of creative endeavor, but then again, Congress itself explicitly stated that the bar for originality when it came to architectural copyright protection would be low.⁶³ *Trek* therefore stands as harmful precedent. Post-*Trek*, one must presume that any element dictated by building codes or involving economic consideration is inherently unprotectable (and, in fact, current case law is already headed that way, see Part I). Given the nature of architecture as a discipline (that it caters to a client’s economic concerns, that it is heavily regulated by building and zoning codes), can *any* work pass the *Trek* hurdle?

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

⁵⁷ *Id.*

⁵⁸ See *supra* note 30 and accompany text.

⁵⁹ See Su, *supra* note 9, at 1876 (“[T]here are many similarities between architectural works and computer programs. Both types of work represent a hybrid of functional and creative elements. Both architects and software engineers face a similar set of external factors that limit their freedom of design choice. The nature of the problem that a computer program aims to solve is analogous to the building program requirements of an architectural design.”).

⁶⁰ *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 19 (2005).

⁶¹ *Id.* at 17.

⁶² *Id.* at 16.

⁶³ See *supra* note 32 and accompanying text.

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

Shine v. Childs was a 2005 New York district court case involving a famous and well-established defendant, David Childs of the behemoth architecture firm Skidmore, Owings & Merrill (SOM).⁶⁴ The plaintiff was a young architect named Thomas Shine, who had designed a soaring skyscraper as part of a studio project at the Yale School of Architecture.⁶⁵ As part of Shine's final review in late 1999, a jury of invitees, including Childs, evaluated his work. The reviews were glowing.⁶⁶ Unfortunately for Childs, in December of 2003, both he and SOM presented a design for Ground Zero's Freedom Tower that Shine alleged was strikingly similar to his prior project.⁶⁷ This suit ensued.

The court declined to "filter out" uncopyrightable elements and analyze "the elements of plaintiff's works separately, comparing only those elements that are copyrightable to those present in the designs for the Freedom tower."⁶⁸ Judge Mukasey briskly writes, "[A]s our Circuit noted, 'we might have to decide that there can be no originality in a painting because all colors of paint have been used somewhere in the past.'"⁶⁹ Reading the same statutory text as *Trek*, the *Shine* court comes to the opposite conclusion, choosing instead to hone in on the words "overall form" and "arrangement and composition" to evaluate the work—even with its arguably unprotectable individual elements—as a protectable *whole*.⁷⁰ Accordingly, the court elects to use the substantial similarity test, rather than *Trek*'s ultra-stringent supersubstantial similarity one.⁷¹

As is often the case, judge-made law will continue to shape the outer limits of architecture's copyrightability. To ignore the legislative history of "poetic" versus "standard" and focus solely on the text of the statute can yield two opposite results, as *Trek* and *Shine* illustrate. 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."⁷² The text is easily amenable to both a *Trek* interpretation (filtering out the standard features and evaluating the remaining whole with a very thin copyright that subsists mostly in the exact arrangement of elements in space) or the *Shine* interpretation (acknowledging that while individual

⁶⁴ 382 F. Supp. 2d 602, 604–05 (S.D.N.Y. 2005).

⁶⁵ *Id.* at 605.

⁶⁶ *Id.* at 604–05.

⁶⁷ *Id.* at 606.

⁶⁸ *Id.* at 610.

⁶⁹ *Id.* (quoting *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995)).

⁷⁰ *Shine*, 382 F. Supp. 2d at 609.

⁷¹ *Id.* at 612.

⁷² 17 U.S.C. § 101 (2006).

standard features may not be copyrightable by themselves, they can nonetheless coalesce to form a copyrightable whole). As *Shine* was decided in August of 2005, a mere three months after *Trek* was decided, the ground is now ripe for either interpretation by future courts.

Subsequent case law, though none as high profile as *Shine v. Childs*, has been equally divergent in its interpretation of the Act. For example, in the recent 2010 case *Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC*, the district court cited “(1) market demands, (2) building codes and manufacturers’ clearance directives, [and] (3) functional demands” as factors that “operate to limit in some way the opportunity for originality and available ways in which to express elements in [plaintiff’s] Architectural Drawings.”⁷³ “Market demands” can even “include the expectations and design tastes of the prospective consumers of the residential apartment and commercial retail space,”⁷⁴ raising very serious questions as to what architecture would be copyrightable at all under such a standard. Unsurprisingly, the *Harvester* court decided that the plaintiff’s copyright was a “thin” one, at best.⁷⁵ The *Harvester* approach that treats expression addressing “market demands, building codes and zoning requirements, functional demands, the physical site and environment, budgetary constraints and available technology” as “merging” with the idea and thus unprotectable under the merger doctrine was followed in the 2011 case *Dream Custom Homes, Inc. v. Modern Day Construction, Inc.*⁷⁶ As we will see in Part III, such standards raise serious questions for the copyrightability of prominent, creative architectural works being built today. In contrast, the district court in the 2009 case *T-Peg, Inc. v. Vermont Timber Works, Inc.* declined to apply *Trek*’s abstraction-filtration-comparison standard, which was urged by the defendants.⁷⁷

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

⁷³ 716 F. Supp. 2d 428, 440 (E.D. Va. 2010).

⁷⁴ *Id.* at 441.

⁷⁵ *Id.* at 434.

⁷⁶ 773 F. Supp. 2d 1288, 1300 (M.D. Fla. 2011) (citing *Harvester*, 716 F. Supp. 2d at 440–41).

⁷⁷ No. 03-CV-462-SM, 2009 WL 839522, at *2 (D.N.H. Mar. 27, 2009).

IV. Alternate Narratives: Bernard Tschumi, Peter Eisenman, and The Dutch School (or, Functionality Rebuked)

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

What the Act and all the legal literature surrounding the Act have implicitly focused on, knowingly or not, is merely one view of the cathedral. That is, in emphasizing architecture's socially beneficial aspect, as Congress did, or in deriding architectural copyright as counter to the progress of the field, as the literature has done, all the analysis surrounding the Act so far is only speaking to the service architect—the architect that merely "seeks to expertly fulfill the needs and desires of a client," resulting in work that only reflects the "self-replicating ambitions of entrenched power and the banalizing forces of the market."⁷⁸ But such is a vastly limited view.

Because then there is the speculative architect—the one who "foregrounds his effort to *change* architecture so that it, in turn, can help shape a better world."⁷⁹ In what is a brilliant repetition of the same Churchill quote Congress used in the Act's legislative history, architect Jeffrey Kipnis writes: "Winston Churchill said, 'We shape our buildings; thereafter they shape us.' Karl Marx would have agreed, *once he had reversed the order of causality*."⁸⁰

Speculative architecture challenges the assumptions we hold about an architecture that can do nothing but be pre-determined end products that reflect the mass desires of consumer society, and it is these assumptions that are being challenged right now by the radical architecture of today. The examples that I will provide serve to not only dispel the (what I argue, wrongful) notion of architecture as akin to "useful articles," but also prove the unworkability of *Trek*—and Congress's tentatively proposed—two-step "functionally determined" standard.⁸¹

A. Bernard Tschumi: Useless Architecture

I want to eradicate once and for all the notion that, as one commentator put it, "[f]ew, if any architectural structures have been conceived and commissioned without some functional purpose in mind even if they are clad in artistic overtones."⁸² Indeed, there is some eagerness amongst the Act's detractors—and

⁷⁸ Jeffrey Kipnis, *Diagram*, in 11 HUNCH: RETHINKING REPRESENTATION 86, 86 (Penelope Dean ed., 2007).

⁷⁹ *Id.*

⁸⁰ *Id.* (emphasis added).

⁸¹ H.R. REP. NO. 101-735, at 20–21 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6952.

⁸² Hixon, *supra* note 10, at 649.

equivocating language on Congress's part⁸³—to label architecture as a useful article. Architecture is useful only insofar as the service architect aims to please his client. And though Modernism's oft-repeated mantra, "form follows function," still stands as the most prominent historical justification for architecture's utilitarian calling, this is just one narrow tunnel view into the whole of architectural history.⁸⁴ Architect Bernard Tschumi (former dean of the Columbia Graduate School of Architecture) traces the history of the other side of the story, that of revolutionary architecture:

[Architectural revolutionaries'] attempts to find a socially relevant, if not revolutionary, role for architecture culminated in the years following the May 1968 events with "guerilla" buildings, whose symbolic and exemplary value lay in their seizure of urban space and not in the design of what was built. . . . This nihilistic prerequisite for social and economic change was a desperate attempt to use the architect's mode of expression to denounce institutional trends by translating them into architectural terms⁸⁵

Tschumi reiterates the distinction between the autonomous architecture that powers the field via its ability to *dream*, and its ultimate translation into the service architecture that we think of when the word is invoked.⁸⁶ In Tschumi's view:

[A]rchitecture seems to survive only when it saves its nature by negating the form that society expects of it. *I would therefore suggest that there has never been any reason to doubt the necessity of architecture, for the necessity of architecture is its non-necessity. It is useless, but radically so.*⁸⁷

In other words, it is the *will* and, indeed, the *goal* toward revolution and estrangement that gives the field its ultimate progressive power. Tschumi's plea for uselessness is not completely utopian: after all, he acknowledges that the architecture he speaks of—the whole of the field that aims to break free of the useful ends society ultimately makes of it—might "contain more revolutionary power than its numerous transfers into the objective realities of the building industry and social housing."⁸⁸ But built works are only half the story. As the facts of *Shine v. Childs* have shown us, anything—from models made for a graduate student studio to proposals submitted as part of an architectural competition (which is the other reality of the field: proposals that may never end up built but still may end up copied)—could be fair game for copycats.

B. Likewise, Peter Eisenman: Alienation Games

For further proof that even built works are not inherently utilitarian, one need only look at the provocative work of Peter Eisenman, who takes the idea that buildings are necessarily humanistic or even inhabitable and inverts it on its head.

⁸³ See H.R. REP. NO. 101-735, at 20–21 (proposing that functional design elements should not be protected).

⁸⁴ Hixon, *supra* note 10, at 648; Scaglione, *supra* note 11, at 209.

⁸⁵ BERNARD TSCHUMI, ARCHITECTURE AND DISJUNCTION 45 (1996).

⁸⁶ *Id.* at 46.

⁸⁷ *Id.* (emphasis in original).

⁸⁸ *Id.*

Eisenman, whose work I began this Article quoting, sets out to challenge the idea of architecture as shelter, comfort, or stability. Eisenman's goal is to *dislocate* dwelling in an attempt to continuously reinvent architecture itself.⁸⁹ But Eisenman's work, too, is a work of literary proportions, and thus would be right at home in Congress's attempt to situate architecture within the meaning of "writing." Using what he terms the "rhetorical figure," Eisenman's architecture works to free the field from its dependency or attachment to representation; sick of architecture's standing in as a readymade sign for age-old cultural signifiers or as reinforcement of institutions, Eisenman would rather create *new* content by "dislocat[ing] site implications from their culturally predetermined meanings."⁹⁰ Deeply opposite to Graves, Eisenman does *not* want to center—he wants to decenter; rather than read a figure aesthetically or metaphorically, Eisenman would rather a figure be read rhetorically.⁹¹ Only by doing so can architecture remain the "constructive activity" it is, and in turn, create institutions, rather than institutionalize.

As a result, works like House VI, which he designed for clients Richard and Suzanne Frank in 1972, are difficult to the point of pure alienation. In the client's tell-all book, *Peter Eisenman's House VI: The Client's Response*, the Franks speak of giving Eisenman "poetic license" to design the house as he saw fit, in what is a pure invocation of Graves's language.⁹² The truth of the matter is that Graves would have hated House VI, for it does not take man at the center of its reference point at all. For example, before the house's renovation, a glass strip had divided the bedroom, forcing the Franks to sleep on opposite sides of the room (in twin beds) in what is a comical denial of the master bedroom prototype.⁹³ The house features only one bathroom, on the second floor, which requires guests "to travel through the bedroom by day or at night to use the facilities."⁹⁴ And if a visitor or the Franks themselves had expected to revel in the New England views, they better be forewarned: "[t]he visual delights of the New England landscape are shut off by the planes painted white, gray, and black inside, so that there are no good views of the trees and fields from the living room, dining space, or kitchen."⁹⁵

Likewise, in his 1989 building, the Wexner Center for the Arts (Ohio State's contemporary art space), Eisenman's use of "not quite vertical," "not quite horizontal" colliding floor and wall planes had the intention of putting "in suspension the sense of the pull of gravity."⁹⁶ As the story goes, legend circulated

⁸⁹ Eisenman, *supra* note 2, at 177.

⁹⁰ *Id.* at 179.

⁹¹ *Id.* at 177.

⁹² SUZANNE FRANK, PETER EISENMAN'S HOUSE VI: THE CLIENT'S RESPONSE 54 (1994).

⁹³ *Id.* at 60.

⁹⁴ *Id.* at 33.

⁹⁵ *Id.*

⁹⁶ ANDREW BALLANTYNE, WHAT IS ARCHITECTURE? 14 (2002).

that the building was known to make people vomit, until a journalist uncovered that Eisenman himself had made up the story.⁹⁷ But the story is instructive, for, as Professor Andrew Ballantyne aptly points out, “[b]y some scale of values he was actually enhancing the reputation of his building by letting it be known that it was hostile to humanity.”⁹⁸ As such works and ideologies show, we’ve long moved beyond the world of Modernism and form-follows-function, and even of that of the social or the human as the ultimate goal—as perhaps best-exemplified by the newly-coined catchphrase for this school of architects: the “posthumanists.”⁹⁹

C. The “Dutch School”: Inevitability as Aesthetic Mantra

Even the highly prolific, successful architects these days—those who straddle the line somewhere between speculative and service architects—put on the “Yes man” suit in order to make a game of the very nature of architecture. In what I will dub the “Dutch school”—specifically, the firms OMA, MVRDV, and BIG—architecture’s “functionally determined” aspect becomes the very play stuff for fancy and irony. These three firms have made an aesthetic mantra out of the *seemingly* inevitably-determined, working off of zoning laws, borrowed airspace, and efficiency concerns to create works that seem inevitably determined yet achieve highly original, creative ends, as if commenting on the modern role of the architect itself. In a sense, it is a winking nod to the Modernist credo of “form-follows-function”—but if anything, the new garde, including the “Dutch school”—addresses the idea of whether form is *ever* a mere inevitable product of functional concerns.

The firm OMA has designed some of the most iconic contemporary buildings in the world, including the Seattle Central Library, Casa da Musica concert hall in Portugal, and the CCTV tower in China.¹⁰⁰ Its principal Rem Koolhaas, a prolific writer and architectural theorist, makes an aesthetic mantra out of the seemingly inevitable. In writing on OMA’s proposal for the 2001 extension to the Whitney Museum in New York¹⁰¹ (the project was eventually handed over to Renzo Piano¹⁰²), Koolhaas cheekily emphasizes the concept of obedience. Koolhaas writes of the project’s conception:

Handed a commission with a wink—design an extension of such virtuoso brilliance that the Landmarks Preservation Commission, custodian of the adjacent late-19th Brownstones, will swoon and give permission for

⁹⁷ MICHAEL POLLAN, *A PLACE OF MY OWN: THE EDUCATION OF AN AMATEUR BUILDER* 68 (1998).

⁹⁸ BALLANTYNE, *supra* note 96, at 14.

⁹⁹ See, e.g., K. MICHAEL HAYS, *MODERNISM AND THE POSTHUMANIST SUBJECT: THE ARCHITECTURE OF HANNES MEYER AND LUDWIG HILBERSEIMER* (1995); Neil Badmington, *Theorizing Posthumanism*, 53 *CULTURAL CRITIQUE* 10 (2003).

¹⁰⁰ *Projects*, OMA, <http://oma.eu/projects> (last visited June 10, 2012).

¹⁰¹ See *infra* App. 1 (OMA, Proposal for the Whitney Museum).

¹⁰² See *New Building Project*, WHITNEY MUSEUM OF AM. ART, <http://whitney.org/About/NewBuilding/About> (last visited June 11, 2011) (confirming that the new building was designed by architect Renzo Piano).

demolition—OMA instead chose to take the preservationist and zoning laws tangling Breuer's Whitney strictly at face value. The result is a building growing from a miniscule footprint, in full submission to the zoning envelope, reaching up and over the Brownstones and the Breuer, "like a gigantic cat's paw." This act of obedience engenders a triple liberation: the Brownstones could be used, for the first time, to house prewar, smaller paintings in intimate spaces . . . or like a Procrustes bed to try to counteract the gigantomania of contemporary art . . .¹⁰³

The proposal, unfortunately, was "deemed disrespectful."¹⁰⁴ But this point goes exactly to the whole genius of Koolhaas and OMA's work: in recalling the seemingly inevitably-determined nature of both skin (in adhering to the zoning envelope) and program (that a museum must be hospitable to the art it keeps), OMA has in turn engendered a building that is neither conventional in shape (thus the rather offensive and comically out-of-place image of a cat's paw stretching over the Upper East Side) nor agenda (the forced preservation of small paintings in private homes). That the end project was deemed liberating and disrespectful is illustrative: Koolhaas is aligning himself *not* with the avant-garde, dedicated to broaching new ground as if in some desperate escape from the inevitability that plagues the architectural profession, but with the *arriere-garde*—turning obedience into quiet subversion.¹⁰⁵ By adhering to the exact letter of the client's demands, Koolhaas instead allows his own vision of the world—as chaos and comedy—to reign, though, as the case of the Whitney shows, not always to the satisfaction of the client.

Likewise, the firm BIG—headed by Bjarke Ingels—takes the idea of the *arriere-garde* and channels it into one overwhelming position: "Yes Is More," or what Ingels calls "pragmatic utopianism."¹⁰⁶ Inherent in the mantra is the idea that you could somehow play the Yes-man and also manage to *exceed* such parameters. For too long, Ingels notes, "the field of architecture has been dominated by two opposing extremes," on "one side an avant-garde of wild ideas, often so detached from reality that they fail to become something other than eccentric curiosities," and on the other side the "well-organized corporate consultants that build predictable and boring boxes of high standard."¹⁰⁷ Thus, "[r]ather than choosing one over the other, BIG operates in the fertile overlap between the two opposites," a position Ingels deems evolutionary, rather than revolutionary.¹⁰⁸

¹⁰³ Rem Koolhaas, *2001 Whitney Museum Extension, New York: Obedience (1966 and 1985)* (quote from tear-off postcards as part of OMA exhibit at New Museum of Contemporary Art in New York, NY, on file with author).

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., Kenneth Frampton, *Toward a Critical Regionalism: Six Points for an Architecture of Resistance*, in *POSTMODERNISM: A READER* 268, 272 (Thomas Docherty ed., 1993) (arguing that "[a]rchitecture can only be sustained today . . . if it assumes an *arriere-garde* position . . . to cultivate a resistant, identity-giving culture").

¹⁰⁶ BJARKE INGELS, *YES IS MORE: AN ARCHICOMIC ON ARCHITECTURAL EVOLUTION* 14 (2009).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

BIG's winning competition proposal for a waste treatment plant in Copenhagen is the perfect embodiment of such mediated avant-gardism.¹⁰⁹ BIG notes that "[m]ost of the recently build [sic] power plants are merely functional boxes, wrapped in an expensive gift paper. The main 'function' of the façade is to hide the fact that factories are having a serious image/branding problem."¹¹⁰ The irony behind the boring, aesthetically drab power plants of today is that, presumably, if the façade lacks function, it might be, under the efficiency/external/economic factors test used by the *Trek* and *Harvester* courts, presumably copyrightable. But BIG, on the other hand, "want[s] to do more than just create a beautiful skin around the factory. [They] want to *add* functionality! The ambition of creating added value in terms of added functionality does not stand in contrast to the ambition to create beauty. It does not have to be either/or."¹¹¹

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

The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature. It is the province of patent law, not trademark law, to encourage invention If a product's functional features could be used as trademarks, however, a monopoly over such features could be obtained without regard to whether they qualify as patents and could be extended forever¹¹²

Copyright protection, while not perpetual like trademark protection, nonetheless lasts far longer than patent law.¹¹³ But here is where we find BIG's stated intent of "add[ing] functionality" diverging from the actual purposes behind the functionality doctrine's prohibition on extended monopolies. As it turns out, BIG's idea of "added functionality" means "turning the roof . . . into a ski slope for the citizens of Copenhagen."¹¹⁴

Comical? Yes. Ridiculous? Probably. But this is exactly the kind of unconventional, tongue-in-cheek, playful thinking parading under old form-meets-function talk that BIG is infamous for. It cannot seriously be argued that skin-as-ski-slope is such a useful feature of a building that to deprive future architects the

¹⁰⁹ See *infra* App. 2 (BIG, Proposal for the AMF Waste Treatment Plant).

¹¹⁰ AMF, BIG, <http://www.big.dk/projects/amf/> (last visited June 26, 2011).

¹¹¹ *Id.* (emphasis added).

¹¹² *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164–65 (1995).

¹¹³ Cf. 35 U.S.C.A. § 154(a)(2) (West 2012) (stating that the duration of a patent grant begins "on the date on which the patent issues and end[s] 20 years from the date on which the application for the patent was filed"); 17 U.S.C. § 302(a) (2006) (stating that copyright "endures for a term consisting of the life of the author and 70 years after the author's death").

¹¹⁴ AMF, *supra* note 110.

ability to use it would inhibit innovation in the field. Yet if we resign ourselves to filtering out any elements with a supposed functional bent, BIG's hyper-creative idea for a rooftop skiing slope is now fair game for any architect, while a monolithic grey skin might somehow manage to surmount the low originality barrier in obtaining copyright protection.

A last example of the type of "Yes"-driven architecture that achieves uncommon ends is MVRDV's 2001 proposal for the Eyebeam Institute in Chelsea.¹¹⁵ Like OMA's proposal for the Whitney extension, MVRDV's building envelope conforms smoothly to the zoning envelope. But "[b]y using the ultimate limits of given urban zoning, the volume permits for an oversizing that allows for interior voids, that can become a collective zone throughout the building, accentuating an endless interior, in which all functions, both Eyebeams [sic] and the tenants [sic], can be addressed. This envelop [sic] turns the Institute into a landmark within its surroundings."¹¹⁶ Under the current abstraction/filtration/comparison standard, both the interior voids and the iconic building envelope would be uncopyrightable. But the act of oversizing (by using the maximum allowable envelope) is artistic genius, for it allows the creation of an endless series of tiny interior voids that is at once beautiful (resembling "[a] giant bee-hive") as it is expressive (the voids are a modern-day rewriting of the cathedral's hollow-tower; "[t]he cathedral like [sic] effect follows the logic of eternity; it avoids a fashionable and rapidly outdated architecture").¹¹⁷

These architectural examples—of taking the demands and efficiency concerns of the external world and, in turn, *making them beautiful, or sublime*—are nothing less than art. Architecture is, as Koolhaas puts it, an art "[that] animate[s] larger and larger spaces," "engender[ing] an Apocalyptic Sublime."¹¹⁸

V. Total Concept and Feel, Reworked

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

If it is true that Graves's narrative of populist social architecture with mere "symbolic appendages"¹¹⁹ (surely superfluous, surely copyrightable) has dominated the legal conversation about architecture's "real" role and what protectable

¹¹⁵ See *infra* App. 3 (MVRDV, Proposal for the Eyebeam Institute).

¹¹⁶ *Eyebeam Institute, Media Galaxy*, MVRDV, <http://www.mvrdv.nl/#/projects/170eyebeamnewyorkmediagalaxy> (last visited June 11, 2011).

¹¹⁷ *Id.*

¹¹⁸ Rita Valencia, *The Stark Fist of Removal*, TIMES QUOTIDIAN (June 13, 2011), <http://www.timesquotidian.com/2011/06/13/the-stark-fist-of-removal/>.

¹¹⁹ This phrase comes from a section titled "Social Architecture and Symbolism" in Denise Scott Brown, Steven Izenour & Robert Venturi's defining work on postmodern architecture, VENTURI, BROWN & IZENOUR, *supra* note 34, at 155.

architecture is or does, then shifting the conversation to other views of the cathedral would necessarily mean widening the arena of protected works under the Act.

Now, it is highly possible—indeed, likely—that architecture does not need copyright to thrive, as it has survived all these years (in the United States, at least) without it. And if, as one commentator has argued, there are plenty of other incentive mechanisms in place for an architect—including satisfying the client and/or desiring the prestige of winning a competition—then does the scope of protection matter?¹²⁰

One reason this is harmful, I argue, is that to narrow protection so that Robert Venturi's symbolic appendages or Graves's anthropomorphic columns are covered, but OMA's towers are not (or, at best, receive a "thin" copyright that any hopeful infringer with half a head on their shoulders would be able to circumvent) would be to unfairly single out specific architectural styles,¹²¹ sending those architects a clear message: Your work does not make the cut (as original, as worthy of protection), but others do. This becomes significant when we take into account demoralization costs (to borrow Frank Michelman's phrase in his famous article on Takings Law¹²²). Applying Michelman's demoralization costs to the losing architect, such costs would be those "disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered" (in the form of infringement damages) and the "present capitalized dollar value of lost future production . . . caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion" (for example, those architects practicing under similar styles).¹²³ To be clear, such demoralization costs only apply if an individual (or, probably more appropriately, an individual architecture firm, which, though collaborative, nonetheless exudes a unique style) feels that his or her work has been unfairly singled out.¹²⁴ In other words, in a classical Rawlsian conception of fairness, the loser cannot feel that there are specific preferences in play.¹²⁵

Of course, in a world in which no architectural work is copyrightable—as in, in the United States of twenty years ago—this would not apply. And, to a certain

¹²⁰ Bucher, *supra* note 42, at 1269–70.

¹²¹ I argue that the Act discriminates against almost all styles, with the exception of some of postmodern architecture's more ornate forms. See Scaglione, *supra* note 11, at 206–07 (stating that the Copyright Act's "functionality test is really a separability test" which "discriminates against modern architecture").

¹²² Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1223 (1967).

¹²³ *Id.* at 1214.

¹²⁴ See *id.* at 1223 ("The relevant risks plainly are minimized by insistence on compensation when settlement costs are low, when efficiency gains are dubious, and when the harm concentrated on one individual is unusually great.").

¹²⁵ *Id.* at 1220.

extent, because architectural copyright is still new, it might still come as a shock when an infringement claim is actually deemed valid.¹²⁶ But the proprietary nature of human beings also cannot be denied—the one that is tempted to look at a similar work and say, “Hey, that looks like mine.” Even the architect Daniel Libeskind—who claimed to “[not] mind that Donald Bates,” the architect of Federation Square in Australia, used “acute angles reminiscent of [Libeskind’s] work”—could not help but be “initially disturbed” when Eisenman revealed a design “for a Holocaust memorial in Berlin . . . [which] looked too much like the memorial garden [Libeskind] had designed for the Jewish Museum in that city.”¹²⁷ And yes, while the social sanctions for “an accusation of architectural plagiarism”—including “cocktail party chatter and snippy blogs”¹²⁸—nonetheless still exist, a claim for infringement would be available as a last resort to vindicate oneself in the eyes of the public—as Shine did with Childs in his David and Goliath tale.

After all, the laws that we have in place do not merely serve utilitarian ends, but are also a vindication of what we as a society are prepared to value. For example, the recently-enacted Visual Artists Right of 1990 and its set of restrictive rights on visual art owners abrogate the traditional property rights of owners in the name of a greater vindication of the value we accord to art as a society.¹²⁹ The Architectural Works Copyright Protection Act, too, can have expressive value—if it allowed architecture to free itself of the commonly-held notion of being nothing but a vehicle for shelter and solace—and stand, instead, on its own two bold feet. Just as fine art exists as more than mere commodity pieces to be bought and sold in the stalls of Art Basel, so architecture too is more than just condo buildings made in service of the wealthy. It is, like music, film, art, and literature, a form of writing, capable of grafting its own intentions and narrative onto the world around it, rather than vice versa.

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

At the same time, the possibility of monopoly—especially in the so-called “bread and butter” architecture (condos, tract homes)¹³⁰—cannot be taken lightly. But to allow for loopholing by using a “supersubstantial” standard, or to denigrate “high architecture” like those of BIG and OMA as merely cloaked by a “thin

¹²⁶ See Fred A. Bernstein, *Hi, Gorgeous. Haven’t I Seen You Somewhere?*, N.Y. TIMES, Aug. 28, 2005, at 27 (discussing three cases of architectural similarity that are unlikely to end up in court).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 17 U.S.C. § 106(a) (2006) (allowing the creator of the work to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation”).

¹³⁰ See Su, *supra* note 9, at 1856 (describing architecture’s bread and butter as the “single-family tract houses and modest commercial buildings”).

copyright” just because individual elements are seemingly “functionally” determined by laws or the market is *not* the answer. Here’s a better idea.

To begin with, copyright law, unlike patent law, already has built-in mechanisms that preclude absolute monopoly. In addition to the “independent creation” rule (two authors who independently arrive at the same result are nonetheless both valid copyright holders¹³¹)¹³² and the idea/expression dichotomy, there is also the fair use defense.¹³³ While the idea of fair use in architecture has not been litigated or written about,¹³⁴ it is easy to imagine the concept as it applies to architecture. Architecture is, like the other arts, one of taking old components and making them new. Thus, if a would-be infringer had used another architect’s copyrighted element in a transformative way, and as part of a larger project, the work would be easily amenable to a fair use defense. And, in the case of tract homes or condos, the “nature” of the copyrighted work itself (the second of the fair use factors) is akin to factual works: it receives a very thin protection. Therefore, only an egregious copier would fail the fair use test.

In addition to all of copyright’s built-in protections against monopoly and in support of the free flow of information and ideas, I want to also propose a simple two-factor balancing test that courts can consider when deciding whether a building design is copyrightable or not. While the “total concept and feel” test should be applied in most cases—thus, allowing a jury to evaluate the original and infringing work for substantial similarity—courts should consider awarding summary judgment to the defendant *only in cases in which the gain to the public (in having such form be in the public domain) would outweigh the loss to the individual*.¹³⁵ This test, which is a reformulation of Michelman’s balancing test, would therefore ensure that if, for example, an architect were to develop a form for low-income housing that is able to maximize the number of available units and breathable space

¹³¹ Note that independent creation in some ways precludes the idea that a not-too-original tract home developer could monopolize the whole field, as “[t]he less creative the choice, the stronger the inference that the same choice or group of choices made by another was made independently.” *Procter & Gamble Co. v. Colgate-Palmolive Co.*, 199 F.3d 74, 78 (2d Cir. 1999).

¹³² I acknowledge that architecture, like fashion, has very much of an “it’s the zeitgeist” feel to it—as in, two firms might very well arrive at the exact same result if certain ideas are circulating in the air that year, as was the case one year with architects Thomas Leeser and Diller & Scofidio. Bernstein, *supra* note 126, at 27. Since the two architects did so independently, there would be no infringement case.

¹³³ Codified at 17 U.S.C. § 107, courts weigh four factors in determining whether defendant has a valid fair use defense: “(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . . ; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107 (2006).

¹³⁴ At least, not in depth. In *Thomas M. Gilbert Architects, P.C. v. Accent Builders and Developers, LLC*, 377 F. App’x 303, 309 (4th Cir. 2010), the defendant *tried* to make out a fair use defense, but only addressed the fourth factor, ignoring the other three. Unsurprisingly, the Fourth Circuit dismissed it.

¹³⁵ Michelman, *supra* note 122, at 1193.

per unit while creating an overall pleasing skin in accord with the zoning code (thus alleviating urban blight), he should be denied a copyright for both the overall form and the individual components (for example, a special form of window that maximizes sunlight while being cheap and aesthetically pleasing) because the general welfare of society has increased via a dramatic increase in available, affordable low-income housing (which, in the long run, might even benefit *him* specifically, for example, via more available building space for other developments).¹³⁶ On the other hand, an MVRDV design for an art space that smoothly conforms to the zoning envelope, though determined by external factors, would nonetheless be copyrightable because the gain to future art spaces hoping to use the same shape simply because it is beautiful would not outweigh MVRDV's perceived loss at having their signature aesthetic be in the public domain (this in turn would make society as a whole *worse off* because these unique, monumental works of architecture would then slowly devolve into quotidian figures incapable of inciting aesthetic awe and, in turn, heightened experience). Such a two-factor test would address concerns that architectural copyright could impede progress by allowing monopolies on vital, useful articles.¹³⁷ Such a test would also find *against* the copyrighting of, for example, tract homes (if independent creation does not take care of that problem), because of the public interest in having them built cheaply, efficiently, and in large number. Thus, the tendency to want to "filter out" seemingly banal elements in these buildings would be stifled, for such a tendency makes bad precedent for architecture like OMA's, which shares that tendency toward banality in irony only, rather than in fact.

VI. Conclusion

Our current penchant for easy dichotomies and facile answers about what architecture is or what it exists for, especially in light of the Copyright Act's split between art and technology, must be reevaluated. We cannot forget, after all, that what Graves supported and Congress codified, via architectural statute, was the distaste and devaluation of the Modernist ideal of the machine—an ideal perhaps nowhere better demonstrated than in Le Corbusier's *Five Points of Architecture*, or in Alan Colquhoun's *Typology and Design Method*.¹³⁸ But it cannot be disputed that both Corbusier and Colquhoun, along with endless other Modernists, were also deeply involved with the idea of beauty and aesthetics, and how we can arrive

¹³⁶ See *id.* at 1220 (discussing Rawls's principles of fairness).

¹³⁷ Further, as a colleague pointed out when this Article was being workshopped, my proposal does not preclude the possibility that specific utilitarian design elements could still qualify for patent protection, or, in the case of aesthetically pleasing design elements, a design patent.

¹³⁸ Alan Colquhoun, *Typology and Design Method*, 12 PERSPECTA 71 (1969) (first published in ARENA, June 1967).

there, or what it means.¹³⁹ Colquhoun himself acknowledges that “[w]hat appears on the surface as a hard, rational discipline of design, turns out rather paradoxically to be a mystical belief in the intuitional process”¹⁴⁰—it is the urge to *will* our romantic inner selves onto the cold external world around us. If the Modernist ideal is of “a world of pure technology” in which form is merely “the result of the application of physical or mathematical laws rather than of previous association or aesthetic ideologies,” then Venturi and Scott Brown are right to point out that this is nothing but a mere conceit—“even [in] the world of advanced technology . . . [such laws are] not totally determining; there are areas of free choice.”¹⁴¹ And, more importantly, even assuming that the Modernist ideal—achieving a world of “pure” technology—could succeed, that utopia, too, is itself a form of aesthetic ideology.

But Modernism aside, we cannot assume that the leaps in new building material and the need for efficient housing that erupted shortly after World War II form the new status quo of architecture’s complacent role to better serve—via machine—mankind.¹⁴² For there are also those leaps of faith that every art form makes every few decades in order to better discover, or more firmly entrench, itself in its own discipline. To me, Eisenman’s evocation of a molten architectural practice continuously shifting in the uneven plates of its own violent eruptions does more to advance a notion of progress than Graves’s plea for a return to the anthropomorphic rituals of our mythical past. Paradoxically, Congress wrote that “[p]rotection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal.”¹⁴³ Congress is right that there is a constitutional goal in mind—of progress—but proceeding forward does not merely mean ornamenting our surrounding environment with nice, habitable buildings. Alienating architecture and difficult architecture and unexpected architecture can work to force us to confront our own assumptions, and that on its own has the power to create real or radical change. As Tschumi writes in an echo of the Eisenman quote I opened this Article with:

[A]rchitecture is constantly unstable, constantly on the verge of change. It is paradoxical that three thousand years of architectural ideology have tried to assert the very opposite: that architecture is about stability, solidity, foundation. I would claim that architecture was used . . . against and despite itself, as society

¹³⁹ Giulio Carlo Argan, *On the Typology of Architecture*, in *THEORIZING A NEW AGENDA FOR ARCHITECTURE: AN ANTHOLOGY OF ARCHITECTURAL THEORY 1965–1995*, at 242, 254 (Kate Nesbitt ed., 1996).

¹⁴⁰ Colquhoun, *supra* note 138, at 73.

¹⁴¹ VENTURI, BROWN & IZENOUR, *supra* note 34, at 133.

¹⁴² See *Announcement, the Case Study House Program*, ARTS & ARCHITECTURE, Jan. 1945, at 37, 37–41 (the Case Study House program, which ran from 1945 to 1966, proves that efficiency and frugality were the banner words of the day, as well-known architects like Eero Saarinen and Pierre Koenig were commissioned to design model homes as part of the housing boom spurred on by the return of soldiers from World War II).

¹⁴³ H.R. REP. NO. 101-735, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6944.

tried to employ it as a means to stabilize, to institutionalize, to establish permanence. Of course, this prevailing ideology meant that architecture had to ignore the other terms of its equation (i.e., to be nothing but “the artful building of spaces” . . .), or to coincide with frozen rituals of occupancy—a court of justice, a hospital, a church, even the vernacular one-family house—in which the rituals of the institution were directly reflected in the architectural spaces that enclosed them.¹⁴⁴

In turn, if we are truly keen on promoting creative possibility on an earth that remains ever-shifting, then we should avoid totalizing narrativistic impulses to subdivide, to dialectize, to neatly categorize, to abstract-and-filter. While a world of chaos may be well-near undesirable, a world without possibility is simply unimaginable. We may all think of buildings as refuge most of our lives. Transcending that notion is grace.

¹⁴⁴ TSCHUMI, *supra* note 85, at 18.

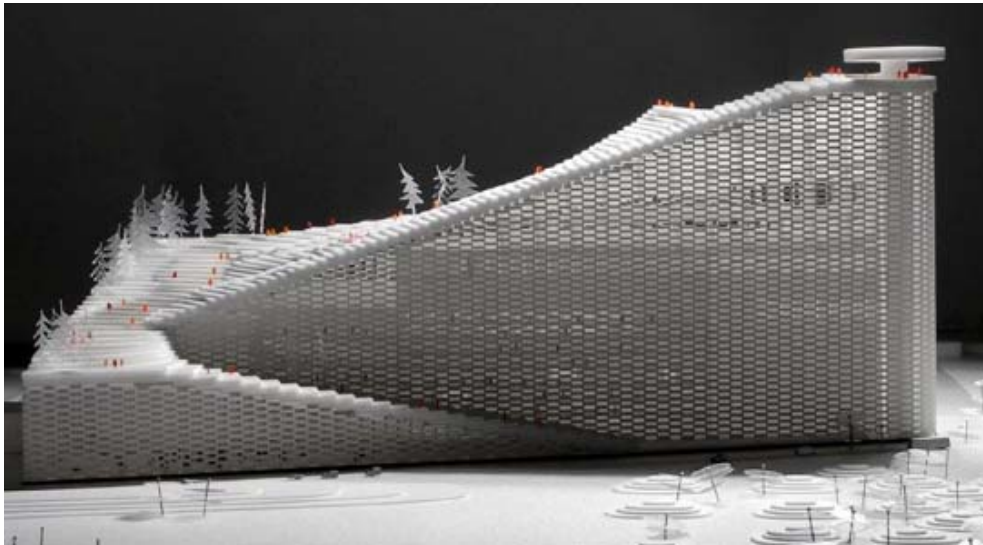
APPENDIX 1: OMA, PROPOSAL FOR THE WHITNEY MUSEUM



The Cat's Paw

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

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



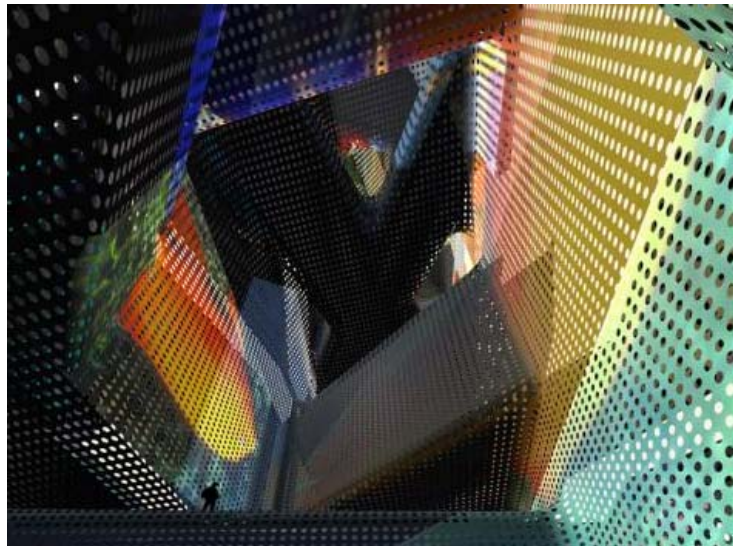
Skin as Ski Resort

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

APPENDIX 3: MVRDV, PROPOSAL FOR THE EYEBEAM INSTITUTE



Exterior



Interior Voids

Source: MVRDV (<http://www.mvrdv.nl/#/projects/170eyebamnewyorkmediagalaxy>)