DEFINING "ARCHITECTURAL WORKS" IN EAST ASIA: INTELLECTUAL PROPERTY PROTECTION FOR LOCAL AND TRANSNATIONAL ARCHITECTURAL WORKS

By Min Son[*]

> Ah, to build, to build!
> That is the noblest art of all the arts.
> Painting and sculpture are but images,
> Are merely shadows cast by outward things
> On stone or canvas, having in themselves
> No separate existence. Architecture,
> Existing in itself, and not in seeming
> A something it is not, surpasses them
> As substance shadow . . . .[1]

Photoshop allows us to make collages of photographs and this is the essence of China's architectural and urban production . . . . Design today becomes as easy as Photoshop, even on the scale of a city.[2]

I. INTRODUCTION

As architectural practice becomes increasingly global and as more architects aspire to build internationally,[3] the rise of copyright related

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[1] HENRY WADSWORTH LONGFELLOW, MICHAEL ANGELO, A DRAMATIC POEM 25 (Houghton, Mifflin and Co. 1884).

[2] Kevin Holden Platt, *Zaha Hadid vs. the Pirates: Copycat Architects in China Take Aim at the Stars*, SPIEGEL ONLINE (Dec. 28, 2012, 12:48 PM), http://www.spiegel.de/international/zeitgeist/pirated-copy-of-design-by-star-architect-hadid-being-built-in-china-a-874390.html (Dutch Architect Rem Koolhaas commenting on the rapid growth of Chinese cities that led to the appearance of Chinese "Photoshop designers" who "copy and paste" architectural design).

[3] *See, e.g.*, Thomas Fridstein, *Global Game Plan*, DESIGN INTELLIGENCE (Oct. 10, 2012), http://www.di.net/ articles/global-game-plan; Vanessa Quirk, *The Countries Where Demand for Architects Outstrips Supply*, ARCHDAILY (Feb. 20, 2013), http://www.archdaily.com/333413/the-countries-where-demand-for-architects-outstrips-supply; Vanessa Quirk, *The 9 Best Countries for Architects to Find Work*, ARCHDAILY (Jun. 14, 2012), http://www.archdaily.com/243925/the-9-best-countries-for-architects-to-find-work.

lawsuits regarding architectural works are inevitable.[4] In particular, such lawsuits may raise the question as to whether the approach that different countries take toward complying with international standards adequately protect architects' copyrights.

For example, in less than ten years Iraqi British architect Zaha Hadid has built numerous works in more than forty-four countries,[5] including China, Japan, and Korea.[6] In March 2014, Hadid inaugurated the Dongdaemun Design Plaza in Seoul.[7] She recently finished the Wangjing Soho complex in Beijing in September 2014,[8] and is designing the New National Olympic Stadium in Tokyo.[9]

In 2013, the Wangjing Soho building became the subject of a copyright controversy when an allegedly plagiarized design appeared on the other side of China, set to finish construction before the original one.[10] Soon after international media reported the controversy, Zaha Hadid Architects reportedly initiated legal proceedings in China,[11] arguing that the "pirates got hold of some digital files or renderings of the project."[12] Regarding the Wangjing Soho phenomenon and the potential lawsuit, a Chinese law expert worried that "at present, the Chinese provisions on

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[4] Roger B. Williams & C. Richard Meyer, *Practicing in a Global Market, in* THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE 153 (Joseph A. Demkin ed., 2011), *available at* http://www.aia.org/aiaucmp/groups/ ek_public/documents/pdf/aiab028658.pdf.

[5] Oliver Wainwright, *Zaha Hadid Beyond Buildings: Architect Launches New Design Gallery*, THE GUARDIAN (May 23, 2013, 6:03 AM), http://www.theguardian.com/artanddesign/architecture-design-blog/2013/may/23/zaha-hadid-design-gallery.

[6] ZAHA HADID ARCHITECTS, http://www.zaha-hadid.com/zha-world (last visited Feb. 5, 2015).

[7] Amy Frearson, *Zaha Hadid's Dongdaemun Design Plaza Opens in Seoul*, DEZEEN MAGAZINE (Mar. 23, 2014), http://www.dezeen.com/2014/03/23/zaha-hadid-dongdaemun-design-plaza-seoul.

[8] Celia Mahon Heap, *Zaha Hadid Opens Wangjing SOHO in Beijing, China*, DESIGNBOOM (Sept. 21, 2014), http://www.designboom.com/architecture/zaha-hadid-wangjing-soho-beijing-09-20-2014.

[9] Andrea Chin, *Zaha Hadid: New National Stadium of Japan Venue for Tokyo 2020 Olympics*, DESIGNBOOM (Sept. 10, 2013), http://www.designboom.com/architecture/zaha-hadid-new-national-stadium-of-japan-venue-for-tokyo-2020-olympics.

[10] *See* Platt, *supra* note 2; *see also* Marcus Fairs, *Zaha Hadid Building Pirated in China*, DEZEEN MAGAZINE (Jan. 2, 2013, 9:41AM), http://www.dezeen.com/2013/01/02/zaha-hadid-building-pirated-in-china.

[11] *See* Sian Disson, *Time Running Out for Zaha Hadid Project as 'Pirates' Replicate Design of Wangjing SOHO*, WORLDARCHITECTURENEWS.COM (Jan. 7, 2013), http://www.worldarchitecturenews.com/index.php?fuseaction =wanappln.projectview&upload_id=21660; *see also* Xing Yihang, *Copying Architecture*, CRIENGLISH (Jan. 14, 2013), http://english.cri.cn/6909/2013/01/14/2724s743500.htm.

[12] Platt, *supra* note 2.

architectural works are too vague . . . and there is a lack of detailed regulations on the content and symbolic meaning of architecture."[13]

While experts had predicted such a phenomenon a few years ago,[14] the Wangjing Soho controversy clearly brought the architectural world's attention to whether an architect would be rewarded with adequate copyright protection in a transnational architectural practice setting.[15]

One of the most important issues transnational architectural practitioners face is confusion as to the scope of copyrightable architectural works in international settings because many countries take different approaches in defining such a scope. While the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[16] and the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[17] call for a minimum standard for international copyright protection, these international agreements leave it to individual member countries to enact legislation to meet such standards.[18] Thus, the approach different countries take toward complying with international treaties may result in varying scopes of protection for literary and artistic works, including works of architecture. In particular, an often overlooked but important outcome of the different approaches is the varying definition of "architectural works."

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[13] Jessie Chen, *Twin Buildings Appeared in Beijing and Chongqing*, CHINA INTELLECTUAL PROPERTY MAGAZINE (Sept. 6, 2012), http://www.chinaipmagazine.com/en/journal-show.asp?id=859.

[14] Platt, *supra* note 2.Experts had predicted such phenomenon a few years before, when Chinese firms were found to be posing as British architecture firms Broadway Maylan and Aedas in pursuing project bids with false information; "If Aedas and Broadway Maylan, why not [higher design profiles] like . . . Zaha Hadid?"

[15] *See* Anna Winston, *Five Things Every Architect Should Know About Copyright*, BDONLINE (May 2, 2013), http://www.bdonline.co.uk/five-things-every-architect-should-know-about-copyright/5053987.article; *see also* Vanessa Quirk, *The 10 Things You Must Know about Architectural Copyrights*, ARCHDAILY (Feb. 6, 2013), http://www.archdaily.com/328870/the-10-things-you-must-know-about-architectural-copyrights; Kelly Chan, *Parametric Panic: China's Zaha Hadid Clone and the Limits of Digital Design*, BLOUINARTINFO (Jan. 23, 2013), http://www.blouinartinfo.com/news/story/858379/parametric-panic-chinas-zaha-hadid-clone-and-the-lim its-of.

[16] Berne Convention for the Protection of Literary and Artistic Works, art. 2(1), Sept. 9, 1886, 828 U.N.T.S. 222 [hereinafter Berne Convention].

[17] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1), Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M 1197 [hereinafter TRIPS].

[18] Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105, 106 (2006).

For example, in some countries, architectural works include all types of buildings and structures,[19] whereas in the United States, for example, protectable architectural works include only inhabitable buildings.[20] In East Asian countries (i.e. Korea, China, and Japan), the definition of "architectural works" is absent in copyright law.[21] For instance, China has only recently dealt with a case asking whether architectural works are "works" protected by China's copyright law.[22] On the other hand, it is interesting to note that Thailand, which is in the same Germanistic law family as Korea and Japan, adopts a very detailed definition of architectural works.[23]

Moreover, an analysis of the language of the current copyright law of East Asian countries which all use Chinese characters and derivatives, may help explain the lack of detailed regulations on the content and symbolic meaning of architecture. As opposed to the language in European and American copyright laws, the language common in the law of East Asian countries emphasizes tangibility and exceptional creativity rather than originality.[24] The apparent high standard set by such language may add to the confusion and misunderstanding as to what constitutes protectable architectural works in East Asia.

This note argues that the lack of a coherent definition of "architectural works" in East Asian countries impedes the fundamental goal of copyright protection to promote creativity and to protect artists' rights. Also, the lack of a coherent definition may be contrary to international copyright protection standards such as the Berne Convention, since it may lead to inadequate protection of potentially qualifying architectural works.

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[19] *See Copyright Act 1968* (Cth) s 10(1) (Austl.); *see also* Copyright, Designs and Patents Act, 1988, c. 48, § 4(2) (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1988/48/data.pdf.

[20] Preregistration and Registration of Claims to Copyright, 37 C.F.R. § 202.11(b)(2) (2010) (defining protectable "buildings" within the meaning of the law 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, pergolas, gazebos, and garden pavilions").

[21] Choon-Sup Yoon, *Keonchukjeojakmului Soksunggwa Beomjue Kwanhan Yoenku* [*A Study on the Copyrightable Attributes and Extent of Architectural Works*], 25 DAEHANKEONCHUKHAKHOEJI [J. OF THE ARCHITECTURAL INST. OF KOREA] 107, 109 (2009).

[22] Beijing Taiheyateqiche Xiaoshou Fuwu Youxian Gongsi Yu Baoshijie Gufen Gongsi Qinfan Zhuzuo Caichanquan Jiufen Shangsu An (北京泰赫雅特汽车销售服务有限公司与保时捷股份公司侵犯著作财产权纠纷上诉案) [Porsche AG v. Beijing TechArt Automotive Sales & Service Co., Ltd.] (Beijing Higher People's Ct. Dec. 19, 2008) [hereinafter Porsche case].

[23] Copyright Act, B.E. 2537, 1994, § 4(4) (Thai.).

[24] Yoon, *supra* note 21, at 111.

As architectural practice becomes increasingly global, adoption of a more coherent definition for the term "architectural works," that takes cultural perspectives into account, becomes essential. The result will lead to better compliance with obligations under international treaties as well as further appreciation for transnational architectural practice and intellectual property law in general.

Part II of this note, therefore, examines the Berne Convention and TRIPS Agreement and the challenges of complying with them. Part III surveys how different countries approach the definition of "architectural works" and identifies potential limits and benefits of each approach. Finally, Part IV explores the reasons behind the narrow protection of architectural works in East Asian countries and considers possible suggestions for expanding intellectual property protection for architectural works.

II. THE BERNE CONVENTION AND TRIPS AGREEMENT

A. Obligations Under the Berne Convention and TRIPS Agreement

As the potential for copyright related lawsuits regarding international architectural practice increases, it is important to examine the international agreements that set the minimum protection standards, as well as the challenges of complying with those standards, in particular, the various approaches to defining the term "architectural works."

The Berne Convention is the most relevant legal instrument for copyright protection when it comes to architecture as it specifically mentions protection of architectural works.[25] It was adopted in 1886 to honor the rights of all authors who are nationals of the 168 contracting countries[26] that are party to the convention.[27] According to Article 2(1) of the Berne Convention, protected "literary and artistic works" include "works of . . . architecture . . . and three-dimensional works relative to . . . architecture."[28] However, the Berne Convention does not further define what types of structures constitute "works of architecture."

Another relevant international agreement in discussing copyright protection for architectural works is the WTO's TRIPS Agreement. With regard to protection of intellectual property works, the TRIPS Agreement simply says "[m]embers shall comply with Articles 1 through 21 of the

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[25] Berne Convention, *supra* note 16.

[26] *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/ wipolex/en/wipo_treaties/parties.jsp?treaty_id=15&group_id=1 (last visited Mar. 8, 2015).

[27] *Fact Sheet P-08: The Berne Convention*, THE UK COPYRIGHT SERVICE, http://www.copyrightservice.co.uk/ copyright/p08_berne_convention (last updated Dec. 6, 2011).

[28] *Id.*

Berne Convention (1971) and the Appendix thereto."[29] Hence, although the TRIPS Agreement expressly incorporates the Berne Convention as to architectural copyright protection, similar to the Berne Convention, it does not further define what constitutes an "architectural work."[30] Nevertheless, the TRIPS agreement is important because it provides member countries with the Dispute Settlement Body (DSB) of the WTO, a forum for resolving intellectual property disputes.[31]

B. The Challenges of Complying with International Treaties

The Berne Convention does not further define what "works of architecture" exactly are,[32] but leaves it up to each member country to enact legislation to meet the standards.[33] Because the Convention does not provide any guidance as to how member countries should protect architectural works or what an architectural work is, as a result, the countries are tasked with the rather heavy responsibility of essentially defining the terms of the Berne Convention.

Moreover, the challenge of determining the scope of the rights is heightened due to the principle of national treatment,[34] whereby countries must treat nationals of other countries the same way they treat their own nationals.[35] The principle of national treatment is one of the most important foundations of international conventions protecting intellectual property.[36] It is adopted in most of the important international conventions, such as the Berne Convention, TRIPS, the Paris Convention, the Rome Conventions, the Universal Copyright Convention, and NAFTA.[37] For example, Article 3(1) of the TRIPS Agreement states that each member country "shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with

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[29] TRIPS, *supra* note 17.

[30] *Id.*; *see also* Kirk W. Wilbur, *Renovating Architectural Copyright: The Case for Protection of Nonhabitable Structures*, 43 MCGEORGE L. REV. 461, 465 (2012).

[31] Wilbur, *supra* note 30.

[32] SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND § 8.47 (2d ed. 2005) ("[T]he meaning of the expression 'works of architecture' remains undefined in the Convention.").

[33] Holst, *supra* note 18.

[34] *Implications of the TRIPS Agreement on Treaties Administered by WIPO*, WORLD INTELLECTUAL PROPERTY ORGANIZATION 11 (2012), http://www.wipo.int/edocs/pubdocs/en/intproperty/464/wipo_pub_464.pdf.

[35] Ken-ichi Kumagai, *Introduction to the TRIPS Agreement*, JAPAN PATENT OFFICE 11 (2008), http:// www.training-jpo.go.jp/en/modules/pico3/index.php?content_id=260.

[36] Ulrich Loewenheim, *The Principle of National Treatment in the International Conventions Protecting Intellectual Property*, *in* PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 593 (Wolrad Prinz zu Waldeck und Pyrmont et al. eds. 2009).

[37] *Id.*

regard to the protection of intellectual property."[38] Thus, under the principle of national treatment, a foreign author like Zaha Hadid would be afforded the same degree of copyright protection as Chinese authors under the Chinese copyright law. A potential problem could arise if Hadid would be awarded less protection than she would be in her own country, the United Kingdom, if China provides narrower copyright protection than the United Kingdom does.

C. The Meaning of "Architectural Works" under the Rules of International Law

Lacking a working definition of "architectural works" on the international plane, then, it becomes imperative to look toward the customary rules for the interpretation of public international law. While there has been no case regarding adequate protection of "architectural works," if a conflict ever arises, the dispute settlement process of the WTO would require the DSB to clarify the existing provisions of the relevant agreements in accordance with the customary rules of interpretation of public international law.[39]

In determining what constitutes "works of architecture" within the meaning of the Berne Convention, one consideration may be the "ordinary meaning" guideline set by the customary rules of international law, such as the Vienna Convention on the Law of Treaties (Vienna Convention). [40] According to Vienna Convention Article 31(1), "a treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose."[41] Under the Vienna Convention, the plain meaning of "architectural work" suggests a rather broad range of structures and buildings, both inhabitable and not. For example, Webster's New World Dictionary defines "building" as "anything that is built with walls and a roof, as a house, factory, etc."[42] The Oxford Dictionary defines "building" as "a structure with a roof and walls, such as a house or factory."[43] By these authorities alone, the term "building" is susceptible to numerous interpretations. The unclear definition of the term creates difficulties for

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[38] TRIPS, *supra* note 17, art. 3.

[39] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (stating that the DSB shall "clarify the existing provisions of . . . agreements in accordance with customary rules of interpretation of public international law").

[40] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[41] *Id.* (emphasis added).

[42] Webster's New World Dictionary 185 (2d ed. 1984).

[43] Oxford Dictionary of English 228 (3d ed. 2010).

member countries to adequately protect the broad range of "buildings" and thus comply satisfactorily with the WTO's TRIPS Agreement.

On the other hand, the potential ramifications of not complying satisfactorily with the WTO's TRIPS Agreement can be severe. In cases of noncompliance, member countries may first negotiate monetary compensation.[44] But if the negotiation falters, the WTO may even authorize punitive suspension of the TRIPS Agreement and essentially allow legal piracy of intellectual property.[45] The WTO's suspension of TRIPS is a "creative and bold effort"[46] to induce compliance with WTO rules, and it can be costly for the compensating country. For instance, when the United States refused to comply with a WTO decision in 2009, the WTO permitted Brazil to pirate up to $409.7 million worth of American intellectual property in retaliation for the United States' noncompliance with a previous WTO decision.[47] For transnational architectural practice, the lack of consensus on the definition of "architectural works" is a risk that could have similar ramifications in the future.

As will be seen, the approach different countries take to define the term "architectural work" varies greatly, partly due to cultural and historical reasons. A more feasible consensus on the definition is necessary since the differences and confusion can neither adequately accommodate the changing realities of global architectural practice, nor comply with the Berne Convention and TRIPS Agreement.

III. DIFFERENT APPROACHES TO "WORKS OF ARCHITECTURE"

A. The United States

Because no working definition is available, it may be beneficial to survey the various approaches member countries take to comply with the minimum standards set forth in the Berne Convention.

In the United States, under the Copyright Act of 1976, architectural works were barely protected because they were protected only as a type of pictorial, graphic, or sculptural (PGS) work.[48] However, after the United States joined the Berne Convention in 1989 to expand the protection of United States' works throughout the world,[49] Congress approved several

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[44] DSU, *supra* note 39, art. 22.

[45] *Id.*

[46] Michael R. Williams, *Pirates of the Caribbean (and Beyond): Developing a New Remedy for WTO Noncompliance*, 41 GEO. WASH. INT'L L. REV. 503, 503 (2009), *available at* http://docs.law.gwu.edu/ stdg/gwilr/PDFs/41-2/9-%20Williams.pdf.

[47] *Id.*

[48] *Demetriades v. Kaufmann*, 680 F. Supp. 658 (S.D.N.Y. 1988).

[49] ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN NEW TECHNOLOGICAL AGE 415 (4th ed. 2007).

amendments to comply with the minimum standards set forth in the Berne Convention, which expressly required protection of "works of architecture."[50] The amendments extended protection for moral rights.[51]

As a result, Congress adopted the Architectural Works Copyright Protection Act (AWCPA) in 1990 in order to better comply with the Berne Convention.[52] Under the AWCPA, an "architectural work" is the "design of a *building* as embodied in any tangible medium of expression, including a building, architectural plans, or drawings."[53] Further, it says "the work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features."[54]

While architectural plans and drawings are tangible mediums that are easier to define, "buildings" are not. Currently, the United States Copyright Office's regulation defines "buildings" 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, pergolas, gazebos, and garden pavilions."[55]

Also, among all the Berne Convention member countries, the United States is the only country that excludes certain works of architecture from copyright protection.[56] For example, while bridges and other three-dimensional works might otherwise qualify for copyright protection, Congress chose to exclude such works from the AWCPA, believing such protection was not "mandated by the Berne Convention."[57]

For instance, under the AWCPA, unique bridge designs like the Zubi-Zuri by the Spanish architect Santiago Calatrava would not be protected. In 2009, Calatrava won a copyright lawsuit against the city of Bilbao and received compensation of 30,000 euros when the city allowed another renowned architect, Arata Isozaki, to design an extension to the bridge.[58] In that case, the Spanish Provincial Court of Biscay ruled in favor of Calatrava because "public interest cannot override Calatrava's moral

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[50] *Id.*

[51] *Id.*

[52] Raphael Winick, *Copyright Protection for Architecture after the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1613 (1992).

[53] 17 U.S.C. § 101 (2010) (emphasis added).

[54] *Id.*

[55] 37 C.F.R. § 202.11(b)(2).

[56] *Id.*; Wilbur, *supra* note 30, at 470.

[57] 37 C.F.R. § 202.11(b)(2).

[58] *Bilbao, Condenado a Indemnizar a Calatrava por "Alterar Su Obra"*, EL PAÍS (Mar. 11, 2009, 12:44 PM), http://cultura.elpais.com/cultura/2009/03/11/actualidad/1236726003_850215.html.

right."[59] Calatrava would not be compensated had the structure been built in the United States, where bridges do not qualify for copyright protection.

Although the case law on architecture is sparse, some key cases provide further insight as to the United States' approach to what constitutes architectural works. In *Yankee Candle Co. v. New England Candle Co.*, a federal district court in Massachusetts narrowed the scope of "building" within the meaning of the AWCPA. In that case, Yankee Candle sued its competitor, New England Candle, for infringing on its colonial style store design.[60] Yankee Candle argued that its store qualified as a copyrightable building because it constituted a habitable three-dimensional structure more closely resembling a conventional building structure than a pergola or gazebo, which are protected under the law.[61] Thus, one of the main issues in the case was whether the store, enclosed within a shopping mall, was an "architectural work" entitled to protection under the AWCPA. The court concluded that protection is extended only to freestanding buildings and not to individual stores enclosed within another building.[62] Thus, under the AWCPA, some structures designed by architects, like the Yankee Candle store, would not fit the definition of a "building."[63] Thus, while the U.S. copyright law protecting architectural works is detailed, it does not protect some potentially qualifying structures on the basis that the structures are purely functional.

B. Korea

Korea acceded to the Berne Convention in 1996,[64] and to the WTO in 1995.[65] Moreover, architectural works are protected under the Copyright Act of the Republic of Korea; "examples of works referred to in the Act include: . . . the architecture, architectural models, plans and other

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[59] *Id.*

[60] Yankee Candle Co. v. New England Candle Co., 14 F. Supp. 2d 154, 156 (D. Mass. 1998).

[61] *Id.*

[62] *Id.*

[63] Winick, *supra* note 52 ("Golf courses, gardens, tunnels, bridges, overpasses, fences, and walls are only a few of the structures designed by architects that would not fit the common definition of 'building.' Unless courts interpreting the AWCPA contort the definition of 'building' well beyond its generally accepted limits, architects designing these other structures will not find copyright protection under the new subject matter category for architectural works.").

[64] *Accession by the Republic of Korea*, WORLD INTELL. PROP. ORG., (May 21, 1996) http://www.wipo.int/ treaties/en/notifications/berne/treaty_berne_175.html.

[65] *Member Information: Republic of Korea and the WTO*, WORLD TRADE ORG., http://www.wto.org/ english/thewto_e/countries_e/korea_republic_e.htm (last visited Mar. 8, 2015).

architectural work."[66] Under the Copyright Act of the Republic of Korea, the term "work" means "creative productions in which the ideas or emotions of human beings are expressed."[67]

However, there is no further definition of "architectural works" or mention of "buildings" in the Copyright Act or other regulations.[68] The complete absence of the definition of "architectural works" or "buildings" gives rise to questions as to whether some architectural works can be protected, such as bridges, dams, pagodas, monuments, landscape designs, and interior designs. Architectural copyright issues are generally rarely litigated in Korea, yet the term remains as an important one to define for the future.

While there are some recent anecdotal reports from Korean courts that have confronted the statute, the cases lack precedential authority because Korea is a civil law jurisdiction that does not adopt a *stare decisis* principle.[69] Nevertheless, in *Haeundae Lighthouse*[70] for example, the Seoul district court addressed the issue for the first time. In that case, to commemorate a meeting of the Asia-Pacific Economic Cooperation leaders, the city of Busan commissioned the building of three lighthouses having unique designs.[71] Towards the end of the design phase, the city obtained the plan drawing and architectural model from the designer and allegedly began constructing the lighthouses without her consent. Upon learning about the construction, the designer sued the City for infringement, arguing that the construction of the lighthouses were in violation of copyright law.[72]

The court, in examining whether the plan and the model infringed the law, first faced the question of whether lighthouses were protected architectural works.[73] The court determined that the lighthouses were not architectural works even if there was creativity in the overall form, and accordingly, the plan and the model could not be protected.[74] Explaining the Copyright Act, the court said "an architectural work is the physical building itself that exists in reality or the works that exist as images in an architectural model or plan."[75] However, the definition given by the

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66 Jeojakkweonbeob [Copyright Act], Act. No. 432, Jan. 28, 1957, art. 4(5), *amended by* Act. No. 11903, Jul. 16, 2013 (S. Kor.).

67 *Id.*

68 Yoon, *supra* note 21, at 109.

69 Young-Joon Kwon, *Civil Law and Civil Procedural Law*, *in* INTRODUCTION TO KOREAN LAW 115 (Korea Legislation Research Institute ed., 2012).

70 Seoul District Court [Seoul Dist. Ct.], 2007Ga-Hap77724, Nov. 29, 2007 (S. Kor.).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* at 31.

court does not further clarify what "buildings" include. If this one decision is indicative of the treatment the term is likely to receive in Korea, it is doubtful whether various structures and buildings will be adequately protected as may be required under the Berne Convention.

C. Japan

Japan acceded to the Berne Convention very early in 1899.[76] Thus, its attitude toward architectural works is similar to that of European signatory countries such as France, Belgium, and Germany, which tend to regard architectural works fundamentally as artistic works.[77]

In terms of its approach to defining "architectural works," the situation in Japan is similar to that in Korea as there is no definition of "architectural works" or "buildings" in the Japanese copyright law.[78] With regard to the general subject matter of copyright protection, the Copyright Act of Japan defines "works" as a production in which "thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain."[79] As examples of such "works," the Copyright Act further explains that "works shall include . . . architectural works."[80]

One interesting aspect to note for Japanese copyright law is that it protects architectural works and architectural plans or models separately.[81] Architectural blueprints or models are protected as figurative works under Article 10(1)(vi).[82] Accordingly, Japanese legal scholars have interpreted that a different level of creativity and copyrightability are required for protection of architectural works as opposed to architectural plans or models.[83] For a building to be protected, it has to possess artistry or beauty capable of evaluation.[84] Thus, an important characteristic of Japanese copyright protection of architectural works is that it emphasizes the aesthetic expression in the structure of the works.

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[76] *WIPO-Administered Treaties*, *supra* note 26.

[77] Yoon, *supra* note 21, at 109.

[78] *Id.*

[79] Chosakukenhō [Copyright Act], Law No. 48 of 1970, art. 2, para. 1(i) (Japan); Hisayoshi Yokoyama, *Japanese Copyright Law*, TRANSPARENCY OF JAPANESE LAW PROJECT, http://www.tomeika.jur.kyushu-u.ac.jp/ip (last visited Mar. 8, 2015).

[80] Chosakukenhō [Copyright Act], *supra* note 79, art. 2, para. 1(i).

[81] Heung-Su Son, *Seolgyedomyunui Jeojakmulseong* [*The Copyrightability of Architectural Designs*], 84 JUSTICE 233, 249 (2005) (S. Kor.).

[82] Yokoyama, *supra* note 79.

[83] Shinichi Yamanaka, *Kenchiku Sekkeizu* [*Architectural Plans*], 128 CHOSAKU HANREI HYAKUSEN 51 (1994) (Japan) (cited in Son, *supra* note 81).

[84] Yokoyama, *supra* note 79.

For instance, ordinary buildings exemplified by ready-built housing are not protected for the reason that they do not exemplify aesthetic expression.[85] The emphasis on aesthetic expression suggests that a broad scope of structures may be protected under the name of "architectural works." Hence, unlike Korea or the United States, Japan's copyright law protects gardens, bridges, and pagodas and similar works as "architectural works."[86]

For instance, most recently in 2013, the Osaka district court examined a case in which a question arose as to whether a garden was an "architectural work" within the meaning of the Japanese copyright law.[87] In that case, the legendary Japanese landscape architect Motoo Yoshimura designed and built a garden on the site of a commercial complex called Shin Umeda City Complex. Containing the garden and the famous Umeda Sky Building, the complex became known as "a synthesis of the built form, environment, and sky."[88] When Yoshimura learned that a world famous architect Tadao Ando was planning to build a monumental green "Wall of Hope" within the complex, he filed a petition against the landowner to suspend the construction of the vegetated wall that was set to cut through the complex and the ground level garden design.[89]

Yoshimura argued that Ando's 78-meter long structure would fundamentally change the identity of the original landscape architecture and was therefore a violation of copyright law.[90] Yoshimura further argued that his garden was an architectural work within the meaning of the copyright law, and that the philosophical specificity and aesthetics of the garden should be protected from the construction of the new Ando design.[91]

In examining the case, the Osaka district court said the first major issue to be determined was whether the Garden met the definition of a work as provided in the Copyright Act.[92] The court regarded the whole commercial complex, Shin Umeda City, as a "city," and recognized the garden area—consisting of plants, trees, ponds and other facilities—as constituting architectural works within its meaning under the Copyright

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85 *Id.*

86 *Id.*

87 Cat Garcia Menocal, *Tadao Ando's Green Wall of Hope Incites Controversy*, DESIGNBOOM (June 27, 2013), http://www.designboom.com/architecture/tadao-andos-green-wall-of-hope-incites-controversy.

88 *Id.*

89 Osaka Chiho Saibansho [Osaka Dist. Ct.] Sept. 6, 2013, 2013 (Yo) 20003, *available at* http:// www.courts.go.jp/hanrei/pdf/20140227120910.pdf.

90 Menocal, *supra* note 87.

91 *Id.*

92 *Id.*

Act.[93] Although the court did not specify what other examples of works are included in the Copyright Act, it regarded Yoshimura's environmental concepts and proactive attitude to reproduce a natural environment as designs that should be protected under the law.[94]

After finding that the Garden was an "architectural work" within the meaning of the law, the court concluded that the new construction would constitute a "modification" to the garden because Ando's new structure would make it difficult to recognize the original concept and aesthetic sense of the Garden.[95] The attitude of the court towards architectural works evident in the case is distinct from other countries, and Korean courts might not have held similarly using the same reasoning.

D. China

China acceded to the Berne Convention in 1992,[96] and the WTO in 2001.[97] Since China promulgated the amended Chinese Copyright Law in 2001, "buildings" have received an express mention as objects protected by copyright law, despite China's rather recent accession to international treaties.[98] Currently, the Chinese Copyright Law and its Implementing Rules form the legal framework of copyright protection in China.[99]

The Chinese Copyright Law says that the "works" mentioned in the law shall include "works of literature, art, natural science, social science, engineering technology and the like" made in the form of "works of fine art and architecture."[100] Further, under Article 4(9) of the Implementing Regulations of the Copyright Law, architectural works are "works which in architectural building or expressed in similar format, when being viewed, impart aesthetic effect."[101] Under this definition, architectural works would only include aesthetic structures and formats of three-

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[93] *Id.*

[94] Saibansho, *supra* note 89.

[95] *Id.*

[96] *WIPO-Administered Treaties*, *supra* note 26.

[97] *Member Information; China and the WTO*, WORLD TRADE ORG., http://www.wto.org/english/ thewto_e/countries_e/china_e.htm (last visited Mar. 9, 2015).

[98] Christian Gloyer, *China: The Architect's Copyright*, INSTITUT FÜR STRATEGIE-POLITIK-SICHERHEITS-UND WIRTSCHAFTSBERATUNG, BERLIN, 1 (2008), http://mercury.ethz.ch/serviceengine/Files/ISN/91636/ipublication document_singledocument/75efc305-ec0a-4221-8dd5-47200b71eccf/en/China_Architect_Copyright.pdf.

[99] *Id.*

[100] Zhuzuoquan Fa (著作权法) [Copyright Law] art. 3(4) (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010) (China).

[101] Zhuzuoquan Fa Shishi Tiaoli (**著作权法实施条例**) [Regulation for the Implementation of the Copyright Law] art. 4(9) (promulgated by the St. Council, Aug. 2, 2002, amended Jan. 30, 2013, effective Jan. 30, 2013) (Lawinfochina) (China).

dimensional expressions, while excluding other forms such as design drawings and models. Unlike Korea or the United States, design drawings and models can be protected as engineering designs or works of art.[102]

Similar to Korea and Japan, a court recently attempted to address the definition of "architectural works." In the 2008 case, *Porsche AG v. Beijing TechArt Automotive Sales & Service Co.,*[103] a Chinese court examined and determined the copyright in a three-dimensional architectural work for the first time.[104] In that case, the copyright holder for the architecture of the Beijing Porsche Center sued TechArt Automotive Center, alleging that the latter's architecture was similar and constituted plagiarism without authorization.[105] The Higher People's Court of Beijing held in favor of the copyright holder and concluded that TechArt Automotive Center's design constituted plagiarism.[106] Instead of coming to the simple conclusion that the buildings were similar, the court scrutinized several aspects of the building's design and considered factors like functionality.[107] For example, the court said that the Porsche Center had unique characteristics, aesthetics, and originality.[108] Thus, with few differences aside, such as shades of color, railings, showrooms, and auto workshop, the court held that the two buildings were similar.[109]

In *Porsche Center*, the court addressed the issue of what could be recognized as architectural works.[110] According to the court, only those works that show the original ideas of the author could be recognized as architectural works covered by copyright.[111] Accordingly, if the form and appearance of a work are not "original," such architecture could not be considered protectable "architectural works" under Chinese law.[112]

Because of its significance in the field of copyright law, China's Supreme People's Court chose the *Porsche Center* case as one of the most influential IP cases and listed it in the Top 10 IP Cases of 2008.[113] Secondly, the case was groundbreaking in that the court, for the first time,

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[102] Chen, *supra* note 13.

[103] Porsche case, *supra* note 22.

[104] Loke-Khoon Tan, *Civil Protection of IP in China: Two Steps Forward, One Step Back?*, BAKER & MCKENZIE, http://www.bakermckenzie.com/RROperatingCivilProtectionofIPFeb10/ (last visited Mar. 9, 2015).

[105] Porsche case, *supra* note 22.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Chen, *supra* note 13.

issued an order to an infringer to substantially change the design elements of a completed building.[114]

E. How Other Countries Approach the Definition of "Architectural Works"

Analyzing the approach of other civil law and common law countries to defining "architectural works" may also shed some light on how they interpret the Berne Convention's language. In general, the United Kingdom, New Zealand, Canada, and Australia employ a broad interpretation of the term.[115] On the other hand, the absence of a definition of the term in some civil law countries, like France and Belgium's copyright laws, may help explain why there is no clear definition of "architectural works" in civil law countries of East Asia.

First, the United Kingdom has a long history of copyright protection; and, along with New Zealand, its law expressly protects "buildings including any fixed structure."[116] While architectural copyright litigation is also not common in the United Kingdom, its history is longer than other countries. The modern history of architectural copyright litigation dates back to the 1940s.[117] For instance, in 1941, a London architect successfully sued his client for employing another architect to extend its store while replicating the original design.[118] The case established the principle of intellectual copyright for architects in the United Kingdom.[119] In more recent years, the United Kingdom has been seeking to expand copyright protection even more. The recently passed Enterprise and Regulator Reform Act promised to help promote innovation in the design industry.[120] Most notably, orphaned works—copyrighted works whose work is unknown or cannot be found—would be licensed for the first time, and design works, including architecture, would be protected for seventy years after the death of the creator.[121] Previously under section 52 of the Copyright, Designs, and Patents Act from 1988, a designer had only

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[114] *Id.*

[115] Copyright Act, 1968 (Cth) s 10(1) (Austl.); Copyright, Designs and Patents Act, 1988, c. 48, § 4(2) (Eng.); Copyright Act, R.S.C. 1985, c. C-42 (Can.); Copyright Act 1994, § 2(1) (N.Z.).

[116] Copyright, Designs and Patents Act, 1988, c. 48, § 4(2) (Eng.); Copyright Act 1994, § 2(1) (N.Z.).

[117] Winston, *supra* note 15.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*; Oliver Wainwright, *An End to Faking It: Could a New Law Damage the World of Design?*, THE GUARDIAN (Nov. 15, 2012, 5:24 PM), http://www.theguardian.com/artanddesign/architecture-design-blog/2012/ nov/15/faking-it-copyright-bill-damage-design.

twenty-five years of copyright from the end of the year in which the work was first marketed.[122]

Other English speaking countries also have adopted a broad definition of the term "architectural works." In Canada, "architectural works" are "buildings or structures or any model of a building or structure."[123] At the end of the spectrum, Australia has the broadest scope in its approach to defining "architectural works." Australia protects "a structure of any kind."[124] While this means broad copyright protection for various buildings and structures, the law has also come under heavy criticism regarding whether the current definition is appropriate since it has been suggested that even portable structures like garden sheds may be "buildings" for the purpose of Australian Copyright Act.[125]

On the other hand, European civil law countries like France,[126] Belgium,[127] and Germany[128] lack a clear definition of "architectural works." The lack of a clear definition may be explained by the belief apparent in their law that architecture cannot be fundamentally separated from fine arts.[129] Such belief is also similar to Japan's emphasis on aesthetic expression in architectural works.

The influence of European civil law on Japan explains why the Japanese copyright law also lacks a detailed definition. France, Belgium, and Germany were among the first to call for copyright protection at the Berne Convention in 1887.[130] Japan was among the earliest members to follow these countries, having acceded to the Convention in 1899. Moreover, Japanese law is a civil law system based on French and German

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[122] *Id.*

[123] Copyright Act, R.S.C. 1985, c. C-42 (Can.).

[124] Copyright Act, 1968 (Cth) s 10(1) (Austl.).

[125] Libby Baulch, *Preliminary Submission to the Copyright Law Review Committee on Protectible Subject Matter*, AUSTL. COPYRIGHT COUNCIL 11 (Sept. 1995), http://www.copyright.org.au/admin/cms-acc1/_images/17494395484fc3006161cee.pdf.

[126] Loi n°94-361 du 10 mai 1994 code de la propriété intellectuelle [Law n°94-361 of October 10, 1994 on the Code of Intellectual Property], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 6, 1996, art. L112-2 ("7° Les oeuvres de dessin, de peinture, d'architecture, de sculpture, de gravure, de lithographie" [Works of drawing, painting, architecture, sculpture, engraving and lithography]) [hereinafter France Copyright Act].

[127] Loi relative au droit d'auteur et aux droits voisins [Law on Copyright and Neighboring Rights] of June 30, 1994, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 27, 1994 [hereinafter Belgium Copyright Act].

[128] Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BUNDESGESETZBLATT [BGBL. I] at 1273, § 2, art. 2(1) (Ger.).

[129] France Copyright Act, *supra* note 126; Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BUNDESGESETZBLATT [BGBL. I] at 1273, § 2, art. 2(1) (Ger.) ("Werke der bildenden Künste einschließlich der Werke der Baukunst." [Artistic works, including works of architecture.]); Yoon, *supra* note 21, at 109.

[130] *WIPO-Administered Treaties*, *supra* note 26.

law.[131] Thus, the influence of European civil law may have had an influence on the Japanese copyright law during the Meiji period when Japan readily absorbed European influence.

On the contrary, Thailand, a civil law jurisdiction in the same Germanistic law family as Korea and Japan, adopts a very detailed definition of architectural works similar to the U.S., but also includes landscape architecture.[132] Under the Thai copyright law, an "architectural work" is "a design of a building or constructions, a design of interior or exterior decoration as well as a landscape design or a creation of a model or building or constructions."[133] The specificity in the Thai copyright law may serve as an example to help expand intellectual property protection for architectural works in other East Asian civil law jurisdictions.

IV. EXPANDING INTELLECTUAL PROPERTY PROTECTION FOR ARCHITECTURAL WORKS

A. Historical and Cultural Reasons for the Narrow Copyright Protection

Although the recent attempts to clarify the scope of "architectural works" in East Asian countries are undoubtedly a step closer to a coherent definition of "architectural works," more work needs to be done in East Asian jurisdictions. However, various historical, cultural, and legal reasons may help explain the current situation regarding copyright protection of architectural works. Exploring the various reasons for the lack of definition of "architectural works" is crucial if we are to produce a uniform working definition and eventually expand intellectual protection for architectural works.

First, the notion that copyright law legally protects designs of buildings and structures has not found unanimous recognition in East Asian countries.[134] This is largely due to historical reasons. Historically, there has been no need to protect intellectual property because the fundamental idea of intellectual property originates from the West.[135] The English history of copyright coexists with the continental approach, which treats an author's right in his work of authorship as a fundamental moral right.[136] In Europe, with the invention of the printing press, the first copyright laws were passed to protect intellectual property rights.[137] On the other hand, ancient Chinese history suggests that such a concept did

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[131] Makoto Ibusuki, *UPDATE: Japanese Law Research Guide*, GLOBALEX (May 2014), http://www.nyulaw global.org/globalex/japan1.htm.

[132] Copyright Act, B.E. 2537, 1994, § 4(4) (Thai.).

[133] *Id.*

[134] Gloyer, *supra* note 98.

[135] MERGES ET AL., *supra* note 49, at 413.

[136] *Id.*

[137] *Id.*

not exist in China.[138] Sima Qian, an ancient historian of China, has recorded a remarkable building program pursued by China's first ruling dynasty, the Qin: "Whenever Qin conquered one of its rivals, it would commission replicas of its palaces and halls and reconstruct them on the slope north of the capital. From Yongmen all the way to the Jing and Wei rivers, there were replica palaces, passages, and walled pavilions."[139]

Moreover, there may have been no perceived need to protect architectural copyright because these countries, especially China and Korea, have not been exporters of architectural design until recently.[140] Korea now lists four architecture firms among the world's 100 largest architecture firms, and China lists one firm that is dually based both in China and the United Kingdom.[141] In Korea's case, the Western concept of architectural design was established in the early 20th century, which saw the start of the modern history of Korea's architectural design.[142] But the need to rebuild a country devastated by war and a difficult colonial period led to the creation of expendable buildings of no particular style, and little attention could be given to architectural aesthetics and creativity.[143] Thus, with some exceptions, Korea has generally relied on importing architectural designs rather than exporting them.

In contrast, there are many historical accounts of American or British architects who were hired to work in China and Japan. The Royal Institute of British Architects, for example, has many members firmly established outside of the United Kingdom as it has a long record of architects working outside its borders in former colonies, mandates, protectorates, and royal holdings.[144] The export of American architecture began as early as the nineteenth century as personal adventures became active in Asia by World War I.[145] American architect Henry K. Murphy

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[138] Jack Carlson, *China's Copycat Cities*, FOREIGN POL'Y (Nov. 29, 2012), http://www.foreignpolicy.com/ articles/2012/11/29/chinas_imperial_plagiarism.

[139] *Id.*

[140] Vanessa Quirk, *The 100 Largest Architecture Firms in the World*, ARCHDAILY (Feb. 11, 2013), http:// www.archdaily.com/330759/the-100-largest-architecture-firms-in-the-world.

[141] *Id.*

[142] *The Korean Architectural Design Industry*, BUSINESS NETWORK SWITZERLAND, 2 (Jan. 2012), http://www.s-ge.com/de/filefield-private/files/41371/field_blog_public_files/22143.

[143] *Korean Architecture*, NEW WORLD ENCYCLOPEDIA (Jun. 24, 2014), http://www.newworldencyclopedia.org/ p/index.php?title=Korean_architecture&oldid=982607.

[144] Thomas Vonier, *Benefits of Exporting Architecture Services*, AM. INST. OF ARCHITECTS (June, 2007), http://www.aia.org/aiaucmp/groups/ek_members/documents/pdf/aiap017689.pdf.

[145] JEFFREY W. CODY, EXPORTING AMERICAN ARCHITECTURE, 1870-2000 at 59 (1st ed. 2002).

practiced multi-nationally in Asia beginning in 1914.[146] While based in his New York City office, Murphy traveled to building sites in China, Japan, and Korea.[147] He was hired by the Chinese leader Chiang Kai-shek and built many landmark buildings including the modern Chinese capital in Nanjing, as well as Tsinghua University, and the Grand Auditorium in Beijing.[148] Frank Lloyd Wright was one of the few architects who led an active international practice during World War I and the Great Depression.[149] One of Wright's most notable works includes the Imperial Hotel in Tokyo, which was built in 1923.[150]

Third, the imitation and piracy culture prevalent in China and other parts of Asia may further explain the current challenges posed by architectural copyright protection in China and other countries. For example, the shanzhai phenomenon is a well-known and popular Chinese culture with no direct English translation.[151] Literally meaning "mountain village or strongholds," the term refers to mountain bandits far from government control.[152] The cultural phenomenon also symbolizes powerful resistance against government for those who proudly take a risk on a counterfeited item that looks stylish.[153] Copying is the core of the shanzhai phenomenon and everything from logos, designs of products, and architecture are subjects of copying.[154] For architecture, China has seen copying to the extent of copying an entire Austrian alpine town.[155] In 2012, a replica of the UNESCO world heritage site in Hallstatt, Austria, was found to have been copied brick by brick in Guandong Province, China.[156] The city of Wuxi holds four buildings resembling the White House, and in another city, an air-conditioning tycoon has built himself a palace

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146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 Hao-Chen Sun, C*an Louis Vuitton Dance with Hiphone? Rethinking the Idea of Social Justice in Intellectual Property Law*, 15 U. PA. J.L. & SOC. CHANGE 389, 395 (2012).

152 *Id.*

153 David Barboza, *In China, Knockoff Cellphones Are a Hit*, N.Y. TIMES (Apr. 27, 2009), http://www.nytimes.com/2009/04/28/technology/28cell.html?_r=0.

154 Sun, *supra* note 151.

155 Oliver Wainwright, *Seeing Double: What China's Copycat Culture Means for Architecture*, THE GUARDIAN (Jan. 7, 2013, 6:59 PM), http://www.theguardian.com/artanddesign/architecture-design-blog/2013/jan/07/china-copycat-architecture-seeing-double.

156 *Id.*

resembling Buckingham Palace and Versailles, next to an Egyptian pyramid.[157]

B. Linguistic Reasons for the Narrow Copyright Protection

In Korea, while such blatant copying may be less common, the practice of copying architectural designs by making minor changes to original designs to avoid infringement is certainly not unheard of.[158] This phenomenon may be caused by yet another challenge posed to architectural copyright protection, which is the lack of detailed regulation on the content and symbolic meaning of architecture in the copyright laws of East Asian jurisdictions. Understanding how linguistic reasons account for the phenomenon may shed further light on the issue of narrow copyright protection of architectural works in East Asian countries.

Most notably in the U.S., "architectural works" are defined as the "*design* of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings."[159] The U.S. definition is comparatively specific and emphasizes that it is the design embodied in a tangible building rather than the building itself that is protected. But unlike the U.S. definition, the Chinese characters 建築物 used to describe "architectural works" in the copyright laws of all three East Asian countries[160] seem to suggest that it is only the tangible building itself that is protected. The Chinese character meaning "architectural works" (建築物) is made of two words, 建築 (architecture) and 物 (objects/substance matter). The second character denotes tangibility when used in a compound word or a sentence. Thus, 建築物 signifies that it is the tangible building itself that is protected by law. The result may lead to a misunderstanding that copyright law protects only against literal copying and that making slight changes to a feature of a building may not constitute a copyright infringement.

Another linguistic issue concerns the notion of creativity versus originality. The Chinese characters 創作物 in Korean, Chinese, and Japanese copyright law literally translate into "created objects." To

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157 Patrick Boehler, *Renowned Architect Races Against Copycat Builders in China*, TIME (Jan. 2, 2013), http://newsfeed.time.com/2013/01/02/renowned-architect-races-against-copycat-builders-in-china.

158 Taek-Gyun Son, *Pyojeolcheonkuk, Changeuiseong Samangjindanseo* [*Copy Nation, Death of Creativity*], DONGA NEWS (S. Kor.), Aug. 2, 2014, http://news.donga.com/3/all/20140802/65551749/1.

159 17 U.S.C. § 101 (emphasis added).

160 Zhuzuoquan Fa (著作权法) [Copyright Law], art. 3(4) (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010) (China); Chosakukenhō [Copyright Act], Law No. 48 of 1970, art. 2, para. 1(i) (Japan); Jeojakkweonbeob [Copyright Act], Act. No. 432, Jan. 28, 1957, art. 4(5), *amended by* Act. No. 11903, Jul. 16, 2013 (S. Kor.).

practitioners, the characters seem to suggest that some exceptional creativity is required for a work to be legally protected. This perception contrasts from the term often adopted by other countries, such as "originality" in U.S. law,[161] which may suggest that the necessary standard requires only that the work owes its existence to the efforts of the author and is not merely a copy of a pre-existing work. The seemingly strict standard in East Asian jurisdictions leads to confusion, and there has already been a case in Korea regarding this specific issue.[162]

In that case, *Triangular Pension*, a vacation resort claimed that its unique triangular façade of the resort building was infringed when it found another building looking similar to the original one.[163] The alleged infringer claimed that such shape of the façade was not a creative work protected by law, since it was a common motif found in various places, such as tents or traditional Korean buildings.[164] Thus, the issue became whether the original triangular façade of the vacation resort was a creative work protected by Korean copyright law. In looking at this issue, the court had to analyze the word "creative works" (創作物) in the law to see the degree of creativity or originality it requires.[165] Holding in favor of the plaintiff vacation resort, the court concluded that the two building façades were "extremely similar." The court also concluded that it does not require that the work is unprecedented, but that it is sufficient if the work "expresses the author's thoughts or emotions in an original manner, and not in an imitative manner."[166] The case illustrated the confusion that linguistic differences may cause in deciding the copyrightability of architectural works.

C. The New Definition of "Architectural Works"

As has been stated above, the ways in which different countries define "architectural works" vary due to historical, cultural, and legal reasons. The result is a spectrum ranging from narrow protection of architectural works to broad protection of all types of structures. Having considered the reasons for the lack of coherent definition of "architectural works" in East Asian countries, then, an attempt can be made at expanding the protection of "architectural works."

For civil law countries that rely on codes rather than case law, it is essential to have a clear definition of "architectural works" within the law.

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[161] 17 U.S.C. § 102 (1990) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.").

[162] Seoul District Court [Seoul Dist. Ct.], 2013Ga-Hap23179, Sept. 6, 2013 (S. Kor.).

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

In Korea, what few cases have arisen emphasize only the functionality aspect of architectural works, yet do not further suggest specific tests or guidelines as to substantial similarity between works of architecture as is often emphasized in U.S. case law. Considering the status quo in East Asian countries, it may be unclear whether Zaha Hadid Architects would be adequately protected in China in its Wangjing Soho case if it were to seek legal remedies in China, where no clear definition of "architectural works" exist. If Zaha Hadid Architects sought legal remedies where there was a broad scope of protection for architectural works, the result may be different.

Thus, a feasible consensus on the definition of "architectural works" is necessary to prevent confusion and to accommodate transnational architectural practice. Problems such as one person from a specific country being awarded greater protection in one country than another should not be simply regarded as tradeoffs of the principles of international conventions. Continued piracy and rise of legal proceedings could also impact global architectural practices around the world.

The most ideal definition of "architectural works" may be the one that promotes the fundamental goal of copyright while taking into consideration the unique functionality-aesthetics dichotomy. While a detailed regulation like the one seen in the United States is most desirable, the narrow guideline expressly excludes protection of some uninhabitable three-dimensional structures such as bridges and landscape architecture. On the other hand, the copyright law of the United Kingdom and similar law showing more broad interpretations of the term should also be considered carefully. As mentioned above, such broad interpretation of the United Kingdom protecting "all buildings and any fixed structures" has come under criticism that even portable structures can be "buildings" for the purpose of copyright law.[167] Such a broad scope also does not contribute effectively to achieving the fundamental goal of copyright law when it comes to promoting creativity.

Thus, an ideal definition would be somewhere in-between the extremes. For example, the Thai detailed definition of protected "architectural works" demonstrates a synthesis of both ends of the spectrum. It is suggested that East Asian countries also adopt the specificity in the Thai and U.S. copyright law, as illustrated in the following definition: A protected "architectural work" is the design of a building, constructions, interior or exterior decorations, or landscape architecture, as embodied in any tangible medium of expression, including a building, architectural plans, models, or drawings.

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[167] Baulch, *supra* note 125.

V. CONCLUSION

In July 2014, the fourteenth International Architecture Exhibition of la Biennale di Venezia (the Venice Biennale of Architecture) awarded its prestigious Golden Lion award for best national participation to Korea.[168] It was an unexpected and unprecedented victory for Korea in what was known as the "cultural Olympics" for the international architectural world.[169] For Korean architects, the Golden Lion Award was indeed a long-awaited dream come true for the field, and the Korean press referred to the incident as "sowing the seeds for Korean architecture to take on the world."[170] While some skeptics have reportedly said that it will probably not happen again in the future, what was clear was that the future of Korean architecture appeared brighter than expected and that Korean architecture is certainly changing.[171] Commissioner and Curator of the Korean pavilion at the Biennale Minsuk Cho said that the victory had "at least laid a solid foundation in architectural discourse for future generations to proceed."[172]

In its developing days, many buildings in Korea were built without much consideration for the harmony with the surrounding landscape or their effect on the human eye.[173] But there is now more consideration being given to aesthetics as well as architectural theory, and today's architecture in Korea employs more diverse shapes and designs instead of relying primarily on simple rectangular designs.[174] The reconstruction of cities and restoration of the Cheonggye stream, which "rebuilds the past to create an aesthetic present," also reflects the remarkable recent transformation in Korea.[175]

On the other hand, as architecture gains its place in Korea and other East Asian countries, the consideration of copyright issues will also be important. As argued above, the absence of a coherent definition of "architectural works" in these civil law countries may impede the fundamental goal of copyright protection because confusion will arise as

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[168] *Awards of the 14th International Architecture Exhibition*, LA BIENNALE DI VENEZIA, http:// www.labiennale.org/en/architecture/news/07-06.html.

[169] Young-Kyu Shim, *Ambition, Frustration and Achievement: The Korean Pavilion at the Venice Biennale 2014*, SPACE MAG. (June 23, 2014), http://www.vmspace.com/eng/sub_emagazine_view.asp?category =architecture&idx=11858.

[170] Da-Young Jeong, *Sowing the Seeds for Korean Architecture to Take on the World*, THE APRO (July 22, 2014), http://eng.theapro.kr/?sub_num=59&state=view&idx=428.

[171] *Id.*

[172] *Id.*

[173] Yoon-Sun Kim, *Modern Korean Architecture, the Shape of Things to Come*, THE GRANITE TOWER (Oct. 8, 2012, 8:36 PM), http://www.thegranitetower.com/news/articleView.html?idxno=284.

[174] *Id.*

[175] *Id.*

to what type of works are legally protected. The confusion may result in a lack of incentive to create new works and the continued practice of copying designs by making minor changes to original designs. Also, the lack of a feasible definition may be contrary to the Berne Convention since it may lead to inadequate protection of architectural works. As such, a detailed and feasible definition within the law of these East Asian countries will lead to better compliance of the obligation under international treaties as well as further appreciation for the transnational architectural practice and intellectual property law.