

FREEDOM OF PANORAMA: A COMPARATIVE LOOK AT INTERNATIONAL RESTRICTIONS ON PUBLIC PHOTOGRAPHY

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I. INTRODUCTION

Freedom of panorama, also called panorama freedom, refers to the right to take photographs of public spaces and use such photo-

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graphs for personal or commercial purposes.¹ In theory, it attempts to balance various property rights and other proprietary interests with the importance of allowing reasonable freedom for photography in public places. Generally, copyright law is the typical vehicle to address panorama freedom, although other laws related to trademark or national security may also restrict public photography. In addition to copyright fair use, the interpretation of panorama freedom in local law defines the rights of anyone daring enough to take photographs outside in public places, including tourists, professional photographers, independent documentary filmmakers, and even Hollywood movie studios. It defines a fairly bright-line range of photographer rights that work apart from the more ambiguous right of fair use and often applies even before fair use becomes an issue. Although, unlike fair use, it is a right that remains somewhat unknown or misunderstood by many who might inadvertently violate its local application, especially when posting photographs on the internet.

The United States has taken a very narrow view in its approach to freedom of panorama in comparison to many other jurisdictions.² Thus, this freedom is more limited in the United States than in many other countries.³ This Article seeks to explore the balance struck in United States law by contrasting it with the approach taken in other jurisdictions, concluding that the United States Congress ought to adopt a more expansive view of the importance of panorama freedom. Congress should begin to respond to this deficiency by expanding the scope of 17 U.S.C. § 120(a)⁴ to include more than just architectural works. Part II of this Article takes a brief look at some recent legal developments related to panorama freedom arising out of a dispute between Hollywood and the Roman Catholic Archdiocese of Rio de Janeiro to provide some real world background. Part III explores the scope of freedom of panorama under the copyright laws of various jurisdictions, with a focus on its application in the United States. Part IV briefly examines some related restrictions on public photography through trademark law. Part V includes a discussion of certain re-

1. *Freedom of panorama*, STATEMASTER.COM, <http://www.statemaster.com/encyclopedia/Freedom-of-panorama> (last visited Jan. 31, 2011); *Panormafreiheit*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Panoramafreiheit> (last visited Jan. 31, 2011). Panorama freedom is a direct translation of the term "Panoramafreiheit," a term used in German copyright law. David Seiler, *Gebäudefotografie in der EU—Neues vom Hundertwasserhaus*, PHOTOPRESSE, Feb. 2006, at 16, available at <http://www.fotorecht.de/publikationen/hundertwasserhaus3.html>; *Freedom of Panorama*, WIKIMEDIA COMMONS, http://commons.wikimedia.org/wiki/Commons:Freedom_of_panorama (last visited Jan. 31, 2011).

2. See *infra* Part III.

3. See *infra* Part III.

4. 17 U.S.C. § 120(a) (2006).

strictions on public photography based on national security interests and terrorism concerns. Finally, Part VI offers a brief conclusion.

II. A BRIEF LOOK AT CURRENT EVENTS

On February 26, 2010, the *Hollywood Reporter* posted a story on its legal blog entitled, *Lawyer: Studio Must Pay for Destroying Jesus Christ*.⁵ The blogosphere quickly picked up and ran with the story, despite an apparent lack of additional information beyond that included in the initial article. The Roman Catholic Archdiocese of Rio de Janeiro threatened to sue Columbia Pictures for infringing its exclusive rights in Christ the Redeemer.⁶ However, before we go too far, it should be clear that this was not a dispute about rampant atheism in Hollywood. In fact, it was not really about religion at all. In reality, the Archdiocese threatened to sue the movie studio for allegedly infringing its copyright in the iconic statue overlooking the city of Rio when it included it in a recent film, *2012*, without licensing the appearance from the church.⁷

The Archdiocese commissioned artist Paul Landowski to complete the statue of Christ the Redeemer in 1931.⁸ The cultural icon subsequently became world famous and has made a number of Hollywood appearances over the years. In fact, the Archdiocese claimed it rarely refuses licensing requests, but objected to the film's treatment of the statue—utter destruction.⁹ The studio claimed it had obtained a proper license from Landowski's estate through the Artists Rights Society after the church's refusal. Apparently, however, some ambiguity existed about who really owned the right to prevent the statue from cinematic destruction at the hands of directors like *2012* director Roland Emmerich.¹⁰ In the end, it appears the church really just wanted Columbia Pictures "to publicly declare that it did not intend to cause offense."¹¹

Perhaps the fact that a major movie studio may have failed to attain a proper license for its use of the statue's likeness, or the fact that such statues can be copyrighted in the first place, does not really make a big difference in the grand scheme of things. However, copyright and other laws that threaten to restrict the ability of indepen-

5. Matthew Belloni, *Lawyer: Studio Must Pay for Destroying Jesus Christ*, THE HOLLYWOOD REPORTER (Feb. 26, 2010, 9:36 AM), <http://reporter.blogs.com/thresq/2010/02/2012-lawsuit-christ-the-redeemer.html>.

6. *Id.*

7. *See id.*

8. *Id.*

9. *Id.*

10. *See id.*

11. *Id.*

dent documentary filmmakers, photographers, and the general public (e.g. tourists) to take photographs in—and use the resulting photographs of—public spaces are potentially overly restrictive and may not properly support the basis for their existence in the first place. As one commentator put it, “Public photographs have a copyright problem because they are both unavoidable for photographers depicting public places and facial violations of copyright.”¹² Public spaces—imagine any urban intersection—almost undoubtedly contain vast numbers of copyrighted material and proprietary trademarks.¹³ Additionally, due to the ambiguous nature of relevant defenses, or rights, such as copyright’s fair or *de minimis* use provisions, it has become difficult to determine in advance if the photographer has a right to photograph something in the public space and subsequently publish the photograph for various purposes.¹⁴ Because of the inherent ambiguities in determining fair or *de minimis* use of copyrighted material, and the expense of defending even tenuous claims through litigation, many documentary filmmakers and photographers have been coerced into paying licensing fees as a form of self-insurance against potential lawsuits.

Consumer access to high quality imaging and distribution technologies, which has blossomed in recent years, has only made the situation more problematic.¹⁵ What was prohibitively expensive to many consumers only a few years ago has now become available at a fraction of the earlier cost.¹⁶ This rapid change in the imaging landscape has provoked an explosion in the ranks of aspiring and increasingly successful filmmakers and photographers.¹⁷ For only a few hundred dollars, consumers can now buy digital cameras that produce images good enough to create high-quality prints, post online, or sell commercially through stock photography agencies, to magazines, or via their own websites. Many of these images, however, likely contain protected subject matter, especially if taken in public.¹⁸ Perhaps surpris-

12. Andrew Inesi, *Images of Public Places: Extending the Copyright Exemption for Pictorial Representations of Architectural Works to Other Copyrighted Works*, 13 J. INTEL. PROP. L. 61, 63 (2005).

13. *See id.* at 64 (stating “Copyrightable works are unavoidable in many of our public places, especially in urban areas. Advertisements are placed on every conceivable surface, from bus benches to shop windows to billboards. Newspapers, magazines, and posters are displayed prominently at newsstands on every street corner. Murals, sculptures, and other pieces of public art are widespread. Even buildings, clothing fabric designs, and jewelry are copyrightable, at least in part.”) (footnotes omitted).

14. *See id.* at 66, 71-81.

15. *See id.* at 67-71 (discussing “Technology Makes Legal Action Against Consumers More Likely”).

16. *Id.* at 63, 68-69.

17. *Id.* at 63.

18. *See Inesi, supra* note 12.

ing to many, the subsequent use of an image taken in a publically accessible space may potentially infringe a number of copyrights or trademarks, violate some right of privacy, or even infringe a national security interest. Because of the exponential growth in consumer image creation in public spaces and mass distribution of the resulting images via the internet, laws that restrict the taking or distribution of photographs in public places have become more burdensome on creativity than when originally enacted.¹⁹ Thus, the United States needs to rethink the current balance between exclusive intellectual property rights and access to the public view.

III. PANORAMA FREEDOM UNDER COPYRIGHT LAW

A. BALANCING EXCLUSIVE RIGHTS AND PHOTOGRAPHY IN PUBLIC SPACES

Copyright is an economic right, at least in the United States.²⁰ Many countries also regard copyright as encompassing an author's moral right.²¹ The aim to promote artistic creation and dissemination of creative works by ensuring authors the economic and moral incentives required to spur such creativity is undoubtedly a necessary and beneficial objective. However, in some cases, the law can go too far—or perhaps not far enough. Architecture provides a fitting example. The evolution of architectural copyright in the United States and United Kingdom provides a valuable glimpse into how different legislative bodies have balanced the competing interests of public photography (or panorama freedom) and exclusive intellectual property rights in slightly different ways.

Architectural works, although now protected in member states of the Berne Convention, have not always benefited from copyright protection, and even now do not enjoy the same level of protection through copyright as other categories of works.²² This limited protec-

19. See Inesi, *supra* note 12, at 63.

20. See Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 1049 (1993) (stating “Historically, the world’s two dominant copyright regimes have differed significantly . . . [E]videnced by the tension between the moral rights doctrine, which originated in countries following the civil law system, such as continental Europe, and the notion of copyright as an economic right, which dominates the Anglo-American system.”) (footnotes omitted); see also Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 68 (2007) (stating “Philosophically, the American limitation of copyright to economic rights has been understood as an expression of Benthamite utilitarianism and Lockean labor theory, while the European focus on moral rights has been characterized as an emanation of Kantian or Hegelian personhood theory.”).

21. Miller, *supra* note 20, at 1049; Rigamonti, *supra* note 20, at 68.

22. See Vanessa N. Scaglione, Note, *Building Upon the Architectural Works Protection Copyright Act of 1990*, 61 FORDHAM L. REV. 193, 193-95 (1992).

tion is evident from legislation that expressly exempts photographers from liability for photographing works of architecture visible from publicly accessible areas and subsequently distributing their images to the public.²³ Interestingly, though perhaps not surprisingly, there have been some notable efforts internationally to create licensing restrictions on commercial photography of various buildings and other structures visible from publically accessible spaces.²⁴ These attempts at restricting panorama freedom aim to create additional revenue streams for the entities claiming rights, by expanding copyright to protect ancient structures,²⁵ covering an existing structure with a copyrighted art installation,²⁶ and attempting to claim trademark rights in the building's appearance.²⁷

B. DERIVATIVE COPYRIGHT IN PHOTOGRAPHS OF BUILDINGS

Copyright protects works "based upon one or more preexisting works"²⁸ as "derivative works."²⁹ Under United States copyright law, derivative works are protectable as long as the author copied or used the underlying material legally³⁰ and contributed more than trivial artistic variations to support a finding of independent originality.³¹ As one oft-cited opinion expressed it, "[a]ll that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"³² Additionally, the copyright protection afforded a de-

23. Such as § 120(a) of the U.S. Copyright Act, 17 U.S.C. §§ 101-810.

24. See *infra* Parts III(C), IV.

25. In 2007, the Egyptian government attempted to copyright the cultural landmarks of the country, including the Pyramids at Giza and the Sphinx. *Egypt 'to copyright antiquities'*, BBC NEWS (Dec. 25, 2007, 11:15 PM), http://news.bbc.co.uk/2/hi/middle_east/7160057.stm.

26. The company charged with upkeep for the Eiffel Tower has claimed copyright in a lighting display covering the tower, thus restricting photographs of the tower taken at night with the lights on. *Eiffel Tower: Repossessed*, FAST COMPANY (Feb. 2, 2005), <http://www.fastcompany.com/blog/fast-company-staff/fast-company-blog/eiffel-tower-repossessed>.

27. See *infra* Part IV.

28. 17 U.S.C. § 101 (2006).

29. 17 U.S.C. § 103 (2006).

30. *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1118 (D. Nev. 1999); Marshall A. Leaffer, UNDERSTANDING COPYRIGHT LAW § 2.9[C] (1989).

31. 17 U.S.C. § 103(b) (stating "The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."); *Weissmann v. Freeman*, 868 F.2d 1313, 1321 (2d Cir. 1989); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980).

32. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951).

ivative work only covers the added artistic elements.³³ Photographs of existing works generally contain enough original expression to be protected as derivative works, unless the photographer has engaged in slavish copying of the original by creating “exact photographic copies.”³⁴ Photographs of preexisting works find their added creativity through a wide range of protectable attributes, such as arranging the subject matter, lighting, and angle, as well as through the selection of camera and lens.³⁵ Indeed, United States courts have found that photographers may independently copyright their photographs of public works of architecture as derivative works.³⁶

C. INCREASING RESTRICTIONS ON PUBLIC PHOTOGRAPHY INTERNATIONALLY

On Christmas Day in 2007, the BBC News reported that the Egyptian government was contemplating legislation that would copyright Egyptian antiquities, such as the Sphinx and Giza Pyramids, to provide revenues to fund conservation and restoration of important cultural treasures.³⁷ The proposed law would have prohibited commercial use of photographs of Egyptian antiquities, as well as the creation of life-size replicas.³⁸ Such a law would not readily pose a problem outside of Egypt, but the example illustrates an interesting attempt to copyright publically visible monuments, as well as an attempt to resurrect copyright protection (assuming copyright could have existed in the antiquities at their creation) for ancient cultural property.

33. *Weissmann*, 868 F.2d at 1321; *Durham Indus., Inc.*, 630 F.2d at 909.

34. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1269 (10th Cir. 2008); *The Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999). See also *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 712 (6th Cir. 2005), and 1 NIMMER ON COPYRIGHT § 2.08[E][1] (1998).

35. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884); *L.A. News Serv. v. Tullio*, 973 F.2d 791, 794 (9th Cir. 1992) (finding videotapes to be copyrightable due to conscious selection of camera lenses, exposures, viewer perspective and editing); *Tiffany Design, Inc.*, 55 F. Supp. 2d at 1119.

36. See *Pagano v. Chas. Beseler Co.*, 234 F. 963, 963-64 (S.D.N.Y. 1916) (copyrighting photo of New York Public Library and its surroundings); *Tiffany Design, Inc.*, 55 F. Supp. 2d at 1119.

37. *Egypt ‘to copyright antiquities,’ BBC NEWS* (Dec. 25, 2007, 11:15 PM), http://news.bbc.co.uk/2/hi/middle_east/7160057.stm.

38. Steven Stanek, *Can Egypt Copyright the Pyramids?*, NAT’L GEOGRAPHIC NEWS (Jan. 15, 2008), <http://news.nationalgeographic.com/news/2008/01/080115-egypt-copyright.html>. See also Jeffrey Fleishman, *EGYPT: Copyright the Pyramids?*, L.A. TIMES, <http://latimesblogs.latimes.com/babylonbeyond/2008/02/egypt-copyright.html>, and Gene Quinn, *Egypt Trying to Copyright Pyramids*, IPWATCHDOG (Feb. 19, 2008, 12:14 PM), <http://www.ipwatchdog.com/2008/02/19/egypt-trying-to-copyright-pyramids/id=117/>.

In France, the organization that oversees the Eiffel Tower implemented a particularly clever plan to create a new revenue stream by essentially resurrecting copyright protection over a monument in the public domain.³⁹ After the city of Paris repossessed the tower in 2003, the company charged with maintaining it installed a new and distinctive lighting display and copyrighted the lighting design.⁴⁰ Also, as early as 1992, the French courts had found copyright protection for the original lighting display installed in 1989.⁴¹ The tower remains in the public domain and photographers can freely photograph the tower during the day, but any images taken after the lighting installation is lit up at dusk are subject to copyright restrictions and licensing requirements.⁴²

D. EXCEPTIONS FOR PHOTOGRAPHERS UNDER UNITED STATES COPYRIGHT LAW

In 1990, the United States Congress passed the Architectural Works Copyright Protection Act⁴³ (“AWCPA”) in response to international pressure to fulfill obligations under the Berne Convention for the Protection of Literary and Artistic Works⁴⁴ (“Berne Convention”), which requires signatory nations to protect architectural works by copyright.⁴⁵ Prior to the AWCPA, United States copyright law protected architectural drawings as artistic works and also protected some sculptural and decorative aspects of architectural works, but did not protect the structures themselves.⁴⁶ This lack of protection emerged because “architectural works are in significant part utilitarian works, and it is axiomatic that the utilitarian aspects of creative

39. *Eiffel Tower: Repossessed*, FAST COMPANY (Feb. 2, 2005), <http://www.fastcompany.com/blog/fast-company-staff/fast-company-blog/eiffel-tower-repossessed>.

40. *Id.*

41. *Eiffel Tower*, WIKIPEDIA, http://en.wikipedia.org/wiki/Eiffel_Tower (last visited Nov. 5, 2010).

42. *Id.* See also *FAQ*, THE OFFICIAL SITE OF THE EIFFEL TOWER, <http://www.tour-eiffel.fr/teiffel/uk/pratique/faq/index.html> (last visited Nov. 5, 2010) (explaining “Q: Are we allowed to publish photos of the Eiffel Tower? A: There are no restrictions on publishing a picture of the Tower by day. Photos taken at night when the lights are aglow are subjected to copyright laws, and fees for the right to publish must be paid to the SETE.”).

43. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5089, 5128 (1990) (codified as amended in scattered sections of 17 U.S.C.).

44. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in Paris on July 24, 1971, 828 U.N.T.S. 221.

45. *Id.* at 227; *Leicester v. Warner Bros*, 232 F.3d 1212, 1217 (9th Cir. 2000); Inesi, *supra* note 12, at 82. See also H.R. Rep. 101-735, at 4-10. See also *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97, 109-10 (1st Cir. 2006) (discussing the legislative intent behind the AWCPA).

46. Inesi, *supra* note 12, at 82; Vanessa N. Scaglione, Note, *Building Upon the Architectural Works Protection Copyright Act of 1990*, 61 *FORDHAM L. REV.* 193, 195-96 (1992).

works are not protected by copyright.”⁴⁷ Indeed, the Copyright Act of 1976⁴⁸ (“Copyright Act”) explicitly denied protection to “useful articles,” defined as any “article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a ‘useful article.’”⁴⁹ Thus, pre-AWCPA, buildings were not protected because they were considered “useful articles” because of their “intrinsic utilitarian function.”⁵⁰ When it enacted AWCPA, however, Congress specifically chose to limit certain protections for architectural works.⁵¹ Section 120(a) of the Copyright Act made this exception clear:

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.⁵²

Buildings are defined as “humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos, and garden pavilions.”⁵³ Other structures, “such as bridges, cloverleaves, dams, walkways, tents, recreational vehicles, mobile homes, and boats,” are not considered buildings for purposes of the AWCPA.⁵⁴

Congress’s delineation of a bright-line rule with respect to photographic reproductions of architectural works embodied in buildings has been hailed as sparing judges from a common-law “morass of conceptual separability and its intrinsic aesthetic controversy.”⁵⁵ However, this bright-line rule only exempts reproduction and distribution of photographic impressions of buildings; it does not grant photogra-

47. Inesi, *supra* note 12, at 82 (footnote omitted).

48. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2006).

49. 17 U.S.C. § 101; *Leicester*, 232 F.3d at 1216-17.

50. *Leicester*, 232 F.3d 1212, 1216; PAUL GOLDSTEIN, COPYRIGHT § 2.15.1, 2:183 (2d ed. 1996) (“Structures built from architectural plans will often fail to qualify as pictorial, graphic, or sculptural works because their ‘intrinsic utilitarian function’ makes them ‘useful articles.’”).

51. See *Landrau v. Betancourt*, 554 F. Supp. 2d 102, 110-12 (D.P.R. 2007).

52. 17 U.S.C. § 120(a).

53. 37 C.F.R. § 202.11(b)(2) (2010); *Gaylord v. U.S.*, 595 F.3d 1364, 1381 (Fed. Cir. 2010).

54. 37 C.F.R. § 202.11(d)(1); *Gaylord*, 595 F.3d at 1381.

55. John B. Fowles, *The Utility of a Bright-line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in Leicester v. Warner Bros.*, 12 UCLA ENT. L. REV. 301, 302 (2005).

phers bright-line freedom to photograph other copyrighted objects, such as sculptures and art installations, in publically accessible areas (such freedom might be found, however, under related legislation in other Berne Convention nations). As such, § 120 of the Copyright Act only applies to public photographs that do not contain any third-party copyrighted material other than works of embodied architecture.⁵⁶ Of course, the defenses of fair or *de minimis* use may ultimately absolve the photographer from liability for infringement of copyright in many instances, but Congress should adopt a bright-line rule with respect to photographing other copyrighted works permanently placed in the public view.

In *Leicester v. Warner Brothers*,⁵⁷ the United States Court of Appeals for the Ninth Circuit ruled that an artistic work, in the form of a large sculptural work called the "Zanja Madre", which included a street wall and multiple towers in addition to its courtyard space, was part of an architectural work and thus subject to the § 120(a) exception for photographic reproduction. In that case, the artist who created the work sued Warner Brothers for including portions of his large-scale public art installation in the film *Batman Forever*.⁵⁸ The finished work consisted of various elements designed to tell an allegorical tale of the history of Los Angeles.⁵⁹ The work was originally commissioned as part of a development project to construct a twenty-four story office building in downtown Los Angeles, and its inclusion was meant "to recreate the feeling of traditional downtown streets in which buildings touch each other so as to create a continuous wall on both sides of the street."⁶⁰ The work also mimicked the facade of the building and shared "common artistic and architectural elements."⁶¹ To ensure the installation and that the building shared this common theme, Leicester and the building's architect worked together in some of the planning and development of the Zanja Madre.⁶² Warner Brothers obtained permission from the development company to use the premises for filming, and the building appeared in the film as the Gotham City Bank.⁶³ The Zanja Madre towers and street wall appear as background elements in a few scenes in the film.⁶⁴ Warner Broth-

56. Inesi, *supra* note 12, at 81.

57. 232 F.3d 1212 (9th Cir. 2000).

58. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1213 (9th Cir. 2000).

59. *Leicester*, 232 F.3d at 1214.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1215.

64. *Id.*

ers also created a miniature replica of the building and a portion of the Zanja Madre street wall for use in a special effects sequence.⁶⁵

In *Leicester*, the plaintiff claimed that his installation was a “unitary sculptural work,” distinct from the connected work of architecture.⁶⁶ Under pre-AWCPA copyright law, the plaintiff argued, his sculpture would have been protected as a sculptural work under 17 U.S.C. § 102(a)(5), and the enactment of § 120(a) should not have changed that result.⁶⁷ Thus, the classification of the work at issue was “critical” because of the more limited copyright protection afforded architectural works qualifying under § 102(a)(8).⁶⁸ Additionally, the plaintiff argued that his work was “conceptually separate” from the building⁶⁹ and therefore could retain separate copyright as a pictorial, graphic, or sculptural (“PGS”) work, notwithstanding the fact that it was “embodied or incorporated within a useful article”⁷⁰ (the building). As the Ninth Circuit recognized, courts have traditionally found independent copyright for PGS works incorporated into a useful article, such as “a carving on the back of a chair or an engraving in a glass vase.”⁷¹ Such protection extended only to the PGS features of a work that are capable of existing independently of the utilitarian aspects of the useful article.⁷² When making this sort of determination, courts have applied two forms of “separability” tests, seeking evidence that the claimed PGS work retained some degree of physical or conceptual separability from its embodying article.⁷³

However, in *Leicester*, the Ninth Circuit upheld the district court finding that the street wall and towers, including various decorative elements, were part of the building as a whole, and that the work was not conceptually separable from the building.⁷⁴ Importantly, it found that the towers and the building were part of an integrated concept,⁷⁵ and the street wall was an architectural element mandated by the ar-

65. *Id.*

66. *Id.* at 1216.

67. *Id.*

68. *Id.*

69. *Id.* at 1219.

70. *Id.* at 1219 n.3.

71. *Id.* at 1219 n.3 (citation omitted).

72. *Id.*

73. *See id.* (stating “Physical separability means that a ‘pictorial, graphic or sculptural feature incorporated into the design of a useful article . . . can be physically separated from the article without impairing the article’s utility and if, once separated, it can stand alone as a work of art traditionally conceived . . . Conceptual separability means that a pictorial, graphic or sculptural feature ‘can stand on its own as a work of art traditionally conceived, and . . . the useful article in which it is embodied would be equally useful without it.’”) (quoting PAUL GOLDSTEIN, COPYRIGHT § 2.5.3, 2:64-67 (2d ed. 1996)).

74. *Leicester*, 232 F.3d at 1218.

75. *Id.* at 1217.

chitectural agreement entered into with the Los Angeles Community Redevelopment Agency.⁷⁶ Indeed, the street wall and towers were “designed to appear as part of the building”⁷⁷ and the legal restrictions and architectural plans severely curtailed any artistic choice inherent in their design.⁷⁸

Based on these conclusions, the three judge panel found, in a fractured opinion only fully endorsed by its author, Judge Rymer, that § 120(a) applied and allowed Warner Brothers—and hence the public—to freely photograph the street wall and towers without requiring any license from the artist.⁷⁹ The other two judges, in their concurring and dissenting opinions, also sparred about whether AWCPA had “completely eliminated separate copyright protection for pictorial, graphic and sculptural works . . . that are a part of, but conceptually separate from, architectural works” in the first place.⁸⁰

This holding appears to be a strong endorsement of the public’s right to photograph at least some elements of the public space, namely architectural works and indistinguishable elements of public art associated with architectural works. However, the fact that § 120(a) exempts only architectural works continues to leave a huge burden on public photography rights. Suppose the court had found elements of Leicester’s towers conceptually separate from the building. On that assumption, two of the judges, Rymer (majority opinion) and Fischer (dissenting), would apparently have found that Leicester may have had a valid copyright infringement claim against Warner Brothers—or any other member of the public who had photographed the street wall or towers. Even without this assumption, § 120(a) obviously does not exempt photographers of monuments or other works of non-architectural art in the public space from copyright liability. The following case, a decision handed down by the United States Court of Appeals for the Federal Circuit in 2010, makes this point clear.

In 1990, nationally renowned sculptor Frank Gaylord started work on the Korean War Veterans Memorial in Washington D.C. under commission from the Army Corps of Engineers’ prime contractor, Cooper-Lecky Architects, P.C.⁸¹ The finished work, installed in 1995 on the National Mall, included nineteen stainless steel foot soldiers, landscaping, a mural, and granite plates to represent rice

76. *Id.* at 1218.

77. *Id.*

78. *Id.*

79. *See id.* at 1219-20.

80. *Compare Leicester*, 232 F.3d at 1225-26 (Fischer, J., dissenting), *with Leicester*, 232 F.3d at 1220-21 (Tashima, J., concurring).

81. *Gaylord v. United States*, 595 F.3d 1364, 1368 (Fed. Cir. 2010).

paddies at the soldiers' feet.⁸² Gaylord received copyright registrations in the soldier sculptures as their sole author.⁸³ Shortly after the installation, photographer John Alli took a number of photographs of the memorial, and sought to sell some of the final prints.⁸⁴ Before making his photographs available for purchase, he properly sought to acquire a license from the copyright owner of the memorial.⁸⁵ Alli contacted Mr. Lecky of Cooper-Lecky Architects, the memorial's contractor, and inquired about copyright ownership. After Mr. Lecky claimed outright ownership of the underlying copyrights, Alli agreed to pay a 10% royalty on the sales of his prints.⁸⁶ In 2002, the United States Postal Service decided to issue a commemorative stamp, in honor of "the 50th anniversary of the armistice of the Korean War," based on one of Alli's photographs of the memorial.⁸⁷ Alli licensed the use of his photograph for that purpose and told the Postal Service that it would also need to acquire rights on the underlying copyright from Mr. Lecky.⁸⁸ These arrangements eventually contributed to multiple successful lawsuits initiated by Gaylord for copyright infringement.

First, in 2006, Gaylord sued Alli for infringing his copyrights in the sculptures, resulting in a settlement agreement under which Alli agreed to pay 10% of his royalties, based on net sales, to Gaylord.⁸⁹ Also in 2006, Gaylord sued the Postal Service, which had issued approximately 86.8 million copies of the "Korean War Veterans Memorial" stamp, gaining the Postal Service millions of dollars in revenue from stamp collectors who never used the stamp for postage as well as from a number of additional commemorative retail items featuring Alli's photograph.⁹⁰ After trial, the Court of Federal Claims found that Gaylord was the sole copyright owner in the sculpture, that § 120(a) did not apply because the sculpture was not an architectural work, and that the government's use of the image constituted fair use.⁹¹

On appeal to the Federal Circuit, Gaylord challenged the trial court's determination of fair use, and the government challenged the inapplicability of § 120(a) to the public monument.⁹² In February

82. *Gaylord*, 595 F.3d at 1368-69.

83. *Id.* at 1369.

84. *Id.* at 1369-70.

85. *Id.* at 1370.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1370 n.2.

90. *Id.* at 1371.

91. *Id.*

92. *Id.*

2010, the Federal Circuit upheld the trial court's decision⁹³ that § 120(a) did not extend to public monuments. It also found that the government's use of the image on a postage stamp and related memorabilia did not constitute fair use.⁹⁴ In a passionate dissent, Judge Newman argued that the government contract required the copyright in the monument to vest with the United States, and that public monuments, "authorized by Congress . . . and paid for by appropriated funds," such as the Korean War Veterans Memorial, should be available to the government to use for governmental purposes.⁹⁵ Judge Newman stated, "[t]his holding is contrary to the contract provisions, contrary to statute for works done in the service of the United States, contrary to copyright law, and contrary to national policy governing access to public monuments."⁹⁶

Under these decisions, it appears clear that § 120 applies only to architectural works in a strict fashion. Other copyrightable works visible from public spaces remain subject to fuller copyright protections, although fair use rights would obviously apply in some circumstances. However, Congress's choice to limit the applicability of § 120(a) when implementing its Berne Convention obligations into United States copyright law stands in some contrast to the approach taken by other countries such as the United Kingdom and Brazil.

E. EUROPEAN UNION COPYRIGHT DIRECTIVE

The European Copyright Directive,⁹⁷ which implemented provisions from the World Intellectual Property Organization ("WIPO") Copyright Treaty,⁹⁸ expressly grants member states the right to limit copyright protections for works permanently situated in public places. Article 5, section 3(h) of that directive states that member states may limit copyright for the "use of works, such as works of architecture or sculpture, made to be located permanently in public places."⁹⁹

93. *Gaylord v. United States*, 85 Fed. Cl. 59 (Fed. Cl. 2008).

94. *Gaylord*, 595 F.3d at 1376.

95. *See id.* at 1381 (Newman, dissenting).

96. *Gaylord*, 595 F.3d at 1381.

97. Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related rights in the Information Society, 2001 O.J. (L 167) 10.

98. WIPO, *WIPO Copyright Treaty*, WIPO Doc. WO033 (Mar. 6, 2002).

99. Directive 2001/29/EC, *supra* note 97, at 17.

F. EXCEPTIONS FOR PHOTOGRAPHERS UNDER UNITED KINGDOM
COPYRIGHT LAW

The freedom of panorama provisions in Britain's Copyright, Designs and Patents Act of 1988¹⁰⁰ ("CDPA") provide for a much greater range of photographer freedoms than does United States law. Like the United States provisions in § 120(a) of the Copyright Act of 1976¹⁰¹ ("Copyright Act"), section 62 of the CDPA¹⁰² allows the making of graphic representations, photographs, or films of certain copyrighted works.¹⁰³ Section 62 of the CDPA also allows a cable broadcast to include a visual image of applicable works.¹⁰⁴ Unlike § 120(a)'s more limited scope, section 62 applies to buildings, sculptures, models of buildings, and works of artistic craftsmanship, as long as they are "permanently situated in a public place or in premises open to the public."¹⁰⁵ Interestingly, the application of this copyright limitation to sculptures would likely dictate a different result in the United Kingdom on the facts of *Gaylord v. United States*¹⁰⁶ or in the matter involving the Christ the Redeemer statue in Rio de Janeiro. Unfortunately, the only British case to thus far consider the scope of section 62's application chose to largely avoid the issue.¹⁰⁷ The provisions in the statute related to buildings and sculptures appear fairly unambiguous; however, defining a work of artistic craftsmanship under the CDPA has proved slightly more difficult.

Under United Kingdom copyright law, works of artistic craftsmanship constitute a distinct form of copyrightable "artistic works," alongside graphic works, photographs, sculptures, collages, and works of architecture. The CDPA does not provide a definition of what con-

100. Copyright, Designs and Patent Act 1988, c. 48 (Eng.) [hereinafter CDPA].

101. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2006).

102. See CDPA § 62 (providing:

Representation of certain artistic works on public display

(1) This section applies to—

(a) buildings, and

(b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.

(2) The copyright in such a work is not infringed by—

(a) making a graphic work representing it,

(b) making a photograph or film of it, or

(c) broadcasting or including in a cable programme service a visual image of it.

(3) Nor is the copyright infringed by the issue to the public of copies, or the broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of this section, not an infringement of the copyright).

103. CDPA § 62(2).

104. § 62(2)(c).

105. § 62(1)(a)-(b).

106. 595 F.3d 1364 (Fed. Cir. 2010).

107. *Shelley Films Ltd. v. Rex Features Ltd.*, [1994] EMLR 134 (Ch.) 143 (Eng.).

stitutes a work of artistic craftsmanship,¹⁰⁸ but case law provides some guidance.¹⁰⁹ In *George Hensher Ltd. v. Restawhile Upholstery (Lancs.) Ltd.*,¹¹⁰ Lord Simon declared that “[a] work of craftsmanship, even though it cannot be confined to handicraft, at least presupposes special training, skill and knowledge for its production” and “implies a manifestation of pride in sound workmanship—a rejection of the shoddy, the meretricious, the facile.”¹¹¹ This manifestation of craftsmanship must also exhibit artistic characteristics.¹¹² According to the opinion of Lord Simon in *Hensher*, protectable works might include hand-painted tiles, stained glass, wrought iron gates, and the more artistic and high-class products of the printing, bookbinding, cutlery, needlework and cabinet-making industries.¹¹³ Lord Kilbrandon further expounded that “[i]t must be possible to deduce the conscious purpose of artistic creation from the work itself,” although judges should not make judgments about artistic merit.¹¹⁴ Lord Reid explained that it might be important, but not necessary or conclusive, that the craftsman “intended that it should have an artistic appeal.”¹¹⁵ Lord Reid continued by stating:

[i]f any substantial section of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual, from looking at it, I would accept that it is artistic although many others may think it meaningless or common or vulgar.¹¹⁶

In the more recent case of *Lucasfilm Ltd. v. Ainsworth*,¹¹⁷ the English courts were asked to decide whether storm trooper helmets and other props created for the original *Star Wars* film were protectable as works of artistic craftsmanship. The court cited the New Zealand High Court for the proposition that:

[F]or a work to be to be regarded as one of artistic craftsmanship it must be possible fairly to say that the author was both a craftsman and an artist. A craftsman is a person who makes something in a skilful way and takes justified pride in

108. *Lucasfilm Ltd. v Ainsworth*, [2008] EWHC 1878 (Ch 2008), [2008] E.C.D.R. 17, ¶ 125, [2009] F.S.R. 2; (2008) 105(33) L.S.G. 24, *rev'd in part on other grounds*, *Lucasfilm Ltd v Ainsworth*, [2009] EWCA Civ 1328, [2010] E.C.D.R. 6, [2010] E.M.L.R. 12, [2010] F.S.R. 10, (2010) 33(4) I.P.D. 33021.

109. *George Hensher Ltd. v Restawile Upholstery Ltd.*, [1976] A.C. 64.

110. [1976] A.C. 64 (H.L.) (appeal taken from Eng.).

111. *George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd.*, [1976] A.C. 91 (H.L.) (appeal taken from Eng.) (Lord Simon, dissenting) (citations omitted).

112. *George Hensher Ltd.*, [1976] A.C. at 91.

113. *Id.* at 91-92.

114. *Id.* at 96-97 (Lord Kilbrandon, dissenting).

115. *Id.* at 78 (Lord Reid, dissenting).

116. *Id.*

117. [2008] EWHC 1878 (Ch) (Eng.), *rev'd in part on other grounds*, [2009] EWCA (Civ) 1328, [209] (Eng.).

their workmanship. An artist is a person with creative ability who produces something which has aesthetic appeal.¹¹⁸

The court said that Ainsworth, the designer of the storm trooper helmets, could “fairly be called a craftsman [because] he produces high quality products and has a justifiable pride in his work. He is not a slavish copier, or a jobbing tradesman.”¹¹⁹ However, since the purpose of the helmets was not to “appeal to the aesthetic” but rather “to give a particular impression in a film,” they were not works of *artistic* craftsmanship.¹²⁰

In any event, it remains clear that copyright law in the United Kingdom grants photographers, filmmakers, and graphic artists much more freedom to replicate the elements of the public view than § 120(a) in United States copyright law.

G. EXCEPTIONS UNDER BRAZILIAN COPYRIGHT LAW

Interestingly, considering the recent threat by the Archdiocese of Rio de Janeiro against Columbia Pictures, Brazilian copyright law provides very broad panorama freedom. Indeed, Article 48 of Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights¹²¹ provides, “[w]orks permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes.”¹²² This copyright limitation applies to any type of copyrightable work, and would clearly allow photographers broad panorama freedom to photograph sculptures permanently situated in a public space, such as Christ the Redeemer.

118. *Lucasfilm Ltd. v. Ainsworth*, [2008] EWHC 1878 (Ch) [131] (Eng.), *rev'd in part on other grounds*, [2009] EWCA (Civ) 1328, [209] (Eng.), *citing* *Bonz Group (Pty) Ltd. v Cooke* [1994] 3 NZLR 216 (HC).

119. *Lucasfilm Ltd.*, at [133].

120. *Id.* at [134]. The court continued by stating:

That was what Mr Lucas and Mr McQuarrie set out to do. It was no part of their purpose that it should in any way appeal as a piece of art; or that it should be admired for any aspect of its appearance as such; or that it should do anything more than what was necessary to give the correct impression of the character inside (and perhaps an environment) when used in a film (with all the assistance that the techniques of filming can do to enhance an impression). If one takes products of the Arts and Crafts movement as an exemplar, the helmet and armour share nothing of the conceptual purpose of such products.

Id.

121. Lei No. 9.610, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.2.1998 (Braz.).

122. *Id.* at 12.

IV. RESTRICTING PANORAMA FREEDOM THROUGH TRADEMARK LAW

Building owners have also attempted to restrict photographers by claiming trademark protection in distinctive building designs. Indeed, the Sydney Opera House Trust, established to manage the iconic Sydney Opera House in Sydney, Australia, has claimed a trademark in the “exact image” of the building in order to discourage commercial exploitation of the building’s image.¹²³ The Trust has been active in defending its trademarks.¹²⁴ Reportedly, sometime in 2007, photographer Simon Phipps took a photograph of the Opera House and uploaded it to iStockPhoto.com, a microstock photography agency owned by Getty Images.¹²⁵ iStock rejected the photograph from inclusion in its catalog on intellectual property grounds.¹²⁶ After inquiring further, Phipps got a response from the corporate counsel at the Trust, who explained that they object to any commercial uses of photographs of the Opera House, and that the Trust also owns a large number of images that they are happy to license to commercial users,¹²⁷ signaling the anticompetitive nature of the Trust’s claims.

In the United States, photographers have faced similar challenges. In 1996, professional photographer Charles Gentile began selling a poster featuring his photograph of Cleveland’s Rock and Roll Hall of Fame and Museum with the words “Rock N’ Roll Hall of Fame” and “Cleveland” printed on a black border.¹²⁸ The museum, which owned a registered service mark in the words “The Rock and Roll Hall of Fame,” sued Gentile for infringement of its trademarks in those words and the “distinctive” design of the museum’s building itself.¹²⁹

123. SYDNEY OPERA HOUSE, http://www.sydneyoperahouse.com/support/CaseStudy_Mallesons.aspx (last visited Nov. 6, 2010). See also Michael Atkins, *Rock and Roll Hall of Fame Redux: Can I Sell My Photo of the Sydney Opera House?*, SEATTLE TRADEMARK LAWYER (Jun. 10, 2007, 11:04 AM), <http://seattletrademarklawyer.com/blog/2007/6/10/rock-and-roll-hall-of-fame-redux-can-i-sell-my-photo-of-the.html>; Simon Phipps, *Opera House, Dawn; Copyright policy, Night-time*, WEBMINK (May 27, 2007, 8:43 PM), <http://www.webmink.net/2007/05/opera-house-dawn-copyright-policy-night.htm>; *Photographing the Sydney Opera House*, PETER BLACK’S FREEDOM TO DIFFER (Jun. 10, 2007), http://www.freedomtodiffer.com/freedom_to_differ/2007/06/photographing_t.html.

124. *E.g.*, Sydney Opera House Trust v. Trilynx Pty. Ltd., Case No. D2000-1224 (WIPO Admin. Panel 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1224.html>.

125. Michael Atkins, *Rock and Roll Hall of Fame Redux: Can I Sell My Photo of the Sydney Opera House?*, SEATTLE TRADEMARK LAWYER BLOG (June 10, 2007, 11:04 AM), <http://seattletrademarklawyer.com/blog/2007/6/10/rock-and-roll-hall-of-fame-redux-can-i-sell-my-photo-of-the.html>.

126. *Id.*

127. See Phipps, *supra* note 123.

128. *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 751 (6th Cir. 1998).

129. *Rock & Roll Hall of Fame & Museum, Inc.*, 134 F.3d at 751.

The museum claimed it had used the building design as a trademark, showing evidence that it produced and sold posters of the museum with similar text in its gift shop and that it used the building design on t-shirts and other items.¹³⁰ Importantly, in this case, the court found the museum's evidence unpersuasive,¹³¹ largely because the museum's depiction of the building design on its products varied broadly from item to item and did not "create a consistent and distinct commercial impression as an indicator of a single source of origin or sponsorship."¹³² Reversing the trial court's decision, the United States Court of Appeals for the Sixth Circuit stated that the building design, as presented in Gentile's photograph, did not serve "as an indicator of source or sponsorship."¹³³ Conversely, the court saw Gentile's work as "a photograph of an accessible, well-known, public landmark" and "not as a separate and distinct mark *on the good*, but, rather, as the good itself."¹³⁴ On remand, the district court granted summary judgment for the photographer.¹³⁵

V. I'M A PHOTOGRAPHER, NOT A TERRORIST! NATIONAL SECURITY LIMITS ON PUBLIC PHOTOGRAPHY

Both the United States and the United Kingdom have seen national security-focused legislation and law enforcement policies impact photographers' legitimate rights, whether directly or indirectly, due to poorly advised law enforcement agencies. The blogosphere has proved to be a fertile ground for discussion of the subject. In one United States example, subsequently reported on the blogs of the *Washington Post*¹³⁶ and *Wired*,¹³⁷ a photographer was stopped by law enforcement for taking photographs in the vicinity of a generic-looking suburban office building at 3701 North Fairfax Drive in Arlington, Virginia, the offices of the United States Defense Department's Defense Advanced Research Projects Agency ("DARPA").¹³⁸ Photographer Keith McCammon was stopped by a police officer and asked to

130. *Id.* at 751-52.

131. *Id.* at 754.

132. *Id.* at 754-55.

133. *Id.* at 754.

134. *Id.*

135. *Rock & Roll Hall of Fame & Museum v. Gentile Prods.*, 71 F. Supp. 2d 755, 765 (N.D. Ohio 1999).

136. Mark Fisher, *Secret Buildings You May Not Photograph, Part 643*, RAW FISHER (Jul. 17, 2007, 7:25 AM), http://blog.washingtonpost.com/rawfisher/2007/07/secret_buildings_you_may_not_p.html.

137. Noah Shachtman, *Don't You Dare Photograph Darpa HQ, DANGER ROOM* (Jul. 18, 2007, 8:29 AM), <http://www.wired.com/dangerroom/2007/07/dont-you-dare-pl/>.

138. Keith McCammon, *Do not photograph 3701 N. Fairfax Dr., Arlington, VA*, KWM (Jul. 11, 2007), <http://mccammon.org/keith/2007/07/11/do-not-photograph-3701-n-fairfax-dr-arlington-va/>.

provide personal identification information (including his social security number), and told to delete any photographs from his camera that might include the DARPA building.¹³⁹ Shortly thereafter, McCammon filed a complaint with the local police force. In response to McCammon's request for information, the Chief of Police informed him that, "the security of any such building is of great importance and every law enforcement officer is duty bound to investigate all suspicious activity."¹⁴⁰ Additionally, the Chief of Police told McCammon that officers are duty bound to respond anytime officers witness suspicious behavior, such as when an officer suspects a photographer has photographed a "government installation."¹⁴¹ The Arlington Police did not create a file on McCammon. However, they did pass along his information to DARPA's internal security agency.¹⁴² Elsewhere in the blogosphere, anecdotal evidence suggests that photographers have been arrested or threatened for taking photographs on public train platforms,¹⁴³ on commercial airplanes,¹⁴⁴ or in Washington D.C.'s Union Station,¹⁴⁵ among other places.

Photographers may be criminally liable for taking photographs that depict national security and defense material if they know the photographs will be disseminated by the media.¹⁴⁶ Criminal liability, including ten years of imprisonment, may arise under provisions in the United States Espionage Act.¹⁴⁷ The act prohibits gathering and disseminating information related to the national defense, including by photograph, for the "purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States."¹⁴⁸ The prohibition applies to:

139. Fisher, *supra* note 136; McCammon, *supra* note 138; Shachtman, *supra* note 137.

140. Letter from Daniel J. Murray, Acting Chief of Police, for Arlington, VA (Jun. 6, 2007), available at <http://mccammon.org/keith/wp-content/uploads/2007/06/20070612073533524.pdf>; Mark Fisher, *supra* note 136.

141. *Id.*

142. Fisher, *supra* note 136.

143. Carlos Miller, *Amtrak photo contestant arrested by Amtrak police in NYC's Penn Station*, PEXIQ (Dec. 27, 2008, 3:29 AM), <http://carlosmiller.com/2008/12/27/amtrak-police-arrest-photographer-participating-in-amtrak-photo-contest/>.

144. Carlos Miller, *The video that got a JetBlue passenger escorted off the plane in handcuffs*, PEXIQ (Sep. 30, 2008, 4:55 AM), <http://carlosmiller.com/2008/09/30/the-video-that-got-a-jetblue-passenger-escorted-off-the-plane-in-handcuffs/>.

145. Cory Doctorow, *Security guards threaten NPR photos with arrest for shooting panorama of DC's Union Station*, BOING BOING (May 13, 2008, 7:49 PM), <http://boingboing.net/2008/05/13/security-guards-thre.html>.

146. BERT P. KRAGES, LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES 43 (Michelle Perkins, ed., 2d ed. 2006). See also 18 U.S.C. § 793 (2006).

147. Espionage Act of 1917, 18 U.S.C. §§ 792-99 (2006).

148. 18 U.S.C. § 793(a)-(b). See also KRAGES, *supra* note 146, at 43-45.

any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense . . . or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency.¹⁴⁹

Additionally, the Economic Espionage Act of 1996¹⁵⁰ prohibits gathering and disseminating trade secret information related to products “produced for or placed in interstate or foreign commerce.”¹⁵¹ This potentially includes industrial trade secrets otherwise visible from places where the photographer has a right to be, since owners do not always need to maintain absolute secrecy of trade secret information to retain their rights.¹⁵² The Act carries stiff criminal penalties and photographers convicted under the act also risk loss of their equipment.¹⁵³

Similarly, the United Kingdom recently enacted the Counter-Terrorism Act of 2008,¹⁵⁴ which made it a crime to “elicit[] or attempt[] to elicit information about an individual who is or has been (i) a member of Her Majesty’s forces, (ii) a member of any of the intelligence services, or (iii) a constable, which is of a kind likely to be useful to a person committing or preparing an act of terrorism.”¹⁵⁵

Thousands of press photographers in the United Kingdom have actively opposed the new law, and there have already been reports of law enforcement allegedly abusing their rights under the legislation by “maliciously” stopping photographers from photographing in public places and confiscating cameras.¹⁵⁶ The European Court of Human Rights has also recently condemned the inappropriate use of the United Kingdom’s counter-terrorism stop and search powers against

149. 18 U.S.C. § 793(a).

150. Economic Espionage Act of 1996, 18 U.S.C.S. §§ 1831-39 (LexisNexis 2011).

151. KRAGES, *supra* note 146, at 45.

152. *Id.*

153. *Id.*

154. Counter-Terrorism Act 2008, c. 28 (Eng.).

155. *Id.* at § 76(1).

156. David Batty, *Photographers protest against police stop and search*, GUARDIAN.CO.UK (Jan. 23, 2010, 3:48 PM), <http://www.guardian.co.uk/uk/2010/jan/23/photographers-protest-stop-search-terrorism-police>; Mark Hughes & Jerome Taylor, *Warning: Do not take this picture*, THE INDEPENDENT (Dec. 3, 2009), <http://www.independent.co.uk/news/uk/home-news/warning-do-not-take-this-picture-1833127.html>; Richard Woods, *Photography Under Threat: The Shooting Party’s Over*, THE SUNDAY TIMES (March 7, 2010), <http://business.timesonline.co.uk/tol/business/law/article7050481.ece>.

photographers.¹⁵⁷ The court's judgment "highlight[ed] a lack of adequate parliamentary and legal safeguards against abuse."¹⁵⁸

In that case, police stopped and searched a press photographer while she was attempting to film a protest outside a Defence Systems and Equipment International Exhibition in East London, even after showing her press pass to the officers.¹⁵⁹ Despite only being held for a few minutes, the photographer "felt so intimidated and distressed that she did not feel able to return to the demonstration although it had been her intention to make a documentary or sell footage of it."¹⁶⁰ The European Court of Human Rights found that the brief detention violated the photographer's Article 8 right to a private life¹⁶¹ and may have also violated her right to liberty under Article 5 of the European Convention on Human Rights and Fundamental Freedoms.¹⁶²

VI. CONCLUSION

In conclusion, the United States limits the right of the public to photograph in public spaces much more than some other signatory countries to the Berne Convention. The exceptions to architectural copyright in § 120(a) of the United States Copyright Act¹⁶³ related to photographic reproduction are more limited than required under Berne Convention obligations. Considering the drastic change in photographic technology since the section came into force in 1990, Congress ought to adopt a more expansive view of the importance of panorama freedom, and should begin by expanding the scope of § 120(a) to include more than just architectural works. The bright-line guidance the section gives photographers and filmmakers in respect to architectural works provides some value beyond that provided by the more ambiguous case-by-case test of fair use. Because public photography has become such a ubiquitous aspect of our participant digital society and many of the uses put to public photography arguably meet the fair use or *de minimis* use tests, the United States ought to provide clear statutory guidance allowing (at least) these non-com-

157. Gillan and Quinton v. United Kingdom, App. No. 4158/05, 28 [2010] ECHR 28; Batty, *supra* note 156.

158. Alan Travis, *European court condemns police misuse of stop and search*, GUARDIAN.CO.UK (Jan. 12, 2010, 11:52 PM), <http://www.guardian.co.uk/uk/2010/jan/12/european-court-police-misuse-stop-search>. See also Gillan and Quinton v. United Kingdom at [87] ("the powers of authorisation and confirmation [and] stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, 'in accordance with the law' and it follows that there has been a violation of Article 8 of the Convention.")

159. Gillan, App. No. 4158/05 at [7], [9].

160. *Id.* at [9].

161. *Id.* at ¶ 65.

162. *Id.* at [55].

163. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2006).

mercial fair uses of copyrighted material visible and permanently situated in public places. In addition, other laws that restrict public photography, such as those related to national security, ought to be monitored closely due to their potential for unduly restricting the public's freedom of panorama.

