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Common Law Copyright Of Architectural Plans - Edgar H. Wood Ass'n, Inc. v. Skene

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Common Law Copyright Of Architectural Plans*

Edgar H. Wood Ass'n, Inc. v. Skene[1]

Plaintiff, a practicing association of architects duly licensed under the laws of Massachusetts, was employed to design and compile a complete set of working drawings[2] and specifications[3] for the erection of an apartment building. The contract stipulated that all property rights, title and interest in the architectural drawings were to remain in the plaintiff and were not to vest in the owner-client upon completion of the structure. No statutory federal copyright was secured for the plans or design by either the plaintiff or the client. The architectural drawings were filed with the municipal building department of Woburn in order to obtain the necessary building permit, a prerequisite to the commencement of any construction project.[4] A building permit was granted. Plaintiff's client, Moylan, employed Portugal to supervise construction and to see that it conformed with plaintiff's drawings and speci-

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[1] — Mass. —, 197 N.E. 2d 886 (1964).

[2] BURKE, DALZELL & TOWNSEND, ARCHITECTURAL AND BUILDING TRADES DICTIONARY 342 (2nd ed. 1963). "WORKING DRAWING: In architecture, a drawing or sketch which contains all dimensions and instructions necessary for carrying a job through to a successful completion."

[3] *Id.* at 288. "SPECIFICATIONS: Written instructions to the builder containing all the information pertaining to materials, style, workmanship, fabrication, dimensions, colors, and finishes supplementary to that appearing on the working drawings."

[4] Municipal building codes and ordinances vary in degree and scope throughout the nation, therefore reference shall be made to two recommended standard building code forms. NATIONAL BOARD OF FIRE UNDERWRITERS, NATIONAL BUILDING CODE § 102.1 (1955 ed.). "Permit required. It shall be unlawful to construct, alter, remove or demolish, or to commence the construction . . . of a building or structure . . . without first filing with the building official an application in writing and obtaining a formal permit." *Id.* at § 102.6. "Plans to accompany application. Applications for permits shall be accompanied by drawing of the proposed work, drawn to scale. . . ." See BUILDING OFFICIALS CONFERENCE OF AMERICA, INC., BOCA BASIC BUILDING CODE § 113.5 (3rd ed. 1960).

fications. The defendant, Skene, desired to construct similar structures and induced Portugal to enter his employment. Portugal brought with him a complete set of plaintiff's drawings. The architectural drawings were copied and a new title box[5] was attached thereto. These copies were submitted to and approved by the Building Commission of Norwood for the construction of defendant's buildings.[6]

Plaintiff brought this action to enjoin the defendant's use of his drawings and/or for damages.[7] The defendant's demurrers having been sustained by the trial court, the specific point raised on appeal was whether the plaintiff had stated a sufficient cause of action to be heard in equity. Specifically the issue was whether the plaintiff had been divested of his common law copyright in his architectural drawings when (1) the drawings were filed with a municipal building department, or (2) the physical structures, graphically described by the working drawings,[8] were constructed. The court held that neither the filing nor construction constituted a general publication which would divest plaintiff of his common law copyright in his drawings.

Copyright law is designed to protect the author from appropriation of his ideas,[9] to allow the creator the benefit of his own original intellectual product,[10] and "to combat

[5] A title box will usually consist of the name of each specific drawing, the date of the drawing's completion, the draftsman's initials and the architectural office's name and address.

[6] Edgar H. Wood Ass'n v. Skene, — Mass. —, 197 N.E. 2d 886, 889 (1964). "In sum, Wood's plans were copied and are being or were used to construct in Norwood, buildings identical in design and specifications to the Woburn buildings being erected."

[7] In a common law copyright action an architect has two possible remedies. He may enjoin the infringer from using the architect's drawings and specifications, and from constructing the structure illustrated and described by them. However, this should only be granted when the defendant-infringer has not *substantially* started construction. If the infringer's building is in the *process of construction*, or is completed, then the architect's remedy should be limited to the fair market value of his services and drawings. This final figure usually would not include personal supervision fees, but should take into consideration the novelty, utility and detail of the original design and drawings. Edgar H. Wood Ass'n v. Skene, *supra* note 6, at 896.

[8] The protection being sought by the architect was for his drawings and specifications illustrating the structure, not for the completed structure.

[9] Capital Records, Inc. v. Mercury Records Corp., 221 F. 2d 657, 662 (2d Cir. 1955); Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904); Kurfiss v. Cowherd, 233 Mo. App. 397, 121 S.W. 2d 282 (1938); Aronson v. Baker, 43 N.J. Eq. 365, 12 Atl. 177, 178-80 (1888); Nathanielsz, *Copyrights: Abandonment by Publication*, 39 DICTA 236 (1962).

[10] Katz, *Copyright Protection of Architectural Plans, Drawings, and Designs*, 19 LAW & CONTEMP. PROB. 224, 228 (1954).

> "Common law copyright is a *negative* sort of protection. It grants nothing to the creator of intellectual property which he did not previously possess. Instead, it aids him in preserving inviolate his unpublished work. In essence, the common law protects his *right of secrecy*, his right to control the first publication of his work."

the host of parasites who would feed gratuitously on his creation."[11] The architect may be protected by one of two forms of copyright,[12] common law or statutory.[13] The federal statute has not preempted the common law,[14] in fact, the statute separates the law into two distinct areas.

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefore."[15]

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[11] Katz, *supra* note 10, at 225.

[12] De Silva Constr. Corp. v. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962); Edgar H. Wood Ass'n v. Skene, — Mass. —, 197 N.E. 2d 886, 889-90 (1964); Smith v. Paul, 174 Cal. App. 2d 744, 345 P. 2d 546, 77 A.L.R. 2d 1036 (1959); and Katz, *supra* note 10, at 225. "[T]he body of copyright law is too small to cover the intellectual property field, it has . . . expanded in other ways: It has grown two separate heads. One head is labeled common-law copyright; the other, statutory copyright."

[13] 61 Stat. 652, 17 U.S.C. §§ 1-32, 101-116, 201-216 (1958).

The architect's work is entitled to federal copyright by registration in one of two classes which will permit the architect a wider scope of circulation than is permitted under limited publication.

> "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> (g) Works of art; models or designs for works of art.
>
> (i) Drawings or plastic works of a scientific or technical character." 61 Stat. 654, 17 U.S.C. § 5 (1958); See 17 U.S.C. *Appendix* §§ 202.10 and 202.12 (Supp. IV, 1958).

However, the clerical and administrative tasks which are involved in the architect's obtaining and maintaining federal copyright of his drawings and/or designs are often enough to discourage his application for copyright. In addition, the architect is restricted to copyrighting his drawings, since most designs cannot be classified as works of art.

The architect's protection for copyrighted drawings neither protects against nor prohibits others from the construction of his graphically described structures, Muller v. Triborough Bridge Auth., 43 F. Supp. 298 (S.D. N.Y. 1942), nor can the protection enjoin others from employing the various arts and systems which the drawings explain, Baker v. Selden, 101 U.S. 99 (1879). The copyright protection will also be subjected to a limited duration and "fair use" by others. For these reasons the architect, who does not contemplate wide publication of his drawings, usually feels that the acquisition of statutory copyright does not improve his position materially.

[14] Palmer v. DeWitt, 47 N.Y. 532, 536 (1872). "The common-law rights of authors, as now recognized, existed before the passage of copyright laws, and have not been taken away or impaired by those laws."; Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904); Edgar H. Wood Ass'n v. Skene, — Mass. —, 197 N.E. 2d at 889-90; and LATMAN, HOWELL'S COPYRIGHT LAW 201 (4th rev. ed. 1962). The scope of this paper is limited to common law copyright and is not intended to fully discuss the present separate statutory remedy. However, it must be noted that a bill for the general revision of the statutory copyright law has been introduced in Congress. S. 3008, 88th Cong., 2d Sess. §§ 1-54 (1964).

[15] 61 Stat. 654, 17 U.S.C. § 2 (1958).

Prior to the first general publication of his literary product,[16] an architect is entitled to complete common law copyright protection.[17] This protection affords him the exclusive right to offer his services and products to his clients, to receive proper remuneration, and to license construction from his working drawings.[18] In order for the architect to maintain this protection, he must remain the owner of his products. Usually, in non-governmental projects,[19] the property rights in the plans pass to the client when he accepts the architect's work and services and properly compensates him for them.[20] Thus in the absence of an express contract term or conduct impliedly stipulating otherwise, all copyright protection vests in the person commissioning the project.[21] To alleviate this problem the American Institute of Architects recommends that all Owner-Architect contracts contain a specific provision reserving in the architect all property rights, title, and interest in the architectural drawings.[22]

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[16] Kurfiss v. Cowherd, 233 Mo. App. 397, 121 S.W. 2d 282, 286 (1938); Palmer v. DeWitt, 47 N.Y. 532, 536 (1872); Katz, *supra* note 10, at 232.

> "To be protected at common law, the unpublished original work must be *expressed*, in a *concrete* or tangible manner. This does not mean that the author's thought must be set forth in some kind of writing, and that each premise must be completely developed. The requirement of concreteness for intellectual productions would appear to be satisfied where the creator's thoughts are contained in such non-abstract form as would permit the impress of his mark of ownership."

See Nathanielsz, *supra* note 9, at 236; 42 COLUM. L. REV. 290 (1942); and 75 U. PA. L. REV. 458 (1927).

[17] Ketcham v. New York World's Fair 1939, Inc., 34 F. Supp. 657 (E.D. N.Y. 1940), *aff'd per curiam*, 119 F. 2d 422 (2d Cir. 1941); Wright v. Eisle, 86 App. Div. 356, 83 N.Y. Supp. 887 (1903); 18 C.J.S. *Copyright* § 136 (1939); TOMSON, IT'S THE LAW! 221 (1960); 42 COLUM. L. REV. 290 (1942); 59 MICH. L. REV. 133 (1960); and 75 U. PA. L. REV. 458 (1927).

[18] TOMSON, *supra* note 17, at 220-1; and 75 U. PA. L. REV. 458 (1927).

[19] In government contracts it is normal procedure for the government to contract for all property rights, title and interest in the drawings.

[20] McCoy v. Grant, 144 Minn. 92, 174 N.W. 728 (1919); AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE, Ch. 9, p. 6 (1963 ed.); and TOMSON, *supra* note 17, at 220, 225.

[21] Tumey v. Little, 18 Misc. 2d 462, 186 N.Y.S. 2d 94, 95 (Sup. Ct. Nassau Co. 1959); Kurfiss v. Cowherd, 233 Mo. App. 397, 121 S.W. 2d 282, 287 (1938); NIMMER, COPYRIGHT § 63 (1963); and TOMSON, *supra* note 17, at 220-1. "In such case . . . the owner is entitled to them. They become his property, and the architect cannot subsequently prevent the owner from using them in constructing another building. Nor does he have a right to receive additional compensation when they are used again. . . ."

[22] AIA Documents, The Standard Form of Agreement Between Owner and Architect, Forms B131, B211, and B311 (1963),

> "*Ownership of Documents.* Drawings and Specifications as instruments of service are the property of the Architect whether the Project

Assuming that the architect has succeeded in preserving full ownership in his drawings, his rights are protected by his common law copyright. This copyright protection extends to the moment there is a *first general,* as opposed to *limited,* publication of his work. However, once there has been such a general publication, the architect loses his common law copyright, and his work becomes part of the public domain.[23] The line separating a general publication from a limited one is thin and often difficult to draw. The intent of the architect,[24] the subject matter, the manner and extent of circulation, the opportunities available for others to copy the work, the communication and exhibition of the literary property, and the nature of the remedy of protection being sought are all contributing factors in determining the nature of publication.[25] General publication exists when the author gives his thoughts, ideas, sentiments, knowledge and/or information to the world by *unrestricted* sale, dissemination, or exhibition.[26] General publication, however, is not dependent solely upon *actual* sale of the literary property nor is it dependent upon any act of the public.[27] Generally when an author makes his literary product available to the public, to all persons who might be interested, he goes beyond limited publication.[28]

for which they are made be executed or not. They are not to be used on other projects except by agreement in writing."

The AIA has incorporated a similar clause in the "General Conditions", AIA Document, The General Conditions of the Contract for the Construction of Buildings, Form #A201 (1963),

"Art. 7. *Ownership of Drawings.* All Drawings, Specifications and copies thereof furnished by the Architect are his property. They are not to be used on other work, and, with the exception of the signed Contract set, are to be returned to him on request, at the completion of the work."

They have also recommended that some restrictive notice appear on all architectural products. AMERICAN INSTITUTE OF ARCHITECTS, *supra* note 20, at 6.

[23] Kurfiss v. Cowherd, 233 Mo. App. 397, 121 S.W. 2d 282, 286 (1938); I LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY § 4 (1938); and TOMSON, *supra* note 17, at 222.

[24] Although the intent of the architect must be considered, this can only be determined objectively by an examination of his actions. Kurfiss v. Cowherd, *supra* note 23, at 287; TOMSON, *supra* note 17, at 224; and 59 MICH. L. REV. 133 (1960).

[25] Werckmeister v. American Lithographic Co., 134 Fed. 321, 326 (2d Cir. 1904); See Burciaga, *Divestative Publication — Two-Century Dilemma,* 12 COPY. L. SYM. (ASCAP) 201 (1963).

[26] Kurfiss v. Cowherd, *supra* note 24, at 286; WITTENBERG, THE LAW OF LITERARY PROPERTY 61 (1957); 2 LADAS, *supra* note 23, § 321; 18 C.J.S. *Copyright and Literary Property* § 13 (1939); and 59 MICH. L. REV. 133 (1960).

[27] Jewelers' Mercantile Agency v. Jewelers' Weekly Publication Co., 155 N.Y. 241, 49 N.E. 872, 875 (1898); and 18 C.J.S. *supra* note 26.

[28] White v. Kimmel, 193 F. 2d 744 (9th Cir. 1952), *cert. denied,* 343 U.S. 957 (1952); and Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904).

It is of little or no consequence that the number of entrusted persons is limited; it is sufficient that he has put it within their reach.[29] In analyzing whether the publication is limited, and, therefore, non-divestive, all of the interrelating factors contributing to general publication must be considered. However the most important factors to be considered are whether or not the *free use* of the subject matter of copyright *is limited* by expressed or implied conditions which preclude its dedication to the public,[30] and whether or not the architect has any realistic control over his actions.[31]

In the case of *Werckmeister v. American Lithographic Co.*,[32] defendant contended that public exhibition of an artist's original painting, without notice of restrictions, on its face divested the artist of common law copyright because of disclosure to the public. The court held that those persons who saw the exhibition were sufficiently governed by museum restrictions, forbidding photographing or reproducing the compositions, so that only a limited publication occurred.[33] Without such restrictions the court probably would have reached the opposite conclusion. Therefore, in order to maintain a limited publication, the architectural designs, drawings, specifications and copies thereof, are and should be distributed only among participating and "interested" parties;[34] and then only with a proper notice of restrictions of use and ownership attached.[35]

Such actions will, probably, not only prevent loss of copyright by general publication but will, in addition, prevent loss of copyright by abandonment. Abandonment is claimed not to be a form of general publication. In *DeSilva*

[29] Jewelers' Mercantile Agency v. Jewelers' Weekly Publication Co., 155 N.Y. 241, 49 N.E. 872, 875 (1898).

[30] Werckmeister v. American Lithographic Co., 134 Fed. 321, 324 (2d Cir. 1904); 18 C.J.S. *supra* note 26; LATMAN, *supra* note 14, at 64-5. "Distribution with limitation by the proprietor of the persons to whom the work is communicated or of the purpose of the disclosure, is known as "limited," "restricted" or "private" publication, but is, more accurately, no publication at all." TOMSON, *supra* note 17, at 222; and Bertz, *Protecting Artistic Property with the Equitable Servitude Doctrine*, 46 MARQ. L. REV. 430, 445 (1963). As long as the architect maintains reasonable control over the possession and distribution of the architectural drawings and specifications to authorized persons, with proper notification of ownership, then obtaining possession without authority makes such person liable to the architect.

[31] United States v. Certain Parcels of Land, 15 F.R.D. 224, 234-35 (S.D. Cal. 1954); and Smith v. Paul, 174 Cal. App. 2d 744, 345 P. 2d 546, 550 (1959).

[32] 134 Fed. 321 (2d Cir. 1904).

[33] *Id.* at 325.

[34] "Interested" parties will normally be the general contractor and subcontractors, the owner-client and subdivisions within their organization, and finally the architect's office which includes the corresponding engineers.

[35] See footnote 22 and corresponding text.

Const. Corp. v. Herrald,[36] the court held that an intention to abandon and therefore a loss of copyright will exist when, *without proper notice of restriction,* (1) there is circulation of architectural drawings amongst subcontractors; and (2) there is a public exhibition of the physical structure as a model; and (3) advertisements and photographs of the structure and plans are freely circulated. The court did not say that such acts constituted a general publication of the architectural drawings. Rather they said that such acts showed a positive intent to abandon the copyright even though such actions might not be sufficient to constitute a general publication. In the *Skene* case there was not sufficient evidence to warrant consideration of abandonment, and most other cases have turned on a determination of general or limited publication. However, this relatively new theory of abandonment, as applied to architects, might have extensive application in future cases where a court is unable to find a general publication, yet in their discretion they still feel that the particular architect is not entitled to his common law copyright.

Is the architect's public filing of his professional product of such a nature that it (1) is tantamount to general publication, or (2) shows his intent to abandon common law copyright protection? There are two distinct types of public filing. The first is that which is required to obtain a federal copyright. The filing in this instance is considered a general publication,[37] and the architect is voluntarily giving up one form of protection for another. Such filing should not be equated with the second type of public filing, the architect's submission of his drawings to the proper municipal office to secure a building permit. In the latter instance no new form of protection is being offered the author, and such filing should not be considered, in itself, a general publication.

Only a limited number of cases have been decided on whether or not the submission of architectural drawings to municipal building departments is a general publication. The two leading cases supporting the view that such filing divests the architect of his common law copyright were both decided in New York. In *Wright v. Eisle,*[38] the plaintiff had prepared working drawings and specifications for the construction of a residence and filed them with the building department of Mt. Vernon, New York. The de-

[36] 213 F. Supp. 184, 197 (M.D. Fla. 1962).
[37] Callaghan v. Myers, 128 U.S. 617, 656-58 (1888); and O'Neill v. General Film Co., 177 App. Div. 854, 157 N.Y. Supp. 1028, 1038 (1916).
[38] 86 App. Div. 356, 83 N.Y. Supp. 887 (1903).

fendant, after seeing the constructed residence, hired a second architect who designed a home substantially conforming to the original. The plaintiff sued for the value of his services and drawings. The court, in a rather brief opinion, stated:

> "The act of publication is the act of the author . . ., and; when the latter has permitted the work to be filed in a public office as a step in furnishing the basis on which he is to receive compensation from his work, we are of the opinion that . . . the plaintiff has published his work to the world, and can have no exclusive right in the design, or its reproduction."[39]

The rule of the *Wright* case was followed in *Tumey v. Little*[40] and *DeSilva Constr. Corp. v. Herrald.*[41] In the *DeSilva* case, the only federal decision on point, the court, in dicta, said "that the filing of architectural plans in a public office, *even though it is required by statute or ordinance,* is tantamount to publication of said plans and amounts to a dedication to the public. . . ."[42] The court stated that its decision was based upon what appeared to be the prevailing view. Apparently the prevailing view consisted of the two New York decisions and three other cases[43] which were not directly in point. In California the case of *Smith v. Paul*[44] adopted the contrary position. Since the two most recent cases on point, *Smith* and *Skene,* have both decided that filing to secure a building permit is not

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[39] *Id.* at 889.

[40] 18 Misc. 2d 462, 186 N.Y.S. 2d 94 (Sup. Ct. Nassau Co. 1959). The plaintiff had prepared drawings of a residence for the defendant and was properly compensated. Plaintiff contended that the defendant turned the plans over to a third party who constructed similar residences. "[T]he filing of an architect's plans with the building department constitutes a publication terminating such common law copyright as he may have had. . . ." *Id.* at 95.

[41] 213 F. Supp. 184 (M.D. Fla. 1962); See also NIMMER, COPYRIGHT § 26 (1963); and 18 C.J.S. § 13 (1939), "Where not otherwise provided by statute, deposit of plans and specifications in a public office . . . is regarded as a publication of them, and the exclusive right of control is thereafter gone."

[42] 213 F. Supp. 184, 194 (M.D. Fla. 1962). (Emphasis added). The court implied in their decision that if the architect wants to avoid a general publication in filing, he should obtain a statutory copyright, and put proper notice of such on each set of filed drawings.

[43] Callaghan v. Myers, 128 U.S. 617 (1888); Kurfiss v. Cowherd, 223 Mo. App. 397, 121 S.W. 2d 282 (1938); and Gendell v. Orr, 13 Phila. 191 (Pa. Common Pleas 1879).

[44] 174 Cal. App. 2d 744, 345 P. 2d 546 (1959). Plaintiff, an unlicensed architect, compiled plans and specifications for a home for Carr. The plaintiff was to retain ownership of the drawings. The defendant copied said plans and was in the process of constructing a home from them when suit was begun.

a general publication, the New York position can no longer be considered a prevailing view. In fact, the case law is so meagre and divided that courts faced with the problem in the future will be free to analyze the problem substantially unrestricted by precedent.

In analyzing and determining the effect of publicly filing architectural plans the courts should give consideration to the public policy embodied in the building codes which require such filing. Such an analysis will disclose that architectural drawings are filed in order to give the building commission graphic illustrations of all proposed structures. These illustrations allow the commissioner to check carefully and determine if the prime purpose of the building code,[45] public safety, is satisfied. The *Smith* and *Skene* decisions employed such an analysis and in reaching their conclusion stated that plans are filed by compulsion of law to assure that the public will have adequate protection from unsafe construction.[46] The filing requirements were not intended to vest new rights with the general public and give them possessory rights in the architectural product.[47] The architect files to obtain a building permit, a prerequisite for beginning construction. He gets no new protection, benefit or compensation by filing; he is not selling anything, and he certainly does not intend to abandon common law copyright.[48]

This analysis of the function of public filing of architect's plans led the *Smith* and *Skene* courts to the sound conclusion that the filing of the drawings with the proper municipal departments was a publication to a "single entity" for a limited and specified purpose and therefore

[45] NATIONAL BOARD OF FIRE UNDERWRITERS, NATIONAL BUILDING CODE § 100.2 (1955 ed.). "Purpose of Code. The purpose of this code is to provide for safety, health and public welfare through structural strength and stability, . . . incident to the design, (and) construction . . . of buildings and structures."

[46] Edgar H. Wood Ass'n v. Skene, — Mass. —, 197 N.E. 2d 886, 893 (1964); Smith v. Paul, 174 Cal. App. 2d 744, 345 P. 2d 546, 551 (1959); and NIMMER, COPYRIGHT § 55 (1963).

[47] Smith v. Paul, *supra* note 46, at 551.

[48] Edgar H. Wood Ass'n v. Skene, — Mass. —, 197 N.E. 2d 886, 893-94 (1964); Smith v. Paul, *supra* note 46, at 550, "Actually the architect by the requirement that his plans be filed in order to build is forced against his desires and consent to lose his common law rights if it be held that he thereby 'publishes' his plans. . . . [H]e is placed in a position where he could rarely sell more than one set of his plans."; 2 LADAS, *supra* note 23, at § 321; Katz, *supra* note 10, at 233 n. 54;

> "If the filing of plans, drawings, and designs in governmental offices . . . is held to throw these technical writings into the public domain, the architect is literally forced to divest himself of his exclusive property, contrary to his own desires. *He cannot build unless he files; the moment he files* he loses his common law rights."

was a non-divesting limited publication.[49] It is conceded by these courts that the public has a right to inspect, and if necessary, to copy the filed plans, but only for the limited purposes which "reasonably related to the objectives behind the filing requirement. . . . That right does not extend to making copies which will impair the architect's common law copyright and property in the plans."[50]

The last point for consideration is whether or not the completion of the building is (1) a general publication or (2) an abandonment of copyright protection of the original or as-built architectural *drawings*. The leading modern case holding that completion of the structure is divestment of copyright is *Kurfiss v. Cowherd*.[51] The court stated that any time the structure is used as a model "open for public inspection" without restrictions on the viewer, the owner of the common law copyright in the architectural drawings will be divested of all future rights and the drawings become part of the public domain.[52] The court reasoned that, since the public was free to take measurements of the structure, they should not be prevented from using the original or as-built drawings. The implications of this decision might well be that any time the public can view or photograph the completed building from several directions there is a sufficient basis to find a general publication of the drawings. Other reasons advanced for holding that erection divests the architect of his copyright are based on the idea that otherwise the architect would in essence have a perpetual monopoly in his designs and this would "remove a majority of structures from the public domain."[53] The basic fallacy in this latter argument is that copyright protection does not embrace the general design, interior or exterior, of the building, and unless the copies are aided by

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[49] Edgar H. Wood Ass'n v. Skene, *supra* note 48, at 893; and Katz, *supra* note 10, at 235.

[50] Edgar H. Wood Ass'n v. Skene, *supra* note 48, at 894.

[51] 233 Mo. App. 397, 121 S.W. 2d 282 (1938). This case cited the first American case on point, Gendell v. Orr, 13 Phila. 191 (Pa. Common Pleas 1879), for its holding that if part of a completed structure is exposed to public gaze this constitutes a general publication of the structure so exposed.

[52] Kurfiss v. Cowherd, 233 Mo. App. 397, 121 S.W. 2d 282, 288 (1938). "We think this unrestricted exhibition of the house was a publication. It is said that it was not intended that the public could or would take measurements thereof; but the fact remains that there were no restrictions to keep anyone from so doing, nor is it claimed that any effort was made to prevent it. It is not a question of whether measurements were so made, it is a question of whether the exhibition was public to all the world and unrestricted."

[53] 73 HARV. L. REV. 1391, 1392 (1960); 34 ST. JOHN'S L. REV. 326 (1959).

the original or as-built drawings, or are in violation of a use restriction, there is no infringement in the first place.[54]

The leading case of *Tabor v. Hoffman*[55] stated the prevailing view that an erection of a structure does not amount to general publication of the plans. Although the *Tabor* case was concerned with an engineering problem, it was properly adapted to architectural problems and followed in the *Smith* and *Skene* decisions.[56] A similar conclusion was reached in the *De Silva* case.[57] The rationale of these decisions is simply that it is virtually impossible for even a professional draftsman to make a near duplicate of the architectural drawings from mere site inspection of the completed structure.[58]

The completion of the building is not, in itself, a basis for a determination of abandonment. Since erection, according to the prevailing rule, is not a general publication divesting the architect of his copyright, it would be inconsistent to imply from this same act that the architect intended to abandon this protection. Furthermore the completion of the structure is merely the consummation of the building project and is not a manifestation of the architect's intent to relinquish his copyright. Although *De Silva* considered "publication" of the completed structure to be one of several contributing factors in a finding of abandonment, this factor, alone, is of little probative value.

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[54] Smith v. Paul, 174 Cal. App. 2d 744, 345 P. 2d 546, 550, 553-55 (1959); Edgar H. Wood Ass'n v. Skene, — Mass. —, 197 N.E. 2d 886, 895 (1964).

> "Observation or measurement of the exterior and the interior of a completed building can hardly be said to approach an accurate copy of a set of plans. We do not suggest that a common law copyright in the plans is infringed by a drawing made from observation of the interior or exterior of the buildings."

[55] 118 N.Y. 30, 23 N.E. 12, 13 (1889). "The precise question . . . is whether there is a secret in the patterns that yet remains a secret, although the pump has been given to the world." The question as it was posed, and the answer, can easily be seen to equally apply to architectural drawings and the erected structures. "While the defendant could lawfully copy the pump, because it had been published to the world, he could not lawfully copy the patterns, because they had not been published, but were still, in every sense, the property of the plaintiff. . . ." *Id.* at 13.

[56] Katz, *supra* note 10, at 236. "A structure is the result of plans, not a *copy* of them. . . . [B]uilding a structure . . . cannot be a publication of its plans."; Edgar H. Wood Ass'n v. Skene, — Mass. —, 197 N.E. 2d 886, 895 (1964); and Smith v. Paul, 174 Cal. App. 2d 744, 345 P. 2d 546, 550, 553-54 (1959).

[57] 213 F. Supp. 184, 196 (M.D. Fla. 1962). The court reached this conclusion because of their ruling "that the building of a structure from copyrighted architectural plans is not an infringement of the architectural plans themselves. . . ."

[58] NIMMER, COPYRIGHT § 57.3 (1963). A building cannot be called a derivative work solely because it is a product of architectural plans. The reason being that mere inspection of the building will not permit a precise reproduction of the architectural drawings upon which the building is based.

Therefore, properly considered, neither public filing of archiectural plans nor completion of the structure should constitute a loss of common law copyright protection.

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