This paper was written for a Fall 2008 architecture course, “Design and Knowledge Production,” taught by Professor Izabel Gass. The course is aimed at producing works to be published in the architectural journal *Manifold*. My research examines how copyright applies to the unique discipline of architecture, and, in particular, to architectural works. The interdisciplinary research I’ve done would have been impossible without the wide range of resources available at Fondren Library. Throughout the course of my research, Fondren Library served as a crucial reference point from which my paper could delve into new, uncharted areas of multidisciplinary synthesis. Fondren’s tools allowed me to produce a paper that is actually publishable (in the forthcoming *Manifold* Issue 4).

Searching the Avery Index for “copyright” revealed 134 articles that had been written related to the topic since 1890. Roughly half of these articles were available in Fondren’s physical journal collection. These articles were scanned and utilized as critical research material that allowed me to gain a grasp of what kind of discussion related to copyright had already taken place in the discipline of architecture. Though copyrights tend to be held by the creators – the architects – themselves, these creators seem to be generally murky on the details of copyright. Many architectural journal articles that mention copyright evidence this level of confusion even in their titles: “What does your copyright really mean?” “Whose copyright?” “It’s my copy, right?” Many of the articles were written around the times that new copyright legislation was established (1909, 1976, 1991). Most of the discussion is factual, aimed at explaining the laws governing architectural drawings and built works to practicing architects. Much of the discussion centers on how to protect designs from being stolen by clients. There were few articles that evaluated the efficacy or appropriateness of current copyright legislation to the discipline. Thus the Avery Index not only provided me with source material upon which to build, but also confirmed that my research was covering new ground in the field of architecture.

Furthermore, Fondren provided access to a large collection of books on copyright, intellectual property law, cultural theory, and economics. My research relied heavily upon these texts to gain a grasp of how copyright has developed in both the U.S. and other countries. Since the TRIPS Agreement in 1994, copyright is increasingly become an international issue that is tied to the global free trade zone. A number of Fondren’s books in this section addressed the international implications of copyright, allowing me to take this global scale into consideration. However, in order to maintain a narrower, more thorough focus, the paper primarily concentrates on aspects of copyright legislation in the U.S. and how they relate to the world. The government documents section of Fondren was crucial in finding primary sources on U.S. copyright law.
The U.S. Code itself was examined as well. LexisNexis Congressional was utilized to find transcripts of committee hearings on topics such as architectural works, fair use, and digital media. LexisNexis Academic provided full-text online access to several crucial law review articles that examined architectural copyright in detail.

Finally, Fondren offered a comprehensive collection of books by and about architect Rem Koolhaas (largely housed in the Brown Fine Arts Library). These books were mined for relevant quotes and projects by Koolhaas, which provided insight into contemporary architectural practices to support arguments throughout the paper.

Time and time again throughout the semester, access to Fondren Library facilitated the in-depth, cross-disciplinary analysis necessary to conducting this research. Many sections, resources, and tools of Fondren Library were called upon to verify and strengthen my paper’s arguments. The information resources available at Fondren allowed me to determine an appropriate course of research and follow through on this intellectual endeavor. I was able to gain an understanding of copyright law’s origins and evolution in terms of guiding principles and specific statutes and cases. I was able to track down what discussion of intellectual property rights in the field of architecture had already taken place. I was able to reference the full scope of architect Rem Koolhaas’ publications and projects. The wide range of resources available at Fondren Library made this in-depth study not only possible, but publishable. Fondren Library served as a crucial reference point that facilitated, informed, and enriched my research into copyright’s effects on architecture.
This paper questions the applicability of current legal standards of copyright to architectural works. Copyright law, as currently written, does not address the unique needs and design practices common to the field of architecture. For example, in architecture, the appropriation of existing design strategies in new built works is common, and should not be seen as a copyright infringement. Secondly, architectural works integrate aesthetics and utility in ways that are often difficult to separate, therein complicating the legal distinction between patents (intended for utilitarian objects) and copyrights (intended for artistic productions). Furthermore, architectural works are not usually meant to be mass-produced and are difficult to copy, thus bringing into question the need to regulate their reproduction. The desire to create connections with the surrounding context of a built work is a fourth argument against the copyrighting of architectural works. This paper problematizes architecture’s position as a copyright protected field, synthesizing information from intellectual property law, cultural theory, economics, and architecture, using the works of prolific architect Rem Koolhaas as key examples. Copyleft thought and antirivalry policies are defined and proposed as alternative solutions to copyright law in the domain of architecture.
Architecture in the Marketplace of Ideas: Copyright and its “Chilling” Effects

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Copyright is a body of laws that gives the creator of a work, for a limited term, control over the use of that work. Copyright does not cover ideas themselves, only the manner in which they are expressed. The law, in its definition of the term, has dubbed copyright an “engine of free expression”; the primary function of which is to provide “the economic incentive to create and disseminate ideas.”\(^1\) The role of copyright in the field of architecture is a relatively recent one. Copyright protection was extended to architectural drawings around the beginning of the twentieth century. Since then, most countries have also extended protection to “architectural works” themselves. This paper argues that copyright is an imprecise fit for regulating architectural works because of long-established traditions of borrowing in the field, the close integration of aesthetics and utility in architectural works, the difficulty in copying an architectural work, and the importance of creating coherence between independent works through contextuality. The projects and writings of culturally immersed architect Rem Koolhaas will be examined to highlight ideas of creation, borrowing, and use in contemporary architectural practices. Though copyright serves an important function in other disciplines, copyright’s applicability to architectural works is less clear, and should be reevaluated to ensure the best outcome for creators and users of architectural works alike.

Traditions of Borrowing

Architectural drawings have been protected by U.S. copyright law since 1909 as “writings of an author.” In 1991, with the passing of the AWCP (Architectural Works Copyright Protection) Act, Congress granted protection to built architectural works themselves. (Figure 1) During the AWCP Act hearing in 1989, several prominent architects and groups, including

\(^1\) U.S. Congress, “Fair use: its effects on consumers and industry, 6.
Michael Graves and the AIA, expressed concern that the act might impede architects’ ability to draw inspiration from existing buildings, stating, “Our concern is that the well-accepted traditions of reference and limited borrowing of elements and details should be suppressed.”\(^2\) Congress passed the act, however, aligning architectural copyright with the more restrictive international Berne Convention treaty regarding Protection of Literary and Artistic Works. The United States joined the Berne Convention in 1989 in an attempt to curtail huge financial losses suffered by U.S. copyright owners in foreign countries due to a lack of a common copyright agreement.\(^3\) It is significant to note that the impetus for copyrighting architectural works did not come from industry demand.\(^4\) On the contrary, architects expressed apprehension about the passing of the AWCP Act.

The AWCP Act protects “the overall form [of a building] as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”\(^5\) From construction details to wholesale building types, architecture, as a discipline, derives benefits from information exchanges. Construction and implementation methods need to be mutually available in architecture for both pragmatic reasons (allowing iterative refinements of performativity and function) as well as aesthetic reasons (creating coherent communities and responding to cultural precedents). As was pointed out at the AWCP Act hearing, architecture retains a greater need to reference both historical and contemporary precedents vis-a-vis other fields. Koolhaas openly acknowledges the dependence of his work on extant figures. For instance, Koolhaas describes his “sampling” of the designs of Modernist architect Mies van der Rohe quite overtly in a letter to the client for his Video Bus Stop project (1991): “I still think an

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\(^2\) Greenstreet and Klingaman, 178.

\(^3\) Ibid.

\(^4\) Su, 1862.

\(^5\) US Congress, Title 17, Chapter 1, Section 101.
impossibly dignified abri – like Mies V.D. Rohe meets Decaux – could be interesting. So no fake marble, real marble.” Referencing Mies’s “dignified” use of asymmetrically placed planes of marble and cruciform, chromium plated columns allows Koolhaas to imbue the mundane experience of waiting for a bus with a subtle cultural and historic resonance. (Figures 2, 3) Koolhaas’ borrowing here is crucial for reasons beyond pure function: it creates an opportunity for the built world that we all inhabit to engage in conversation with current and past cultures.

Copyright is not intended to protect “individual standard features” of an architectural work. Koolhaas highlights the difficulty in differentiating between standard and non-standard features with “Typical Plan” (SMLXL). Koolhaas presents ‘typical’ plans of American central core/open plan office buildings without architect or building name (identified only by address) to make the point that the authors are dematerialized—rendered invisible—by work so undifferentiated from the norm (Figure 4):

Typical Plan is to the office population what graph paper is to a mathematical curve. Its neutrality records performance, event, flow…. Typical Plan is as empty as possible: a floor, a core, a perimeter, and a minimum of columns…What insecurity triggered the crisis of Typical Plan?...Suddenly, the graph blamed the graph paper for its lack of character….An environment that demanded nothing and gave everything was suddenly seen as an infernal machine for stripping identity.  

These seem the type of “standard” elements to which copyright denies protection. In contrast, Koolhaas supplies the architect’s and building’s name for European “atypical” plans (Figure 5):

In Europe, there are no Typical Plans. In the twenties, European architects fantasized about offices. In 1921, Mies imagined the ultimate atypical plan in Friedrichstrasse.  

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8 Ibid, 348.
Are these projects to be interpreted as “non-standard” by copyright law? Koolhaas then takes on placing a “typical plan” in Europe as a hypothetical project (Figure 6):

Morgan Bank is an attempt at a typical plan in Europe….it undergoes a minimum of adaptation to perform certain urbanistic duties…otherwise the building is simply abstract office space…The proportion typical/atypical plan is itself atypical: a typically European 50/50 split.\(^9\)

Copyright, with its struggle to define standard and non-standard features, is left stymied by a project like the Morgan Bank.

The legal distinction between appropriation and originality itself has flaws. It is difficult to imagine any work of art that could claim absolute originality and deny any citing of precedents. Koolhaas wonders about this idea of a cultural blank slate in *Tabula Rasa Revisited*:

And then we had a very strong urge to make a new beginning. But the notion of a new beginning – starting from scratch, the tabula rasa – had been taboo ever since Le Corbusier’s brutal attempt with the Plan Voison to scrape everything away at once.\(^10\)

Borrowing functions as a mechanism of allows cultural heritage to serve as a source of inspiration for future generations of architects. As Koolhaas states, “I wanted to resist that commercial pressure and — where interesting or relevant or plausible — maintain an interest in ‘old’ things.”\(^11\)

Strict applications of copyright to the field of architecture could have a chilling effect on this kind of interest in old things. In the legal world, “chilling effect” refers to the stifling of legitimate free speech activity by vague or overbroad laws. Though U.S. copyright law attempts to carve out some space for creative appropriation (along with educational use, critical reviews,

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\(^9\) Ibid, 350.
\(^11\) Koolhaas, Interview with Sigler, online.
and parodies) through fair use, the line of what constitutes infringement is not always clear. The fair use doctrine weighs the use of a work against a highly subjective list of four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Fair use tempers copyright’s exclusive rights on the grounds of preserving the Constitutional purpose of copyright: promoting “the Progress of Science and the Useful Arts.”

US copyright law has been described by Congressmen as ultimately commercial law aimed at maximizing the number of creative works being produced. Access to existing works (to aid in the creation of new works) must therefore be balanced with the economic incentive that comes with exclusive rights. In attempting to strike this difficult balance, courts have tended to view singular or limited edition appropriation art as fair use, while not allowing multiple-reproduced adaptations (such as a Warhol print that has been transformed and silkscreened on coffee cups produced in multiple). The reasoning is that if the creation of multiple derivative works could offer substantial revenues to the creator of the original work (through licensing), then allowing their use not only harms that specific creator, but also signals to other artists that forgoing licensure is acceptable. Temporarily accepting this economic model, it would seem that appropriation techniques applied in architectural works constitute singular uses, and thus might tend, like singular or limited edition appropriation art, to be seen as fair use. But since the

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12 Numerous other countries have similar doctrines (i.e., Canada’s “fair dealing” doctrine).
13 US Code: Title 17, Chapter 1, Section 107. “Limitations on exclusive rights: Fair use.”
14 Bettig, 26.
16 Landes and Posner, 326.
17 Landes, 9.
18 Landes, 23.
revenue generated by the sale of even one architectural work is quite high, it is difficult to guess how the courts would rule in a particular case. Fiona Macmillan (professor of law at University of London) points out that, in the long term, a purely economic approach to copyright interpretation could lead to disasters such as environmental degradation and the introduction of oppressive laws. That said, in the mean time, borrowing in architecture has cultural and social benefits that are overlooked by a purely financial cost-benefit analysis.

Fair use also protects parodies and critical reviews, such as a negative newspaper review of a play. Architecture that criticizes or parodies existing works would seem to constitute a parallel type of fair use. It becomes interesting to note that the law differentiates between parodies that are aimed at the inspiring work (which constitute fair use due to the difficulty in negotiating a license with the copyright holder) and parodies that employ an existing work as a “weapon” at society at large (which do not constitute fair use). The work of contemporary architects, so much of which references preexisting projects and commentates on society in either subtle or overt ways, seems difficult to classify in these terms. Such subtle nuances in the aims of parodies are seen by Rushton, among others, as impossibly murky grounds for legislation. Consider OMA’s hypothetical “Study for the Renovation of a Panopticon Prison” (1979-81). Created by Jeremy Bentham in 1791, the panopticon is a design for a building that utilizes one-way surveillance to induce efficient production at schools, factories, hospitals, and prisons alike. (Figure 6) Koolhaas’ proposed revision relies on the precedent of the panopticon remaining legible, yet it also crosses out the central guard tower, thus pointedly removing the key to its function. (Figure 7) Thus Koolhaas’ hypothetical renovation of a “clearly outdated

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20 Legislators argue that one would have an easier time negotiating a license or could pick an alternate work that would perform the same function. (Rushton, 59.)
21 Rushton, 59.
architectural object…ridicule[s] 100 years of ‘progress.’” Is this a parody aimed at the panopticon itself, or is it aimed at the society that has employed it? The point here is moot since Bentham’s work predates architectural copyright. Yet Koolhaas’ inventive reconfiguration illustrates the freedoms that are at stake by applying copyright, with its chilling effects, to architectural works.

Koolhaas has been heralded as an architect who immerses himself in contemporary culture (see Delirious New York, Atlanta, Content, Mutations) with aims of formulating a new architecture. While critical architecture is perceived as oppositional and dialectic, Koolhaas’ approach has been characterized as creating new alternatives. Koolhaas’s international design firm, Office of Metropolitan Architects, openly seeks to integrate architecture, urbanism, and cultural analysis. As Koolhaas puts it, he found “an option beyond ‘hating’ society and wanting to destroy it.” In order to facilitate creativity and innovation in the field, all of these options should be available in the architect’s tool box: opposing, inverting, parodying, transforming, synthesizing, or duplicating societal norms and precedents.

The open texture of fair use serves as a strength to many disciplines, in that the doctrine operates as a dynamic keystone that can adapt to technological advances such as the internet. The downside to this ambiguity, however, is that the outcomes of particular cases can be contradictory. Roger vs. Koons, for instance, determined that artist Jeff Koons’ use of a copyrighted photograph of a group of puppies to create four derivative sculptures (entitled “A String of Puppies”) did not constitute fair use. The solution implied by the court’s decision is that appropriation artists resign themselves to negotiating licensure fees for all source material in

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23 Somol and Whiting, 73.
24 Koolhaas, Interview with Sigler, online.
26 Landes, 24-25.
order to avoid risking litigation. Tracking down copyright holders can be costly and time-
consuming, however, and a particular copyright owner may not be willing to negotiate if he or
she doesn’t approve of the intended use. It therefore seems that the uncertain protection granted
by fair use is inadequate to satisfy the high need for borrowing in the field of architecture.

Separating Aesthetics from Utility

Copyright does not cover utilitarian works, only artistic ones. Patents, which are both
harder to obtain and have a shorter duration, cover utilitarian works. The shorter term covering
utilitarian items is meant to allow for incremental functional improvements within an industry.27
Unlike music or art, in which the claim of the artist is proof enough for copyright protection,
architecture has the added responsibility of directly satisfying utilitarian needs. Michael Graves,
in his statement at the AWCP Act hearing, characterized these two facets of architecture as
“internal” and “poetic.” The “internal” is that which is “intrinsic to building in its most basic
form—determined by pragmatic, construction, and technical requirements.”28 Everything else is
the “poetic language of architecture responsive to issues external to the building, and
incorporat[ing] the three-dimensional expression of the myths and rituals of society.”29 A stated
objective of Congress in creating a distinct category of copyright protection for architectural
works was to avoid the confusion of the separability test used in evaluating useful objects.30
Unfortunately, though, “useful” and “aesthetic” have merely been reworded as “internal” and
“poetic.”

27 Proffitt, “Poetry or Production,” online.
28 Su, 1865.
29 Ibid.
30 Ibid.
The AWCP Act has been described as an attempt to strike a middle ground between international demands that buildings receive copyright protection, and the economic rationale held in America that buildings, as functional articles, fall outside the scope of copyright law.\textsuperscript{31} The terms of the Berne Convention for the Protection of Literary and Artistic Works (an international agreement governing copyright first accepted in Berne, Switzerland in 1886) dictate that buildings receive copyright protection, but it leaves the scope of the protection up to each member nation. Congress’ solution, then, was to extend protection to the “poetry” of buildings, but not their functionally required elements. This attempt at compromise, however, involves several points of ambiguity that set up the potential for much legal confusion and inadequacy.

Separating functional aspects of a building from the aesthetic is often difficult if not impossible. Architectural works cannot achieve a total conceptual separation between utility and aesthetics. In fact, in many works these two are intentionally intertwined. Koolhaas describes his “Study for the Renovation of a Panopticon Prison” as a complex interaction of programmatic, metaphoric, formal, and political issues: “the idea of culture as a system of continuously revised paradigms…bond[s] the utilitarian to the conceptual.”\textsuperscript{32} Are buildings whose form is ostensibly entirely derived from function protected by copyright? Or do they suffer from the lack of protection borne by “purely infrastructural” efforts (cloverleaf interchanges, bridges, streets)? Congress reasoned that these “important elements of this nation’s transportation system” do not require copyright protection as an incentive for the creation of new works.\textsuperscript{33} The hybridization between landscape, urbanism, architecture, and infrastructural systems would seem to argue against such an abrupt distinction.

\textsuperscript{31} Proffit, “Poetry or Production,” online.
\textsuperscript{32} Koolhaas, \textit{SMLXL}, 251.
\textsuperscript{33} Ibid., 1863.
Like many architects, Koolhaas sees the value in mining, rather than reinventing or replacing, existing diagrams of urban and social organization. Koolhaas’ typological canvas is broad, including the traditional plaza, courtyard, and street, but also more recent developments like the skyscraper.\(^\text{34}\) Both utilitarian and aesthetic aspects of these typologies evolve through incremental improvements over the years by various designers. Koolhaas points to the skyscraper in particular as an emblem of our time: “It is one of the rare 20\(^\text{th}\) century buildings that is truly revolutionary: it offers a full inventory of the fundamental modifications – technical and psychological—that are caused by life in the Metropolis.”\(^\text{35}\) Copyright law interprets architectural typologies such as the skyscraper as ideas, rather than expressions of ideas, thus allowing them to remain in the public domain. Specific expressions of the skyscraper, however, are protected by copyright.

Of recent note is the high-profile case of *Thomas Shine vs. David Childs/SOM*. Shine claimed that David Child’s Freedom Tower design proposal was copied from a design Child observed while on the student Shine’s final review jury at Yale University. (Figures 8a, 8b, and 8c) Though the suit was ultimately settled outside of court, it is a landmark case as one of the few architectural copyright cases involving something other than suburban tract homes. The case presented the court with the issue of separating aesthetic (protected) from utilitarian (unprotected) elements in a skyscraper. The court basically ignored and avoided this ambiguous issue by applying the imprecise and simplistic “total concept and feel” test of substantial similarity to architectural works. Determining substantial similarity is one of the most debated questions in copyright law, and courts have developed several possible tests. “Total concept and feel,” in which a lay person’s evaluation of two works as being substantially alike is proof


\(^{35}\) Koolhaas, “Life in the Metropolis, or, the Culture of Congestion,” 322.
enough of infringement, serves as the norm in comparing simple works such as greeting cards. Daniel Su (writing as a J.D. candidate in *Northwestern University Law Review*, 2007) argues this test’s vagueness and subjectivity render it inappropriate for evaluating such complex subject matter as architectural works. In *Shine vs. Childs*, the court skipped an alternate approach, known as analytic dissection, because it thought it would overlook original arrangements of unprotected elements. Analytic dissection, which developed in cases involving computer software, employs a three-step method: abstraction (in which independent features of the allegedly copied program are isolated), filtration (in which unprotected elements are removed from the inquiry), and comparison (in which the remaining features are compared with the defendant’s allegedly copycat program). *Apple Computer, Inc. v. Microsoft, Inc.* (1994) employed a variation of analytic dissection to compare two GUIs (graphical user interfaces). Su offers the *Apple* test as a clear option that does check for unique combinations of these elements. In the *Apple* case, Apple (the plaintiff) was asked to identify those elements of its interface that it was alleging Microsoft had stolen. The court also checked for a virtually identical copying of Apple’s unprotected design elements. Although the case was ultimately settled outside of court, the court ruled that the plaintiff did have grounds for pursuing the suit.

Architecture, as a discipline that hybridizes complex functional demands (such as program, site, climate, and building codes) with creative techniques, seems to have more in common with software programming than with greeting card design. Specifically, the design of GUIs (graphical user interfaces) involves balancing aesthetics with functional constraints such as the programming language employed, technical capabilities of hardware, and interoperability

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36 Su, Daniel, “Substantial Similarity and Architectural Works: Filtering out ‘Total Concept and Feel.’”
37 Ibid., 1868-74.
Both GUIs and architecture deal with the interaction between people and space, whether virtual or physical. Both reference a library of preexisting design elements in creating new works. Su argues that the relatively narrow scope of protection provided by the Apple test is appropriate to the low demands for copyright as a form of creative incentive in the field. Others, such as Matsuura, argue that copyright protection for GUI aspects of software is far too limited and inconsistent to be effective. Noting that the architectural industry did not itself demand protection via copyright, I would agree with Su that a narrow scope of copyright protection is the most needed in the field of architecture at this time. I would go further, however, and question whether copyright’s role in architectural works is even appropriate or beneficial to the discipline. The precedent set by *Shine vs. Childs* of employing “total concept and feel” seems to imply that courts do not have an adequate understanding of how to analyze infringement of architectural works.

Difficult of Copying

Architectural works are created as customized services for a client; costs are generally recouped through the one-time sale of a building design. The costs of producing an architectural work are often absorbed by an individual or a small group. The cost of public buildings, though, can be borne by a large group of citizens. As Koolhaas adroitly comments about his own Seattle Public Library: “Are there any taxpayers left who haven’t been in the building?” Rather than being fine-tuned for mass-production, architectural works are the product of an author’s

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38 Ibid., 1868-76.
39 Ibid., 1882.
40 Matsuura, 74.
41 Koolhaas, Interview with Rahner.
synthesis of a number of highly specific factors such as surrounding infrastructure networks, buildings, and plazas, hydrology and topography, solar orientation, population density, neighborhood characteristics, and cultural surroundings.\textsuperscript{42} For these reasons, direct copying of an architectural work is unusual. Copying an architectural work is a highly intensive effort in terms of time, energy, and money. The creativity incentive of copyright (which functions to ensure the creator of an easily pirated work that it won’t be copied) is thus greatly diminished in architecture. It would follow that the scope of copyright could be quite narrow, or nonexistent, in the field. In other words, neither aesthetic nor functional aspects of buildings need the economic incentive of banned copying to promote their production.

Functional aspects of computer software programs, termed “literal” elements, are granted protection because of the relative ease of copying a software program. The economic benefits to the copyright holder gained by barring copying are seen as outweighing the associated industry-wide slowdown of software development.\textsuperscript{43} Architectural works, however, are not as easily replicable. It is argued that disciplinary refinements of functional works do more industry-wide economic good than harm to individual copyright holders. By this economic cost-benefit analysis, the copying of functional works of architecture is seen as acceptable.

Though intellectual property, once created, has the potential for an infinite lifetime, contemporary copyright law is based on the idea of copyrights of finite duration, after which a work enters the public domain. This conception of copyright as a statutory right of limited duration, rather than a natural right of infinite duration, highlights the primacy of both cultural progress and revenue generation over exclusive rights. Copyright’s length was internationally

\textsuperscript{42} It should be pointed out that, though “fine” architecture tends to be designed for a specific set of parameters, many architecture firms exist solely by designing easily reproducible tract houses. Legislators have remarked that these tract housing cases “have little if anything to do with enabling the creator of an expressive work to recoup his fixed costs” and therefore conceptually belong in the realm of trademark law. (Landes and Posner, 101-102)

\textsuperscript{43} Proffitt, “Poetry or Production,” online.
standardized in 1994 to “author’s life + 50 years.” The US, however, went one step further with the “Copyright Term Extension Act” (1998), heavily lobbied for by Disney and other corporations, which increased the term to “author’s life + 70 years.” (Figure 9) Architectural works, when created (as is often the case) as works for hire, are protected under a potentially even longer term of 120 years after creation. However, this presents a problematic situation in the architectural discipline, as most buildings do not last 120 years. Copyright’s current duration thus carries with it an inherent risk of creating “orphan works” (copyrighted works that have outlasted the copyright holder and entered the public domain, but aren’t available due to physical decay of the work). The issue of orphaned architectural works raises questions as to whether the need to reference the intellectual commons is currently being satisfied by the 100+ year delay in availability of material.

Multiple cultural economists have commented that an expansion of copyright’s scope primarily benefits investors over individual creators themselves. In the music industry, copyright largely benefits publishers, performance rights organizations, record companies, and broadcasters over creators. Repeated mergers since the 1970s have augmented the concentration of copyrights in the hands of a few. Indeed, in an increasingly global world in which people, ideas, and processes have begun to replace land, labor, and capital as the primary tools for production, these conglomerates wield a great deal of power. These groups have increasingly pressed their agendas in copyright and royalty disputes involving music, media, and other industries. Copying an architectural work, however, as evidenced by the lack of cases that have been brought about since the passing of the AWCP Act in 1991, seemingly arouses less concern over negatively impacting the market value of existing works. Legislators have remarked on

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their surprise about this fact.46 Interestingly, the relatively few legal cases regarding architectural copyright have largely been brought about by builders or developers against one another.47 In other words, the copyright law that was intended to protect the creative work of an artist is primarily being invoked between third parties that handle the works as commodities. This trend, then, begins to mimic what has occurred in the recording industry.

Critics of copyright have argued that the concentration of music copyrights in the hands of a few monopolistic corporations has led to the promotion of exclusive “stars” instead of a diverse range of talents.48 As Koolhaas has observed, “There is such a complete, across-the-board commodification [of architecture] today that expectations have shifted from [architecture as] a didactic experience to an entertainment.”49 Frank Gehry’s Guggenheim Museum in Bilbao, which is viewed by Bilbao officials as touristic bait, is a prime example of architecture serving as a franchise and a promotional tool. Commodifying architectural copyrights would bring no benefits to architects themselves. Such a travesty instead would benefit third party investors and could result in a less diverse, more limited number of “sellable” design options. It has been pointed out that copyright’s purported role in incentivizing creativity has not been conclusively demonstrated. The Classical Era has been cited as one of the most creative periods of musical innovation in history – with no effective copyright legislation in place.50

In the information age, however, intellectual property has become far too valuable of a product to go unregulated. Intellectual property (ideas, music, expressions) is generally described by economists as nonrivalrous goods (goods that may be consumed by one consumer without preventing simultaneous consumption by others). Rivalrous goods, such as land, cars, 

47 Greenstreet and Klingaman, 179.
48 Macmillan, 121.
49 Koolhaas, Interview with Sigler, online.
50 Tschmuck, 218.
and computers, are those whose consumption by one consumer prevents simultaneous consumption by other consumers. Musical works are considered nonrivalrous goods since they can be transferred as “bits” and enjoyed simultaneously by an unlimited number of consumers. (A CD is considered a temporary rivalrous manifestation of music.) As with rivalrous goods, there must be some incentive for creating nonrivalrous ones. But unlike rivalrous goods, there is no fear of a nonrivalrous good being used up. Due to their different natures, the means for controlling a rivalrous good is not necessarily appropriate for nonrivalrous goods. Most often, intellectual property law governs nonrivalrous goods, and private property law governs rivalrous goods.

Are the primary products of architecture, like all copyrighted fields, the nonrivalrous goods (the drawings—which can be transferred as bits—and the design intentions)? And is the physical realization (construction) merely a temporary rival manifestation? If so, perhaps Koolhaas’ response to the question “How long do you hope this building will last?” is understandable in its apparent apathy: “First of all, that’s not really a question that any architect I know ever focuses on. So that’s really not a question I’m concerned with.” His response suggests that, for him, the nonrivalrous good is the essence of an architectural project – and the building just a temporary, even inconsequential, incarnation. But this building is generally what is enjoyed by consumers – not the drawings. Unlike CDs, buildings are not intended to be mass-produced. A building is governed by private property laws: it is bought and owned by a client, who is usually not the creator herself. Is the building then a rivalrous good? If so, does it need to be governed by intellectual property laws? It seems unclear if the system of control usually

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53 Koolhaas, Interview with Hawthorne, online.
granted to nonrivalrous goods (intellectual property law) should apply to architectural works (as rivalrous goods that are already governed by real property law).

Economics offers another classification in terms of “excludability” (the ability of producers to detect and prevent uncompensated consumption of their products). A musical work, for example, is intended to be excludable since one must purchase or license it to use it. An architectural work could be either excludable or non-excludable, depending on whether it is a public or private building, or whether you must pay to enter it. Private buildings, though, can remain visible from public property, making certain aspects, such as their exterior, non-excludable. Since copyright serves to limit access to excludable goods through licensing and purchasing, its applicability to built architectural works seems less clear than its applicability to architectural drawings.

Contextuality

Copyright begins to pin down an intellectual, non-material good (information) with spatial constraints (a creative work is governed by the laws of its country of origin) and temporal constraints (that same work is also defined by its date of creation, followed by a term of copyright). Architectural copyright legislation is given to protecting the building as an object in space and time. One of many unintended consequences of this attitude is the AWCP Act’s evaluation of works on a building-by-building basis. The immediate implication is that buildings should be designed with an eye to difference from their surrounding context — which precludes opportunities to create visually harmonious neighborhoods and districts. Koolhaas has described OMA’s “Programmatic Lava” (unbuilt, 1992) as intertwined with its host city of Yokohama, Japan: “Our scheme, to a large extent, had to complement this future city, or at least it had to be
Architecture relies on contextuality (cultural, spatial, temporal, conceptual, virtual) for coherence. It thus seems an unfortunate oversimplification that a building gains protection as it becomes more unique.

Copyright seems slave to the idea that duplication yields identical copies with no distinguishable original. Copyright thus fails to recognize a wide range of postmodern practices by implying that re-contextualizing an object leaves the object itself unchanged. Baudrillard’s object-value system provides insight here. Baudrillard argues that objects have no innate value, but are imbued with value through four different processes: functional, economic, symbolic, and sign. Baudrillard’s consideration of the broad range of uses that an object may have suggests that a sound, painting, or built work undergoes a transformation of identity when it is copied into a new context (of any kind). Furthermore, architecture is unique in that it involves the creation of real property: buildings that constitute improvements to land. Therefore, even in the rare case of exact duplication, the site context of a work is always changed. A duplicated architectural work takes on new meaning from its new location. As applied to architecture, copyright is primarily a visual vehicle: it calls two visually identical works or features duplications. It fails to consider other ways that an object may have been recontextualized (functionally, economically, symbolically, culturally, spatially, temporally, or conceptually) to derive new meaning.

Conclusion: Consensual Copyright, “Copyleft” Thought, and Antirivalry

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54 Koolhaas, “Programmatic Lava,” SMLXL, 1217.
55 Baudrillard, For a Critique of the Political Economy of the Sign.
Applying copyright law to architecture opens a Pandora’s box of conflicts, from originality and appropriation to function and aesthetics. The strict enforcement of copyright (by prohibiting derivative works, for example) would fragment the architectural discipline into a near-oblivion of firm-against-firm antagonisms and failures. By stubbornly restricting transformative appropriation in other disciplines, copyright legislation has, in many ways, begun to stifle today's artists. Current copyright law purports to promote freedom of expression by providing economic incentive for creators. Copyright protection of architectural works seems to do more to stifle creativity than to promote it. As Koolhaas has noted, “today's architecture is subservient to the market and its terms. The market has supplanted ideology.” Economic reconciliations, however instrumentally resoluble, are fundamentally inadequate for assessing the proper course of action. Copyright law is in desperate need of reevaluation to determine if its regulation of architectural works is accommodating the needs of this unique user community and is functioning, beyond rhetoric, as an “engine of free expression.”

Koolhaas, in his study of contemporary cities, brings up a faith in the general public to regulate itself:

If all these cities are now so similar, it probably means people want them that way…Maybe we should stop looking for any kind of glue to hold cities together. In cities like Houston [and Atlanta], people have found, largely without the help of architects, other forms of coherence.

An alternative way of thinking about governing architectural works might prove more effective. Copyleft thought has emerged as an alternative to copyright that allows for appropriative or collaborative techniques. Copyleft refers to a whole class of licenses which preserve and propagate a freedom to modify their contents within certain restrictions (less

56 Koolhaas, Interview with Matussek and Kronsbein, online.
57 Koolhaas, in Kwinter, Conversations with Students, 40-41.
stringent and stifling than traditional copyright). Copyleft licenses are capable of granting and restricting rights in a more adaptable fashion than traditional copyright. Some licenses allow editing of a work, others duplication. Many require that derivative works be released under the same licensing terms. This open source licensing model provides for faster, more efficient revisions of technical releases, and greater freedom of expression in artistic enterprises.

Knowledge management in architecture has traditionally had more in common with the shareware model (in which users have unrestricted, free usage, but are not authorized to view or modify source code). In this sense, the library of general construction and detailing knowledge (i.e. the coding language) is considered common ground, but individual blueprints (programs) are proprietary. Intra- and inter-disciplinary teams employ small-scale versions of collaborative design development, but typically resort to consulting fees to cover exchanges of valuable information. In contrast, the music industry has a stricter definition of ownership in which musical works are treated as private property to be exchanged through licensing and purchasing. Copyleft movements such as Creative Commons have begun, however, to favor an environment of mutual free exchange to benefit the field as a whole, challenging the assumed relationship between private and intellectual property rights. Works of architecture, like publicly released record albums, seem to imply some degree of trade-off between control of use and public consumption.

If architecture, as a discipline, were to move toward an open source model, its creative products (architectural drawings and works) would be reconstituted as “antirivalrous” goods. As described by Steven Weber, antirivalrous goods are created by a process of reciprocal exchange for mutual benefit.\(^{58}\) In other words, everyone would benefit from having open access to architectural designs. Since the field of architecture does not currently rely on licensing fees,\(^{58}\) Weber, Steve, *The Success of Open Source*. 
there would be no loss of licensing income for creators. One weakness of open source code for
the software industry is fragmentation, or the creation of multiple versions of an original source
code that do not effectively mesh with each other.\textsuperscript{59} In architecture, this detriment would
become an advantage by creating a diversity of branching design paths. There would be no
chilling effects, no risk of litigation- just open access to a library of designs, details, expressions,
and ideas that would serve as the primordial ooze of future designs.

\textsuperscript{59} Matsuura, 40.
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Appendix 1: Illustrations

Figure 1: Changes in US Copyright law, 1900 to Present

(© 2009 Jessica Tankard)
Figures 2a and 2b: Rem Koolhaas, Video Bus Stop

Figure 3: Mies Van der Rohe, Barcelona Pavilion


2 http://www.e-architect.co.uk/barcelona/barcelona_pavilion.htm (© adrian welch / isabelle lomholt)
Figure 3: Typical Plans

Figure 4: Atypical Plans

Figure 5: Morgan Bank (OMA/Rem Koolhaas) ⁵

“The proportion typical/atypical plan is itself atypical: a typically European 50/50 split.” ⁶

⁶ Ibid.
Figure 6: Panopticon, Jeremy Bentham

Figure 7: Study for the Renovation of a Panopticon Prison, Rem Koolhaas

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8 Ibid, 244, 246.
Figures 8a, 8b, and 8c: Comparisons of David Childs’ Freedom Tower proposal (left) with Thomas Shine’s Olympic Tower design (right)
Figure 9: Graphical Representation of the Duration of Copyright

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