

# Copyright of Architectural Records: A Legal Perspective

ALAN K. LATHROP

**Abstract:** As more archivists become concerned with the acquisition and preservation of architect's drawings, they need to be aware of the issues surrounding the copyright of these materials. Because of their unique nature, these records inherently possess special problems under copyright law, which have been defined and litigated in statute and in the courts of the United States for more than a century. A summary of relevant cases and copyright laws reveals the issues and special problems that architects' records have presented to those concerned with deciding their ownership, and the potential impact of these for archivists.

*About the author:* Alan K. Lathrop is curator of the Manuscripts Division at the University of Minnesota Libraries, which includes the Northwest Architectural Archives. He received his B.A. from Augustana College in Sioux Falls, South Dakota, and his M.A. degrees in history and library science from the University of Minnesota. He also completed the summer institute in archives administration offered jointly by the University of Denver and the Colorado State Archives. Before assuming his present position in 1970, he was a social science reference librarian and head of the Architecture Branch Library at Arizona State University, Tempe, and manuscripts librarian at the University of Iowa. Lathrop has served on the Minnesota State Historical Records Advisory Board and Minneapolis Heritage Preservation Commission and is currently a member of the Minnesota State Review Board for the National Register of Historic Places.

THE DRAMATIC INCREASE in historic preservation in the past decade has given rise to a corresponding increase in interest among archivists and historians in preserving the records documenting older architecture. More and more archives have adopted programs to preserve architectural records. An inevitable result is that archivists will be confronted with questions of copyright in such documents.

Copyright issues inherent in architectural records have evolved in statutes and case law since the last century. To clearly understand these issues one must examine the history of copyright law, both statutory and common law, up to the present time. As Michael J. Crawford wrote in the *American Archivist* a few years ago:

The archivist ought to concern himself with the rights of the copyright holders whose records are in his custody, as well as with the rights of researchers. . . . To handle issues of copyright in unpublished materials wisely is a constant and difficult responsibility for the archivist. With study, however, he can understand the law and establish a workable set of policies in regard to it.<sup>1</sup>

The following summary of relevant cases and statutes reveals that architects have often been dealt with unfairly in copyright law and especially case law, which one authority called "wrong in

principle and destructive in practice of architects' intellectual property."<sup>2</sup> The archivists' awareness of the issues and concerns discussed here, which have occupied both architects and the courts, is the necessary starting point for future considerations of the complex questions surrounding copyright of architectural records in archival custody.

Architectural drawings or plans possess unique copyright problems, not present in other types of architectural records—such as photographs, specifications, correspondence, and reports—and case law has dealt only with drawings.<sup>3</sup> Archivists are more familiar with these supporting record types and their associated copyright issues. For these reasons, this article focuses only on architectural drawings. The term "architectural records" as used below refers specifically and exclusively to drawings.

The talent to create literary and artistic works is considered a valuable gift, and the works themselves are thus deemed to deserve protection under law. For hundreds of years men have searched for ways to prevent others from appropriating their work and claiming it as their own.<sup>4</sup> Such is the essence of copyright, which protects artists and authors by granting to them the exclusive privilege of reproducing or publishing their creations for pecuniary gain or less tangible personal enhancement.<sup>5</sup> This right has long been extended by law in most western na-

<sup>1</sup>"Copyright, Unpublished Manuscript Records, and the Archivist," *American Archivist* 46 (Spring 1983): 137, 146.

<sup>2</sup>Arthur S. Katz, "Copyright Protection of Architectural Plans, Drawings, and Designs," *Law and Contemporary Problems* 19 (1953): 233.

<sup>3</sup>For a fuller definition of various types of architectural records, see Ralph E. Ehrenberg, *Archives & Manuscripts: Maps and Architectural Drawings* (Chicago: Society of American Archivists, 1982); Alan K. Lathrop, "The Archivist and Architectural Records," *Georgia Archive* 5 (Summer 1977): 25-32; and John Zukowsky, "Fine Lines: Connoisseurship in Collecting Architectural Drawings," *Art & Antiques* 3 (Sept.-Oct. 1980): 102-07.

<sup>4</sup>The earliest case involving copyright infringement that has come to the author's attention was one in sixth-century Ireland in which a monk named Finnian charged St. Columba with surreptitiously and wrongfully copying Finnian's manuscript of a new translation of the Gospels. The king, to whom the dispute was referred, ruled for Finnian, saying, "As a calf is to the cow, so is the copy to the book," thereby implying that the purloined manuscript was indeed a copy of the original and therefore illegal. (John Morris, *The Age of Arthur* [New York: Scribners, 1973], 172.)

<sup>5</sup>Eaton S. Drone wrote, "The aim of the law is to encourage learning by allowing a fair use to be made of

tions and is intended to ensure that creators of literary and artistic works may fairly benefit from their creations.

Copyright has taken two forms in Anglo-American law: *common law*, or copyright of unpublished creations; and *statutory*, sometimes called copyright after publication. In the United States, the latter was codified in federal statutes; the former was built up in the courts through judicial opinion and left as a concern of the individual states until 1978. Common law copyright historically protected unpublished intellectual property against unauthorized copying from the time it was put in tangible form (such as expressed in writing) until it was either published or was otherwise placed in the public domain.<sup>6</sup> Statutory copyright applied when a work was published, offering protection to authors and artists for a stipulated number of years.

The precedent for copyright law in the United States was established in England in statute and by the courts. The first modern copyright law was the Statute of Anne (8 Anne, c.19), enacted in 1709 to protect authors by penalizing publishers of unauthorized copies. Over the next sixty years, the courts were increasingly occupied by the question of unpublished intellectual property rights, or common law copyright, which was not addressed in the Statute of Anne. A body of common law in copyright grew up side by side with the statutory law. The case of *Millar v. Taylor* (98 Eng. Rep. 201) (1769) held for perpetual right of the author in unpublished works, saying that the Statute of Anne did not deprive an author of his

common law copyright. *Donaldson v. Becket* (4 Burr. 2408) (1774) reversed this opinion, ruling that common law copyright was lost when an unpublished work was published and thereby came under the protection of the Statute of Anne.<sup>7</sup>

This legal tradition was carried forward in the United States, first in state copyright laws issued under the Articles of Confederation, and then in the federal Copyright Act of 1790. The nation's first federal copyright law, the result of power reserved to the federal government by the Constitution (section 8), extended protection to maps, charts, and books. The fact that the act did not pertain to common law copyright was reinforced in a Supreme Court decision, *Wheaton v. Peters* (8 Pet. 591) (1834), which cited *Donaldson v. Becket* as precedent in determining that common law rights were lost in published works.<sup>8</sup>

In the nineteenth century, there were eight revisions of the act. Each made adjustments in the act's provisions such as extending the term and coverage of copyright to twenty-eight years, renewable for fourteen years (1831); adding dramatic performances, photographs, and works of art to its purview (1865); and including drawings, models, and designs in the copyright law in 1870, a move intended to benefit architects.

In practice, however, architects were afforded little protection of their records under the law or in the courts. Interpretations of copyright law in cases involving architectural records seem to have consistently run contrary to the interests of architects throughout the nineteenth and

---

a copyrighted work, but at the same time to prevent the subsequent author from saving himself labor by appropriating without consideration the fruits of another's skill and industry" (*A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* [Boston: Little, Brown, 1879], 398).

<sup>6</sup>William S. Strong, *The Copyright Book: A Practical Guide* (Cambridge, Mass.: MIT Press, 1981), 2.

<sup>7</sup>Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), 7, 13-14.

<sup>8</sup>Katz, "Copyright Protection," 226; Barbara Ringer, "Two Hundred Years of American Copyright Law," in *Two Hundred Years of English and American Patent, Trademark and Copyright Law*, ed. American Bar Association (Chicago: American Bar Center, 1977), 125.

early twentieth centuries. As a result many of them simply chose to ignore the implications of the law for their records or to fatalistically console themselves with the thought, in the words of one nineteenth-century source, "that the better worth copying their work is the more difficult it is to copy, and the more flattering will be the difference between the copy and the original."<sup>9</sup>

Copyright protection extends only to the drawings themselves, not to the *ideas* contained in them. To protect ideas, architects are forced to seek a *patent*. This distinction came about as a result of *Baker v. Selden*, a landmark U.S. Supreme Court case in 1879.<sup>10</sup> The decision of the court embodied a fundamental principle that has had special significance ever since in the interpretation of copyright law as it affects architectural records: the *useful article doctrine*.

The case involved a book on accounting techniques that included a new ledger format, a page ruled into columns and headings. Baker had seen this format in Selden's book, published in 1859, and adopted the idea in a book of his own, rearranging the columns and using different headings. The case revolved around the contention

that the ruled lines and headings, given to illustrate the system, are a part of the book, and, as such, are secured by the copyright; and that no one can make or use similar ruled lines and headings, or ruled lines and headings made and arranged on substantially the same system, without violating the copyright. . . . Stated in another form, the question is, whether the ex-

clusive property in a system of book-keeping can be claimed, under the law of copyright, by means of a book in which that system is explained.<sup>11</sup>

Justice Joseph P. Bradley, writing for the majority, raised the crucial issue of whether the described bookkeeping system fell within the domain of *copyright* or *patents*. What is and can be secured by copyright, he said, is the form in which the ideas are *expressed*. The "application and use" of the ideas "are what the public derive from the publication of a book which teaches them." He used as his example a copyright on a book about perspective drawing, which "gives exclusive right to the modes of drawing described." If the author does not patent the art described in the book, that art is given to the public to use freely. The art, or *useful ideas*, set forth in the book are *not* subject to copyright, but belong to the people.

Justice Bradley wrote, "The use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such books."<sup>12</sup>

*Baker v. Selden* set out the principle that the form of expression can be copyrighted, but not the system or process. Copyright cannot be secured in a work if that protection would prevent other people from using the ideas presented in it. For architectural drawings this decision meant that the "lines, words, and symbols" on them could be copyrighted as the expressions used by architects to convey or communicate their design ideas. The

<sup>9</sup>*American Architect & Building News* 6 (25 October 1879): 1.

<sup>10</sup>101 U.S. 99. Legal citations place the abbreviated name of the source (in this case, *U.S. Supreme Court Reports*) following the volume number (here, 101) and before the page number in that volume (here, 99). See Gary M. Peterson and Trudy Huskamp Peterson, *Archives & Manuscripts: Law* (Chicago: Society of American Archivists, 1985), 112, for an excellent explanation of legal citations.

<sup>11</sup>101 U.S. 101.

<sup>12</sup>101 U.S. 104.



useful, functional elements or design ideas themselves portrayed in the drawings could not be copyrighted, but could be patented; non-functional, aesthetic elements thus depicted were copyrightable.<sup>13</sup>

While *Baker v. Selden* held that architects could not copyright their ideas, the case of *Gendell v. Orr* (1879) dealt another heavy blow in architects' efforts to protect their designs. In *Gendell v. Orr* the court ruled that the plaintiff had published his design by building a porch on a residence alongside a highway, therefore making it available to unrestricted public viewing. The defendant was not enjoined from building a similar porch because, in the opinion of the court, the plaintiff had lost his common law copyright in the design when it was "published."<sup>14</sup>

(The decision was upheld as precedent much later in *Kurfiss v. Cowherd* (1938) when the court ruled that copyright was lost in a building that had been built and opened by the plaintiff to unrestricted public inspection. The defendant measured a house and built copies of it from plans made from the measurements. What is interesting about this case is that the courts found against the architect (plaintiff) by interpreting the law to cover buildings as absolute copies of plans; consequently, plans were considered to be published when the buildings they depicted were constructed (or "published") and opened to public viewing.<sup>15</sup> This narrow interpretation of copyright law would later be challenged and overturned.)

The reaction to these adverse decisions in the professional press of the day was relatively mild and surprisingly unsup-

portive of architects. The *American Architect and Building News*, an influential voice for the profession, published the remark that architects were essentially eager for publicity and so would have to continue to suffer the consequences of having their ideas stolen. "The only other defence to which they can look is in public opinion," wrote an unidentified staff writer, "and the growth of a common delicacy about appropriating the fruits of other men's labor, which we cannot expect to see advance very rapidly, if it comes at all."<sup>16</sup>

The same magazine ruminated over the question of copyright in several articles published between 1878 and the turn of the century. Generally, the magazine took the view that if architects chose to protect their designs either by copyright or patent, such action would stifle their study and development by others. Architecture is an art that grows "by a common development and assimilation of current ideas"; through study of each other's work architects learn to improve designs for the sake of the progress of the art. Although arguing that patent protection of plans would be an incentive for architects to invent new building techniques and a stimulus for new ideas, thus spurring attempts to improve on previous plans, the magazine ultimately decided that patenting probably would stifle progress, forcing members of the profession to pay a royalty before they could use others' designs and introducing an unhealthy "commercial element" into design. In addition, a costly search would be required to find whether the idea had been used previously before a patent could be granted. Finally, the magazine

<sup>13</sup>Strong, *The Copyright Book*, 12-14; Alan B. Stover, "What Can I Do to Prevent Others from Misappropriating or Infringing Upon My Drawings?" in *Avoiding Liability in Architecture Design and Construction: An Authoritative Guide for Design Professionals*, ed. Robert F. Cushman (New York: John Wiley & Sons, 1983), 89-90.

<sup>14</sup>13 Phila. 191 (Ct. Common Pleas, Philadelphia, Pa., 1879).

<sup>15</sup>233 Mo. App. 397.

<sup>16</sup>*American Architect & Building News* 6 (25 October 1879): 1.

pointed out, both the difficulty of patenting something like a room arrangement, for example, as truly "new," and the practically impossible task of enforcing copyright.<sup>17</sup> This magazine and others, including the *Improvement Bulletin*, argued from artistic arrogance that architects, being artists and gentlemen, should be above all of the petty financial wrangles that seemed inherent in seeking copyright protection. Architects could use statutory protection, if available, but common law copyright was considered sufficient.<sup>18</sup>

Two important cases tried early in the twentieth century solidified the "useful article" principle enunciated in *Baker v. Selden*. The case of *Larkin v. Pennsylvania R. Co.* (1925) determined that an architect's rights were not violated when the defendant, to whom the architect had given a copy of his plans for a hotel, allowed another architect to reproduce the same plans for use in constructing the building. The court held that the structural methods employed by the architect in the plans were well known as functional ideas or elements and thus not protected by copyright. The architect could have obtained a patent for the idea, which would have offered effective protection against unauthorized use; however, even if the architect had gotten statutory copyright protection for his plans, such protection would have only extended to the plans themselves, not the actual structure.<sup>19</sup>

The second case was *Muller v. Triborough Bridge Authority* (1942) in which

the court, citing *Baker v. Selden*, said that exclusive right to an art must be obtained by patent.<sup>20</sup> In this case, the plaintiff, Muller, charged that the defendant had built a bridge approach that reproduced his copyrighted design, which the defendant had seen prior to construction. The court denied compensation, holding that the plaintiff should have obtained a patent on his idea if he wanted to fully protect it. Copyright of a drawing, said the court, did not give copyright in the "art" or useful idea described in the drawing. The ruling went further to state that the plan as built was not an "actual appropriation" of the plaintiff's design but had been "independently conceived and executed by the engineers of the New York City Parkway Authority from other sources based on prior experience."<sup>21</sup> The court was silent on the subject of whether there had been infringement of the mode of expression used by the plaintiff, as would be involved if the defendant had actually *copied* the plans. One commentator noted that "[the] underlying rationale of the *Triborough Bridge* case seems to be that copyright in a drawing or picture of a nonartistic object of utility does not preclude others from making the three-dimensional object portrayed in the drawing or picture."<sup>22</sup>

It seemed that an important step had been taken in 1909 when the Copyright Act of that year was passed by Congress. The act made provision for "drawings or plastic works of a scientific or technical character" (section 5), and the Regulations of the Copyright Office stated that

<sup>17</sup>*American Architect & Building News* 4 (20 July 1878): 1; 6 (19 July 1879): 17; 19 (9 January 1886): 23; 28 (19 July 1890): 45; 41 (23 January 1897): 29.

<sup>18</sup>"Copyright for Architects' Plans," *Improvement Bulletin* 15 (2 January 1897): 6.

<sup>19</sup>125 Misc. 238, 210 N.Y. Supp. 374.

<sup>20</sup>43 F. Supp. 298.

<sup>21</sup>43 F. Supp. 299. An earlier case, *Jones Bros. v. Underkoffler* (16 F. Supp. 729 [1936]), also adhered to *Baker v. Selden* by recognizing that a cemetery monument was a non-functional work of art entitled to be protected by registered copyright because it was not considered to incorporate a "useful article."

<sup>22</sup>William S. Strauss, "Copyright in Architectural Works," in *Studies in Copyright*, ed. The Copyright Society of the U.S.A. (South Hackensack, N.J.: Fred B. Rothman; Indianapolis: Bobbs-Merrill, 1963), 1:70.

these were to include mechanical drawings, architects' blueprints, and engineers' diagrams.<sup>23</sup> But courts were not willing, in practice, to interpret copyright in architectural plans as meaning it also protected "against their use in building a structure, except as regards a copyrighted design for a structure deemed to be a 'work of art.'"<sup>24</sup> What was basically at issue was whether or not plans were considered "published" after the structure they depicted had been erected and whether or not the structure itself was considered "published." Common law copyright offered more protection, but only for unpublished drawings; the law would punish anyone who made unauthorized use of unpublished works because such works constituted an exclusive right of property. The courts, however, were not clear about what they believed constituted publication. As one writer noted, "the theory of publication is simple enough, but its correct application to a particular set of facts is another matter."<sup>25</sup>

There were efforts to revise the provisions of the Copyright Act of 1909 protecting architectural records in 1924, 1925, 1930, 1932, 1935, and 1940. The revisions generally extended copyright to structures, architectural molds, or designs, but only covered the artistic character of such designs and not the "processes or methods of construction," which, as explained, fell in the area of patentable works. The various bills proposed to protect artistic architectural structures from unauthorized reproduction in form as well as design. While some bills apparently intended to protect against infringement through the

unauthorized reproduction of artistic, non-utilitarian structures in the form of drawings and plans, others did not include this protection, nor did they prohibit the "making and publishing of two-dimensional pictures (other than architectural drawings and plans)" of such structures. Also, some of the revisions did not consider construction of an architectural design to be publication and would have allowed a work of architecture to be registered in the Copyright Office. None of these revisions was enacted, so additional protection for architects' works failed to occur.<sup>26</sup>

An additional problem arose in the case of *Wright v. Eisle* (1903), which raised the intriguing question of whether plans deposited in a public office, as required by law to obtain a building permit, were considered published because they were open to public inspection. The court concluded that common law copyright would indeed be lost in such circumstances,<sup>27</sup> thus setting a precedent that endured until 1959, when it was reversed in *Smith v. Paul*, a case heard in the California Court of Appeals.

*Smith v. Paul* concerned an architect, Ernest M. Smith, who complied with local ordinances and filed a set of house plans in a county office in order to obtain a building permit.<sup>28</sup> The defendant saw those plans, considered them to be a public record, and copied them for use in constructing a similar residence. The court noted that there was very little precedent and that previous decisions, such as *Wright v. Eisle* and *Kurfiss v. Cowherd*, had concluded that both the acts of filing plans in a public office and constructing a building, which would put

<sup>23</sup>*Ibid.*, 69.

<sup>24</sup>*Ibid.*, 70-71.

<sup>25</sup>Katz, "Copyright Protection," 232.

<sup>26</sup>Strauss, "Copyright," 71-72.

<sup>27</sup>86 App. Div. 356, 83 N.Y. Supp. 887.

<sup>28</sup>174 C.A.2d 744. By contrast, also in 1959 another court followed the precedent of *Wright v. Eisle* in the case of *Tumey v. Little* (186 N.Y.S.2d 94).

it before the public gaze, constituted publication, and, therefore, loss of common law copyright. The court decided that it would be more equitable instead to interpret both acts as *limited* publication, under which common law copyright would not be lost. In its decision the court ruled that

the purpose of the requirement of filing the plans in a government office is to protect the public from unsafe construction—not to take away from the architect his common-law property rights. . . . The architect derives no profit from the deposit of his plans with the building department. He does not thereby sell his work and has no intention of dedicating it to the public. He is merely complying with a governmental regulation [which does not require that the plans be dedicated to the public] and is merely to insure that if the architect's plans are thereafter used, the structure thereby designed shall comply with governmental regulations.<sup>29</sup>

In its opinion, the court cited Arthur Katz's highly influential essay, "Copyright Protection of Architectural Plans, Drawings, and Designs," published in 1953.<sup>30</sup> Katz maintained that loss of common law copyright by either filing plans in government offices or through construction of the building they depicted was a grave injustice in that it penalized the architect for trying to profit from his own labor and, by extension, for attempting to comply with the law.

The test of publication is one of *intention*, that is, the dissemination of any literary creation must be to the extent to justify the belief that it was for the pur-

pose of rendering the work public property. "Thus," Katz wrote, "an architect who discloses his unpublished plans, drawings or designs to a prospective client, or series of clients, does not do so with the intention of abandoning his rights in the work."<sup>31</sup> The same applied to filing them in any government office.

Katz firmly stated that a completed structure was not a publication of the plans. It was, he noted, "no more a copy of its underlying plans than a phonograph record is a copy of its underlying musical notations." For a work to be considered published, it must be reproduced and copies issued to the public. Katz went on to say that "a structure is the result of plans, not a *copy* of them. It follows that building a structure and opening it to public gaze cannot be a publication of its plans."<sup>32</sup>

Katz noted that while "an architectural creation" can be protected as a plan, model, or completed structure in most countries of the world, such was not the case in the United States. The architect could obtain copyright for his drawings and models, but not for the completed structure. Once built, it could be copied by others as long as they did not also copy the copyrighted drawings and models. One who infringes on copyright, said Katz, "is not denied the right to use the information or ideas expressed in the original technical writings. He is merely enjoined [by the court] from copying the copyrighted technical writings, and is made to give up all offending copies."<sup>33</sup>

Katz observed that the courts had decided many copyright cases on the basis of access, that is, any indication that the alleged transgressor saw or other-

<sup>29</sup>174 C.A.2d 750, 751.

<sup>30</sup>Katz was the department head, Copyright & Television Departments, Columbia Pictures Corp. in Hollywood and a counsel to architecture firms.

<sup>31</sup>Katz, "Copyright Protection," 235. Even though his comments were written as interpretation applicable under the old Copyright Act of 1909, those highlighted here remain valid under the new Act of 1976.

<sup>32</sup>*Ibid.*, 236.

<sup>33</sup>*Ibid.*, 245.

wise had knowledge of the plaintiff's work. Infringement will be committed when one person makes a direct copy of another's plans, when one makes a copy of plans following the instructions of a third party who saw the originals, or when one reproduces copies that someone else has obtained. "The test of infringement," Katz said, "is whether the questioned work is 'recognizable by an ordinary observer as having been taken from the copyrighted source.'"<sup>34</sup> Statutory copyright protection will only protect the architect from unauthorized copying of his drawings or other technical writings; it will not be effective in prohibiting others from building virtually identical structures from their own plans, Katz pointed out.

Katz's article greatly influenced subsequent decisions in the courts, sometimes in proving positions contrary to those supported in the essay. One such example was *DeSilva Construction Corp. v. Herrald and DeSilva Construction Corp. v. LaHurd* (1962), two cases consolidated for the purposes of trial.<sup>35</sup> The suits involved possible copyright infringement of the design of a model home in Florida. The key issues were loss of copyright when a building is opened to the public, when plans are deposited in a public office, and when someone draws similar plans from memory.

In 1960, Frank Weissman, president of DeSilva Construction Corporation, and his son Alan drew up plans for a one-story dwelling. They applied for a building permit to erect the house, at the same time depositing a set of plans in the Building Inspection Department of Sarasota as required by law. These plans bore no copyright notice.

The house was subsequently built and opened to the public as a model home.

Both Mrs. Alice Herrald and Mrs. Margaret LaHurd visited the house and talked with the Weissmans about building one for their families. Neither party came to terms with the Weissmans on the construction price and separately turned to other contractors, who drew up plans. These plans closely resembled those for the model home designed and built by DeSilva Construction Corporation. The contractors later admitted that they had visited the Weissman house and one of them, employed by the LaHurds, looked at the DeSilva plans on deposit in the Building Inspector's office in Sarasota.

Meanwhile, Alan Weissman directed his draftsman to revise the plans from which the model home was built to conform with the house as built and to affix a notice of copyright on them. A set of plans was sent, together with an application, to the U.S. Copyright Office. These revised plans were never sold, published, given away, or circulated, and a certificate of registration was issued in May 1961. Soon after, the LaHurds and the Herralds received registered letters from an attorney for DeSilva Construction Corporation informing them they would be in violation of copyright if they erected the houses allegedly based on the Weissman plans. Both parties had their homes underway and did not move to halt construction. The Weissmans filed suit.

In its decision, the court upheld an earlier precedent, ignoring *Smith v. Paul*. The court said that filing a set of plans to obtain a building permit had caused the plaintiff, Weissman, to lose his common law copyright. The court advised all architects to place a copyright notice on their plans before filing them in any government office. The plans, therefore, that

<sup>34</sup>Ibid., 243, 245, n. 120. Katz quoted from the decision in *Fleischer Studio v. Ralph A. Freundlich*, 73 F.2d 276 (1934).

<sup>35</sup>213 F. Supp. 184.



Weissman deposited in the Sarasota Building Inspection Department were in the public domain.

After a study of "respected text writers" (including Strauss and Katz), the court concluded that under U.S. copyright laws "the architect does not have the exclusive right to build structures embodied in his technical writings," unless the building is a nonfunctional work of art. "Construction of the building does not amount to publication" because the "building is not a copy of the plans," the court declared. If copyright law is not applicable to the building itself, the act of building cannot be taken as an infringement of copyright.<sup>36</sup> Agreeing with Katz, the court went on to say that "the protection extended by Congress to the proprietor of a copyright in architectural plans does not encompass the protection of the buildings or structures themselves, but it is limited only to the plans."<sup>37</sup>

The court further declared that the conduct of the Weissmanns "clearly indicated a voluntary abandonment of any copyright in said plans" because they freely circulated copies of the plans to subcontractors without informing them that the plans were copyrighted. They also had permitted the public to view the model house without giving any notice of copyright and had advertised it with no notice of copyright. The court said that "common law copyright in said architectural plans was not published and dedicated to the public long before the plaintiff's assignor applied for the statutory copyright. The failure to preserve the common law copyright inviolate and intact until the acquisition of the statutory copyright is . . . fatal."<sup>38</sup>

Finally, to the plaintiff's charge that copyright may be infringed if plans are drawn from memory, the court said that the defendants had merely seen the uncopyrighted plans that were in the public domain in the Building Inspection office. There was no evidence that the defendants ever copied those plans. Even though the defendants viewed the model house, that act did not constitute infringement because the house was not copyrighted or copyrightable.

In its ruling, the court essentially took a view detrimental to the interests of architects and quite the opposite of *Smith v. Paul* in deciding that plans deposited in a public office as required for building permit application had thereby lost their common law copyright. While the court cited Katz in determining that the building of a structure did not constitute publication of the associated plans and thus was not an infringement of copyright in the drawings themselves, it contradicted Katz in finding that circulation of plans to subcontractors without proper notice of copyright was indeed publication.<sup>39</sup> The court did not believe, as Katz did, that giving copies of the plans to a limited segment of the public meant only "limited publication" had taken place, which would not have resulted in loss of copyright.<sup>40</sup> Instead, the court said that the plans were published because the copies were "freely circulated." Obviously, the court felt that the intention on the part of the Weissmanns was to allow public access to the plans, but this does not seem their purpose in giving out copies of the drawings to subcontractors. In this case, the court appears to have interpreted "intent" very narrowly.<sup>41</sup> Fur-

<sup>36</sup>213 F. Supp. 196.

<sup>37</sup>213 F. Supp. 195.

<sup>38</sup>213 F. Supp. 198.

<sup>39</sup>Katz, "Copyright Protection," 239-40.

<sup>40</sup>*Ibid.*, 234, 235. Katz followed Drone (*A Treatise on the Law of Property*) and several judicial decisions in formulating his interpretation, especially regarding the dissemination of a work of art to the public.

<sup>41</sup>In *American Tobacco Co. v. Werckmeister* (207 U.S. 284 et. seq. [1907]) the Supreme Court stated, "It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art



thermore, the ruling declared that rights to the drawings were not infringed upon when the defendants saw them in the Building Inspection Department office and reproduced them from memory because the plans had already lost their common law copyright through deposit, and the model house also seen by the defendants was not copyrightable.<sup>42</sup> *Smith v. Paul*, of course, took just the opposite view, deciding that drawings deposited in a public office in compliance with local ordinances retained their copyright. Here, however, the court adhered to the "useful article" principle in its decision that houses were not copyrightable.

By 1970 the courts were consistently affirming that the only effective copyright protection was through statutory copyright. The case of *Imperial Homes Corporation v. Lamont* (1972) involved a home builder who had created and copyrighted a set of working drawings for a model dwelling.<sup>43</sup> The company printed a brochure describing the home, which featured a floor plan taken from the working drawings but not a direct copy. The Lamonts visited the model home, obtained a copy of the brochure, and "made detailed observations and measurements" of the home. There was no evidence, however, that they ever saw or had access to the complete architectural plans. The defendants built a home whose plan was "substantially similar" to the Imperial Homes model. Imperial Homes then brought action against them, "seeking injunctive relief against further dissemination or use of the allegedly infringing plans, damages, return of profits and attorneys' fees."<sup>44</sup>

The court found that the defendants indeed were guilty of copyright infringe-

ment in reproducing a floor plan and that the reproduction of the floor plan in the brochure, taken from a copyrighted drawing, did not waive or abandon the plaintiff's copyright. In explaining its decision, the court said that "every valid copyright vests in its holder the exclusive prerogative '[to] print, reprint, publish, copy, and vend the copyrighted work.'" Thus, to imply that the plaintiff abandoned his rights in his copyrighted work by publishing the plan in his own brochure is contrary to the U.S. Copyright Law, the court said. Furthermore, the plaintiff clearly did not intend to abandon his rights because a copyright notice was included in the brochure. Citing *Baker v. Selden*, the court noted that although the intention of copyright law was not to protect and set up a monopolistic ownership of an idea from which many could benefit and which could only be protected by patent, there was nothing in that case that "prevents such a copyright from vesting the law's grant of an exclusive right to make copies of the copyrighted plans so as to instruct a would-be builder on how to proceed to construct the dwelling pictured."<sup>45</sup>

In conclusion, the court said that the law gave the architect exclusive right to copy what he has copyrighted, although *Baker v. Selden* did not permit him to copyright structural details. By copying the floor plan from the brochure, the Lamonts had infringed on the plaintiff's copyright vested in the plans themselves.

Two caveats are appropriate [the court wrote]. First, we do not hold that the Lamonts were in anywise restricted by the existence of Imperial's copyright from reproducing a substantially identical residential

itself among the public as to justify the belief that it took place with the intention of rendering such work common property." (Quoted in Katz, "Copyright Protection," 234, n. 62).

<sup>42</sup>213 F. Supp. 197, 198.

<sup>43</sup>458 F.2d 895.

<sup>44</sup>458 F.2d 897.

<sup>45</sup>458 F.2d 898, 899.

dwelling. All we hold is that if copyrighted architectural drawings of the originator of such plans are imitated or transcribed in whole or in part, infringement occurs. Second, we intimate no view whatsoever as to whether the Lamonts' floor plan is substantially similar to the brochure floor plan and, if so, whether the Lamonts copied from the brochure.<sup>46</sup>

In softening the tough stance toward architects that previously characterized such decisions, the court upheld the notion that statutory copyright protection was effective against unauthorized copying of the expression of a design, as in architects' drawings, even if the drawings themselves were not directly reproduced.

Again in 1972, in *Ballard H.T. Kirk & Associates Inc. v. Poston* the defendant was alleged to have "knowingly and maliciously converted [the plaintiff's] ideas, designs, and plans to [his] own use by filing part of said plans with the Clermont County, Ohio, building inspector to obtain a permit for [his] own apartment project and constructing that project by the use of and in accordance with a portion of [the plaintiff's] plans."<sup>47</sup> Defendant Poston claimed that Kirk had lost his common law copyright in the drawings, and that a general publication of the drawings occurred when Kirk gave a set of plans to a general contractor to use in bidding, without putting any "express restrictions, reservations or other limitations . . . concerning the use and

dissemination of such plans." The court decided that the "architect's common-law protection must necessarily be conditioned upon notice of the rights reserved in the architectural material produced."<sup>48</sup> In other words, since Kirk had not given notice of copyright in the plans he gave to contractors, he lost his common law copyright. Once again, the court found not only that common law copyright was lost through general publication (one might argue as to whether dissemination of plans to contractors constituted "general publication"), but that statutory copyright must replace it in order to ensure effective protection. While not a step backward for architects in their efforts for adequate copyright protection, the decision was not exactly a significant step forward.

Decisions since passage of the U.S. Copyright Act of 1976 seem to have strengthened the hand of architects in maintaining ownership of their records. The courts have, however, consistently demanded that notice of copyright be properly given on the drawings and that written contracts or agreements between clients and architects specifically transfer rights of ownership of drawings to clients. In the absence of such contracts, architects are now presumed to own their drawings by "custom" or "tradition."<sup>49</sup>

The 1976 Copyright Act extends the same term of copyright to architects' records as to other types of writings: life of the author plus fifty years. It also ab-

<sup>46</sup>458 F.2d 899, 900.

<sup>47</sup>177 U.S.P.Q. 92.

<sup>48</sup>177 U.S.P.Q. 93.

<sup>49</sup>See *Cliff May v. Morganelli-Heumann & Associates et. al.* (1980), 1980 *Copyright Law Decisions* ¶25,155; and *Aitken, Hazen, Hoffman, Miller P.C. v. Empire Construction Co. et. al.* (1982), 1982 *Copyright Law Decisions* ¶25,458. Architects have claimed possession—of both the physical and literary property rights—of their drawings since the nineteenth century. In a very early case testing the concept, *Ebdy v. McGowan* (1870), a British court decided that the tradition of architects keeping their drawings even if a client had paid for them was unreasonable and, thus, clients need not pay the architect if they did not receive the plans in return (Alfred A. Hudson, *The Law of Building, Engineering and Ship Building Contracts*, 2v. [London: Sweet and Maxwell, 1914], 2:9.). Nevertheless, despite this and subsequent adverse rulings (such as *Gibbons v. Pease* [1 K.B. (Eng.) 810] [1905]), architects continued to cite "tradition" or "custom" as a defense for retaining their drawings. Later in the twentieth century, the courts began to accept this claim, although the exact date and circumstances have not been determined.

sorbed common law copyright into statutory, so that both kinds of copyright no longer coexist, a provision similar to one in the British Copyright Act of 1911.

It appears that the courts have reached consistency, too, in three previously controversial areas. First, courts now generally agree that common law copyright is not lost when drawings are deposited in a building inspections office for the purpose of obtaining a building permit. Second, infringement of copyright of plans does not occur unless it can be proven that the drawings themselves were used in the infringing act. No infringement occurs when another builder copies the structure but not the plans. Third, the "useful article" principle governs: the essential idea cannot be copyrighted and, therefore, cannot be infringed under the law. One may go out and photograph a building, measure it, prepare one's own plans, and build it, but one may not build it utilizing somebody else's unpublished or copyrighted drawings. The drawings can be protected by copyright; the structure cannot.<sup>50</sup> Architectural plans can be fully copyrighted as non-utilitarian articles. The function of such drawings is to "convey information" or to "portray a useful article," i.e., a structure or part of a structure. The Copyright Act of 1976 does seem not to

consider architectural plans "useful articles" as defined in the act and, therefore, they can be copyrighted; the courts have agreed with this definition.<sup>51</sup>

The growing trend toward use of computer software in architectural design may lead to other problems for architects and, inevitably, for archivists.<sup>52</sup> *Avco Corp. v. Precision Air Parts Inc.* (1980), for example, raised the question of whether infringement takes place when a mechanical part is made from copyrighted computer-produced drawings and then new drawings are, in turn, created from that part adding "functional data" from the old drawings and the old data base in the new drawings. Unfortunately, a state court could not rule on the case by dint of pre-emption and remanded it to federal court where, under the 1976 Copyright Act, such cases must be heard.<sup>53</sup> In 1982 an appellate court refused to rule on the infringement claim because of a technicality, so the suit ended there with no final resolution of what might have been a very interesting action with far-reaching consequences.<sup>54</sup> This case does point out, however, that very complex issues lie ahead in the area of copyright of computer-generated architectural records.

Authorities commenting on this case in 1981 disagreed on what direction the

<sup>50</sup>Commerce Clearing House, *Copyright Law Reporter* 1 (Chicago: Commerce Clearing House, 1981), ¶598, 1087. The case cited as the source for this interpretation is *Scholz Homes Inc. v. Maddox* (379 F.2d 84 [1967]). But, a contrary decision was rendered in *Stephen T. Rothchild and House of Rothchild Inc. v. Richard E. Kisling, t.a. R.E.K. Group* (1982) (1982 *Copyright Law Decisions*, ¶25,429) in which the court found infringement had taken place when the defendant built three houses from plaintiff's plans. Although plaintiff had already constructed several homes from these same plans, copyright was still intact, and the unauthorized residences built by the defendant infringed because they "reduced the plan's market value .... [Each] new construction caused the unique aspect of the plans to decrease."

<sup>51</sup>Melville B. Nimmer, *Nimmer on Copyright* (New York: Matthew Bender, 1980), Section 2: 104-05, 106-07.

<sup>52</sup>For an overview of this rapidly-developing field, see Natalie Langue Leighton, *Computers in the Architectural Office* (New York: Van Nostrand Reinhold, 1984); and Alfred M. Kemper, ed., *Pioneers of CAD in Architecture* (Pacifica, Cal.: Hurland/Swenson Publishers, 1985).

<sup>53</sup>210 U.S.P.Q. 894. Under the 1976 Copyright Act, federal law pre-empts state law in all copyright cases. Thus, if a state court finds that copyright is the basic issue in a case, it must refer the case to a federal court.

<sup>54</sup>*Copyright Law Decisions*, ¶25, 405.

findings should take.<sup>55</sup> They thought that if the infringer had simply indulged in reverse engineering (that is, working backward from the result to reconstruct the drawings), there would have been no infringement. They pointed to the law of copyright pertaining to computer programs, in which it is legal to take a program apart and trace the results back to the beginning, thereby creating a program that accomplishes the same thing but in a different order of processes. In such a situation, the next generation of the idea has been produced.

William Strong, a copyright authority, believes that if a work is created with the aid of a computer program, the program and the result are separable. The program does not change; therefore, the author of the program and the author of the result are not considered joint authors.<sup>56</sup> Both the result obtained from employing software and the software thus created may be copyrightable. Computers cannot currently operate without human direction. The results must be created with human endeavor, with the inevitable human tendencies to inject changes or subtle manipulations, which will make the result quite different from the program itself. Thus, the program is a means to an end and the result is the end in itself; both are distinct entities, each created by different people, and both copyrightable.

With this reasoning in mind, one may consider that the software needed to create a building design is somewhat generic. That is, it is a tool, much like a pencil or pen in the hands of an architect. While the tool is the intellectual property or creation of someone else, who may hold a copyright on it, the design that is produced through use of that tool by the architect is his own unique creation. In

the hands of another architect, an entirely different design might emerge, or numerous designs be created by a single individual from the same program. All would be copyrightable. Such seems to be the current opinion of most authorities.

Copyright law as it pertains to architectural drawings may be summarized in a few key provisions that have been defined both in legislation and by the courts. Archivists should be aware of these, for in several instances the law may affect their handling of architects' drawings.

1. Copyright protection extends only to the aesthetic, non-functional elements of a design, not the functional or utilitarian.

2. Copyright applies only to architects' drawings. Buildings constructed from them are not copyrightable unless they are non-functional, but all or part of the structures they depict may be eligible for patent protection.

3. A notice of copyright must be affixed to all drawings in order for such protection to be legally effective. Since 1978, common law and statutory copyright are, for all intents and purposes, merged. Under the 1976 act, common law copyright pertains only to works that have not been put in tangible form. Thus, for all works that have been put into writing, or "fixed," statutory protection is applicable. For works in existence before 1 January 1978 that are protected by statutory copyright, the old law pertains (Copyright Act of 1909); for those unpublished and not protected by statutory copyright (or "published"), the 1976 act with its provision of life plus fifty years generally applies.

4. Copyright is not considered lost if documents are deposited in public offices as required by local law.

<sup>55</sup>Thorne D. Harris, *The Legal Guide to Computer Software Protection* (Englewood Cliffs, N.J.: Prentice-Hall, 1985), 69; The Computer Law Association, *Computer Software Protection: A Pragmatic Approach* (Springfield, Va.: Computer Law Association, 1982), 115-17.

<sup>56</sup>Strong, *Copyright Book*, 32-33.

5. The architect is generally considered to be the copyright owner unless ownership was transferred to the client by specific agreement. In cases where the work was "made for hire," as by an employee, the employer is the owner. Archivists may thus assume that ownership of a collection of drawings acquired from an architectural office may be legally transferred by the architect as donor to the archives. As with other unpublished documents, however, one should not assume that the donor architect owns the rights to reproductions or originals of drawings by colleagues that may be present in the collection. The donor will merely own the physical property rights to such plans. The question of whether or not the archivist should go about seeking legal transfer of ownership of what might be a large quantity of material is akin to that involving other types of documents and probably is best answered by legal counsel.

6. Copyright law gives the architect exclusive right to copy his/her unpublished drawings for life plus fifty years. The law does not, however, prevent other persons from building identical structures. The sole restriction is that a potential user may not copy the plans themselves, if they are still under copyright, and use them to build the structure.

7. Architects may obtain injunctions in federal court to prevent persons from copying their plans, and such injunctions will require that all unauthorized copies be seized and destroyed. Section 8 of the 1976 act is fairly specific in its exclusion of pictorial and graphic works from fair use archival reproduction. Strictly interpreted, this would seem to imply that architects' drawings may not be repro-

duced except for purposes of preservation, security, or replacement. No challenges have as yet been brought in court, however, on the question of whether a reproduction made by an archives for a patron may be construed as "fair use." In light of this potential legal pitfall, archivists should be sure they are on safe ground before making reproductions. It would be wise for the archives either to own the copyright in donated collections or to be certain that the material is not otherwise subject to copyright protection. Archivists should seek legal counsel if unsure of their responsibilities under the law. Archivists should be aware that special care must be taken to insure that unauthorized reproduction will not occur of drawings acquired from individuals and firms bearing copyright notices.

8. Finally, unbuilt designs are considered to be unpublished, and, because these can only be built from the original plans, unauthorized reproductions of the drawings may be a violation of copyright unless the archives holding the plans owns the literary property rights.

Copyright law has always been fraught with contradictions and problems. As we have seen, it has long been a critical issue for architects. They have at last achieved proper protection of their artistic work after many decades of struggle. Knowing the problems that have occupied architects should make archivists cognizant of copyright concerns and thus better able to deal knowledgeably with them. There is, however, no substitute for good legal counsel, and archivists should not hesitate to seek advice in handling architectural records in their own institutions.