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Literary and Artistic Property – Common-Law Copyright– Filing of Architectural Plans in a Public Office as Publication

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LITERARY AND ARTISTIC PROPERTY — COMMON-LAW COPYRIGHT — FILING
OF ARCHITECTURAL PLANS IN A PUBLIC OFFICE AS PUBLICATION — Plaintiff

home designer prepared plans for a client and filed a copy in a county office as required by ordinance in order to obtain a building permit. Defendant copied and used these plans without plaintiff's consent. In an action under a state statute codifying the common-law right of designers to the exclusive ownership of their unpublished designs,¹ the lower court held for defendant, finding plaintiff's copyright to have been destroyed by publication. On appeal, *held*, reversed. The filing of architectural plans in a public office in order to secure a building permit does not constitute a publication of them which will divest their creator of his common-law copyright. *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P.2d 546 (1959).

At common law and by statute, copyright law attempts to strike a mean between two competing extremes, ". . . the one, that men of ability . . . may not be deprived of . . . the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts retarded."² In so doing it protects as property³ certain products of the intellect, including architectural plans.⁴ Under the federal statutes⁵ an artist can copyright his work by publication with notice of copyright and a subsequent filing of copies. Prior to that time the common law secures to him the exclusive right to the first publication of his work.⁶ This common-law protection ends with publication,⁷ the indicia of which will vary with circumstances and the object protected.⁸ While the courts generally have required greater dissemination of a work to divest its creator of his common-law copyright than to invest him with a copyright under the federal statute,⁹ an unrestricted sale, dissemination or exhibition will in

¹ CAL. CIV. CODE §980.

² *Sayre v. Moore*, 1 East 361, 102 Eng. Rep. 139 (1785) (opinion of Lord Mansfield).

³ *Aronson v. Baker*, 43 N.J. Eq. 365, 12 Atl. 177 (1887); see BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 474 (1944). Some assert that it is a right of personality that is protected; see, e.g., Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). Others state it to be a right *sui generis*; see, e.g., *White-Smith Music Publ. Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (concurring opinion of Mr. Justice Holmes). The various theories of copyright are discussed in LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* §§2, 4, 5 (1938).

⁴ 37 C.F.R. §202.12 (1960); see HOWELL, *THE COPYRIGHT LAW* 23 (1952). 17 U.S.C. §2 (1958) preserves common-law copyright rights until publication in order to protect any work which may be copyrighted under the federal statute. See WEIL, *AMERICAN COPYRIGHT LAW* 109 (1917).

⁵ 17 U.S.C. §§10, 13 (1958).

⁶ *Palmer v. De Witt*, 47 N.Y. 532 (1872); see also *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 18 (2d Cir. 1906), *aff'd*, 210 U.S. 339 (1908).

⁷ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *American Code Co. v. Bensinger*, 282 Fed. 829 (2d Cir. 1922); see BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 486 (1944).

⁸ See *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301, 303 (S.D.N.Y.), *aff'd*, 218 Fed. 577 (2d Cir.), *cert. denied*, 235 U.S. 704 (1914).

⁹ Compare *Palmer v. De Witt*, *supra* note 6, with *Tams-Witmark Music Library v. New Opera Co.*, 298 N.Y. 163, 81 N.E.2d 70 (1948). See also *American Visuals Corp. v. Holland*, 239 F.2d 740, 744 (2d Cir. 1956), quoted with approval in *Fader v. Twentieth Century-Fox Film Corp.*, 169 F. Supp. 880 (S.D. N.Y. 1959), and in *Hirshon v. United Artists Corp.*, 243 F.2d 640 (D.C. Cir. 1957).

either circumstance be a publication.¹⁰ A communication restricted to certain persons and purposes will not, however, extinguish a common-law copyright,¹¹ for it is only the "general" rather than the "limited" publication which carries a work into the public domain.¹² In the principal case the court indicates that a general publication will not be found in the absence of plaintiff's intent to make one.¹³ This proposition is not without support,¹⁴ and its application here is aided by the peculiar wording of the California copyright statute.¹⁵ Nevertheless, the better view is that there has been a general publication when the copyright proprietor has by his intended act placed his work within reach of the general public, without discrimination with regard to persons, so that anyone who desires may have access to it.¹⁶ Accordingly, in *Wright v. Eisle*¹⁷ and *Tumey v. Little*,¹⁸ apparently the only other decisions on point, the New York courts held that the filing of architectural plans in a public office publishes them for

¹⁰ *Carns v. Keefe Bros.*, 242 Fed. 745 (D. Mont. 1917); *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 Fed. 54 (1st Cir. 1896). Thus, in the principal case, construction of the house was a publication of its exterior design, *i.e.*, of that portion of the house that was open to an unrestricted public view. See *Gendell v. Orr*, 13 Phila. 191 (1879) ("novel porch"); *cf. Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W.2d 282 (1938) (architect's plans published when interior was opened to public inspection), 24 WASH. U.L.Q. 418 (1939). *Cf. Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12 (1889) (marketing of pump held not to be publication of patterns from which it was made).

¹¹ *Press Pub. Co. v. Monroe*, 73 Fed. 196 (2d Cir.), *appeal dismissed*, 164 U.S. 105 (1896); see *White v. Kimmell*, 193 F.2d 744 (9th Cir. 1952), *cert. denied*, 343 U.S. 957 (1952).

¹² *Werckmeister v. American Lithographic Co.*, 134 Fed. 321 (2d Cir. 1904); see AMDUR, COPYRIGHT LAW AND PRACTICE 351, 354 (1936); Note, 19 ST. LOUIS L. REV. 323 (1934).

¹³ See principal case at 751, 345 P.2d at 550.

¹⁴ *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907); *Berry v. Hoffman*, 125 Pa. Super. 261, 189 Atl. 516 (1937); see BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 487, 488 (1944).

¹⁵ CAL. CIV. CODE §983 provides that "(a) If the owner of a composition in letters or art publishes it the same may be used in any manner by any person. . . . (b) If the owner of any invention or design intentionally makes it public, a copy or reproduction may be made public by any person. . . ." (Emphasis added.) However, the court indicates that despite the difference in wording both subsections adopt the common law rules of publication. Principal case at 757-758, 345 P.2d at 555.

¹⁶ Numerous holdings indicate that there may be acts lacking the requisite intent for abandonment or dedication which are nevertheless "publications." *E.g.*, *Wagner v. Conreid*, 125 Fed. 798 (S.D. N.Y. 1903); *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898). Compare *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940), with *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937). One writer has suggested that the *sine qua non* of publication should be the acquisition by members of the public of a possessory interest in tangible copies of the work. See Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 197 (1956).

¹⁷ 86 App. Div. 356, 83 N.Y. Supp. 887 (1903), relying upon *Callaghan v. Myers*, 128 U.S. 617, 656-7 (1888) (court reporter's deposit of volumes with the secretary of state for a consideration, as required by law) and *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, *supra* note 16 (delivery of copies of reference book to subscribers).

¹⁸ 18 Misc.2d 462, 186 N.Y.S.2d 94 (Sup. Ct. 1959), following *Wright v. Eisle*, *supra* note 17.

dissemination to the world. This result has been criticized;¹⁹ indeed, analogous authority in that jurisdiction might lead one to expect the contrary rule to prevail.²⁰ In various circumstances not involving architectural plans it has been held that a required filing in a public office is not a general publication,²¹ even as it is not a general publication to submit a poem to a committee for limited purposes²² or to grant permission to pupils to copy a manuscript for purposes of instruction.²³ The vulnerability of the New York view lies not in the criterion of publication followed, however, but rather in the initial assumption that plans filed in a public office necessarily become public records that are available without restriction to public scrutiny and use. In recognition of this the California court finds a limited publication on the theory that since the purpose of the filing was not "to disseminate information to the public, or to serve as a memorial of official transactions for public reference,"²⁴ the plans did not become public records for any purpose other than to determine the designer's compliance with the building code. It is difficult to disagree with the court's observation that it "would be unreasonable to deprive an architect of his property right merely because he is required to file his plans with a public officer, for reasons completely independent of any requirement that he thereby lose such right."²⁵ The result accords with basic notions of fairness and is characterized by a disrespect for labels which the New York courts would have done well to employ.

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¹⁹ Katz, *Copyright Protection of Architectural Plans, Drawings, and Designs*, 19 LAW & CONTEMP. PROB. 224, 233-5 (1954); 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 694 (1938); see generally 42 COLUM. L. REV. 290 (1942).

²⁰ O'Neill v. General Film Co., 171 App. Div. 854, 856, 860, 157 N.Y. Supp. 1028 (1916), held, *inter alia*, that filing a copy of a play with a public official was not a dedication of it to the public, apparently on the sole ground that the filing was by statute a condition precedent to public performance of the play.

²¹ Fader v. Twentieth Century-Fox Film Corp., *supra* note 9 (manuscript filed in Copyright Office); Osgood v. A. S. Aloe Instrument Co., 69 Fed. 291 (C.C.E.D. Mo. 1895) (copies of book filed with Library of Congress); *cf.* Blunt v. Patten, 3 Fed. Cas. 762 (No. 1579) (S.D.N.Y. 1828) (survey chart filed in Navy Department). *Contra*: Callaghan v. Myers, *supra* note 17; Brown v. Select Theatres Corp., 56 F. Supp. 438 (D. Mass. 1944) (deposit of copies with Librarian of Congress).

²² Press Pub. Co. v. Monroe, *supra* note 11.

²³ Bartlett v. Crittenden, 2 Fed. Cas. 967 (No. 1076) (C.C. Ohio 1849).

²⁴ People v. Purcell, 22 Cal. App.2d 126, 130, 70 P.2d 706, 708 (1937), quoted in the principal case at 752, 345 P.2d at 551.

²⁵ Principal case at 752, 345 P.2d at 551.