

COPYRIGHT LAW REVISION

STUDIES

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SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS
OF THE
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STUDIES 26-28

27. Copyright in Architectural Works



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FOREWORD

This committee print is the ninth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains the following three studies prepared by members of the Copyright Office staff: No. 26, "The Unauthorized Duplication of Sound Recordings," by Barbara A. Ringer, Assistant Chief of the Examining Division; No. 27, "Copyright in Architectural Works," by William S. Strauss, Attorney-Adviser; and No. 28, "Copyright in Choreographic Works," by Borge Varmer, Attorney-Adviser.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
*Chairman, Subcommittee on Patents, Trademarks, and Copyrights,
Committee on the Judiciary, U.S. Senate.*

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

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Librarian of Congress.

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1. The History of U.S.A. Copyright Law Revision from 1901 to 1954.
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5. The Compulsory License Provisions in the U.S. Copyright Law.
6. The Economic Aspects of the Compulsory License.

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7. Notice of Copyright.
8. Commercial Use of the Copyright Notice.
9. Use of the Copyright Notice by Libraries
10. False Use of Copyright Notice.

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11. Divisibility of Copyrights.
12. Joint Ownership of Copyrights.
13. Works Made for Hire and on Commission.

Fifth print:

14. Fair Use of Copyrighted Works.
15. Photoduplication of Copyrighted Material by Libraries.
16. Limitations on Performing Rights.

Sixth print:

17. The Registration of Copyright
18. Authority of the Register of Copyrights to Reject Applications for Registrations.
19. The Recordation of Copyright Assignments and Licenses.

Seventh print:

20. Deposit of Copyrighted Works.
21. The Catalog of Copyright Entries.

Eighth print:

22. The Damage Provisions of the Copyright Law.
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25. Liability of Innocent Infringers of Copyrights.

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STUDY NO. 27
COPYRIGHT IN ARCHITECTURAL WORKS
BY WILLIAM S. STRAUSS
August 1959

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COPYRIGHT IN ARCHITECTURAL WORKS

I. THE PROBLEM

Architecture has traditionally been considered one of the arts, and the copyright laws of most countries provide specifically for copyright protection of "artistic works of architecture" (i.e., artistic architectural structures) as well as of plans, drawings, or models for architectural structures. In the United States, as will be seen, the protection now afforded to architectural works, particularly as regards "artistic" structures, is somewhat uncertain and may be deemed too narrow. The problem to be considered here is that of the provisions that might be appropriate in a new copyright law for the protection of such works.

"Architectural works" may be understood in a broad sense as referring to two different things: (1) the plans, drawings, or models for an architectural structure (all referred to hereinafter as "plans") and (2) the structure itself. In considering the problem of copyright protection, this distinction between the plans and the structure must be kept in mind. Thus, as regards copying, plans may be reproduced in the form of plans or their features may be reproduced in the form of a structure; and a structure may be reproduced in another structure with or without the use of the plans. Consideration must therefore be given to both the copying of plans (in the form of plans and in the form of a structure) and the copying of a structure (in another structure).

It should also be borne in mind that architectural works (in the form of either plans or structures) embody functional ideas and mechanical processes or methods of construction. It is axiomatic that copyright does not protect the ideas or methods expounded in a work, but protects only the author's "expression" or form of exposition of the ideas or methods.¹

II. THE PRESENT LAW IN THE UNITED STATES

A. PROTECTION UNDER THE COMMON LAW

There seems to be no reason to doubt that the "literary property rights" accorded by the common law to authors in regard to their unpublished works generally,² extend to the authors of unpublished architectural plans.³ Thus, the common law would protect such unpublished plans against unauthorized reproduction in the form of plans and perhaps in the form of a structure.⁴

¹ See the landmark case of *Baker v. Selden*, 101 U.S. 99 (1879). As applied to architectural works, see *Larkin v. Pennsylvania R. Co.*, note 9 *infra*; *Muller v. Triborough Bridge Authority*, note 20 *infra*; and see also the foreign laws, part IV *infra*.

² See Strauss, *Protection of Unpublished Works* [Study No. 29 to appear in a later committee print in the present series]; and see 17 U.S.C. § 2.

³ *Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W. 2d 282 (1938). For a general discussion, see Katz, *Copyright Protection of Architectural Plans, Drawings, and Designs*, in the Spring 1954 issue of *LAW AND CONTEMPORARY PROBLEMS*, 224, 229, Duke University School of Law.

⁴ Katz, *op. cit.* note 3 *supra*.

However, the few reported cases on the question of what constitutes such publication of architectural plans as will terminate common law property rights would seriously limit the practical protection afforded by the common law. In *Gendell v. Orr*,⁵ where the plaintiff had built a porch of his own design on a highway, the court denied his petition to enjoin the defendant from building a similar porch, on the ground that the plaintiff had published his design by building the porch in a public place, thereupon terminating his common law rights. In *Wright v. Eisle*⁶ the court said that the filing of architectural plans in a public office (as required to obtain a building permit) where they were open to public inspection, was such a publication as to terminate common law property rights.⁷ In *Kurfiss v. Cowherd*⁸ the plaintiff had opened a house of his design to unrestricted public inspection, and the defendant took measurements of the house and used the plaintiff's plans to construct similar houses. The court held that the plaintiff had published his plans by opening the house to unrestricted public inspection and thereby terminated his common law property rights.*

Two other cases, denying common law protection for what the courts considered to be structural methods or ideas, may be noted in passing. In *Larkin v. Pennsylvania R. Co.*⁹ the plaintiff architect alleged that his plans for a hotel building, which he had submitted to the defendant in an unsuccessful effort to obtain a contract to construct it for the defendant, were copied in the plans of another architect used in constructing the building. The court found that the plaintiff's plans were not copied and that no right of the plaintiff was violated by using the same structural methods, which were well known, as those embodied in his plans. In *Mackay v. Benjamin Franklin Realty and Holding Co.*¹⁰ a builder was held not liable for using plans prepared by an architect as an independent contractor, where the architect, without the knowledge of the builder, used "ideas" derived from the plaintiff's plans.

In the view taken in the *Gendell*, *Wright*, and *Kurfiss* decisions,¹¹ such literary property rights as the common law extends to architectural plans will generally cease when the plans have been used, by or with the consent of their author, for their intended purpose of building a structure. And if, as those decisions hold, the structure were treated as a published work, the common law would not afford any literary property rights in the structure itself.¹²

⁵ 13 Phila. 191 (Ct. Common Pleas, Philadelphia, Pa., 1879).

⁶ 86 App. Div. 356, 83 N. Y. Supp. 887 (1903).

⁷ The court also found that the plaintiff architect had transferred any rights he may have had to his client. The decision in *Wright v. Eisle* was followed, on both points, in the very recent case of *Tumey v. Little*, 188 N. Y. S. 2d 94 (Sup. Ct. 1959).

⁸ 233 Mo. App. 397, 121 S. W. 2d 282 (1938). See note in 24 WASH. U. L. Q. 418 (1939).

* [Editor's note: In a very recent case decided after the present study had been written, the California District Court of Appeal refused to follow the *Wright* and *Kurfiss* decisions, and held that the plaintiff's design for a house was not published by virtue of the filing of the plans in a public office as required to obtain a building permit, or by virtue of the house being open to public view. Copying of the plans by the defendant in building a similar house was held a violation of the plaintiff's property rights under a California statute. *Smith v. Paul*, 345 P. 2d 546, 123 USPQ 463 (Cal. App. 1959).]

⁹ 125 Misc. 238, 210 N. Y. Supp. 374 (1925).

¹⁰ 288 Pa. 207, 135 Atl. 613 (1927). See notes in 75 U. PA. L. REV. 458 (1927); 25 MICH. L. REV. 886 (1927); 40 HARV. L. REV. 1017 (1927).

¹¹ Note that these are decisions of inferior courts. No others in point have been found. These decisions have been criticized as "wrong in principle and destructive in practice of an architect's intellectual property" Katz, *op. cit.* note 3, *supra*. See also note in 42 COL. L. REV. 290 (1942).

¹² However, the common law may afford some protection against the unauthorized reproduction of structures in circumstances constituting unfair competition, as where the structures have become identified to the public as those of the original builder. See *May v. Bray* at note 19 *infra*.

Whatever may be deemed to constitute publication, protection for published architectural works would be dependent upon the securing of statutory copyright.

B. COPYRIGHT PROTECTION UNDER THE STATUTE

Architectural plans (including drawings and models) may be copyrighted under the present Federal statute. Among the classes of copyrightable works enumerated in section 5 of the statute¹³ are "drawings or plastic works of a scientific or technical character." The Regulations of the Copyright Office¹⁴ state:

This class includes published or unpublished two-dimensional and three-dimensional works which have been designed for a scientific or technical use and which contain copyrightable graphic, pictorial, or sculptural material. Works registrable in [this class] include diagrams or models illustrating scientific or technical works or formulating scientific or technical information in linear or plastic form, such as for example: a mechanical drawing, * * * an architect's blueprint, * * * or an engineering diagram.

The Copyright Office has, in fact, made many registrations of copyright claims in architectural plans.

When published, architectural plans may be copyrighted by registration in the Copyright Office.¹⁵ When published, they may be copyrighted by affixing the required notice of copyright on the published copies.¹⁶

As to the protection afforded by copyright in architectural plans, section 1(a) of the present statute, which pertains to all classes of copyrighted works, gives the copyright owner of such plans the exclusive right to make and publish copies of the plans.¹⁷ In *May v. Bray*,¹⁸ the unauthorized making and sale by the defendant of copies of the plaintiff's copyrighted architectural drawings was held and infringement and was enjoined, with the defendant being ordered to deliver up all infringing copies for destruction.¹⁹ Thus, under section 1(a) copyrighted plans are protected against their unauthorized reproduction in the form of plans.

Whether the copyright in plans protects them also against unauthorized use in the building of a structure seems highly doubtful. In *Muller v. Triborough Bridge Authority*²⁰ it was held that a bridge approach (designed to operate as a traffic separator) constructed by the defendant was not copied from the plaintiff's copyrighted drawing of a similar bridge approach. The court said that even assuming that the defendant had used the plaintiff's drawing in designing and constructing its bridge approach, the plaintiff's copyright was not infringed since it did not prevent anyone from using the system of traffic separation set forth in his drawing.

Involved here is the somewhat nebulous line between an author's "expression" of an idea, which is protected by copyright, and the idea itself which is not so protected. The underlying rationale of

¹³ 17 U.S.C. § 5(l).

¹⁴ 37 C.F.R. § 202.12(a).

¹⁵ 17 U.S.C. § 12; 37 C.F.R. § 202.12(a).

¹⁶ 17 U.S.C. §§ 10, 19.

¹⁷ The exclusive rights specified in § 1(a) are: "To print, reprint, publish, copy, and vend the copyrighted work."

¹⁸ Unreported opinion appears in 30 Copyright Office Bull. 435 (S.D. Cal. 1955).

¹⁹ The court, finding that the houses constructed by the plaintiff from his plans had come to be known to the public and recognized as the plaintiff's, also enjoined the construction of similar houses by the defendant as unfair competition.

²⁰ 43 F. Supp. 298 (S.D.N.Y. 1942).

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. That case has its counterparts in other situations that are somewhat analogous. Thus, while the copyright in pictures of ladies' garments in a trade catalog has been held to be infringed by copying them as pictures,²¹ the copyright in such pictures was held not to be infringed by making the garments depicted.²² Likewise, the copyright in a drawing of a dress was held not infringed by making such dresses, though the court said that reproduction of the drawing as such would have been an infringement.²³ The copyright in pictures of furniture in a catalog was held not infringed by making such furniture.²⁴ And the copyright in a design for camouflaging parachutes was held not infringed by the making of parachutes with such a design.²⁵

There may be some possibility that in respect to an architectural structure which is itself a "work of art" within the meaning of the statute, the copyright in drawings or models for such a structure will afford protection against their use in building the structure. Section 5(g) of the statute designates "models or designs for works of art" as copyrightable works; and section 1(b) gives the copyright owner of "a model or design for a work of art" the exclusive right "to complete, execute, and finish it." In *Jones Bros. Co. v. Underkoffler*,²⁶ it was held that a copyrighted design for a cemetery monument (which had been registered as a design for a work of art) was infringed by the unauthorized use of the design in the construction of a monument; the court held the monument to be a "work of art," and concluded that its construction was an execution of the design within the above-quoted provision of section 1(b).

Two other cases may be thought to afford analogies. In *King Features Syndicate v. Fleischer*²⁷ and in *Fleischer Studios, Inc. v. Freudlich*,²⁸ copyrights in cartoon characters were held infringed by their reproduction in the form of three-dimensional doll figures; the courts held the figures to be copies of the cartoons. Perhaps these cases are sui generis; or perhaps they may be explained by the fact that the doll was considered a nonfunctional reproduction of the artistic form represented by the cartoon. Thus, the court in the first case observed that "the form of the horse [the cartoon character 'Spark Plug'] was the essence of the cartoon," and that the doll figure had the same nonfunctional purpose as the cartoon, "to give amusement in contemplation."^{29a}

In summary, while the law on this point is not entirely clear, it appears probable, from the various court decisions cited above, that copyrighted architectural plans are not now protected against their use in building a structure, except as regards a copyrighted design for

²¹ *National Cloak and Suit Co. v. Kaufman*, 189 Fed. 215 (M.D. Pa. 1911). The court referred to the distinction between copying the pictures as such and making the wearing apparel depicted.

²² *National Cloak and Suit Co. v. Standard Mail Order Co.*, 191 Fed. 528 (S.D.N.Y. 1911).

²³ *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187 (S.D.N.Y. 1934).

²⁴ *Lamb v. Grand Rapids Furniture Co.*, 39 Fed. 474 (W.D. Mich. 1889). It was held further that the defendant's pictures of the furniture so made by him, though similar to the plaintiff's copyrighted pictures, did not infringe as long as they were not copied from the plaintiff's pictures.

²⁵ *Fulmer v. United States*, 103 F. Supp. 1021 (Ct. Cl. 1952). The court said: "The only monopoly which the copyright gave him was the exclusive right to reproduce the design, as an artistic figure."

²⁶ 16 F. Supp. 729 (M.D. Pa. 1936).

²⁷ 299 Fed. 533 (2d Cir. 1924).

²⁸ 6 F. Supp. 808 (S.D.N.Y. 1934) *aff'd* 73 F. 2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935).

^{29a} *Cf. Rushton v. Vitale*, 218 F. 2d 434 (2d Cir. 1955) in which a doll figure in the form of a grotesque chimpanzee, modeled after a character in a television show, was held a copyrightable work in itself.

a structure deemed to be a "work of art." In the broad area of architectural structures, those constituting "works of art" would seem to be relatively rare.²⁹

The remaining question is whether the present copyright statute affords any protection to architectural structures as works in themselves. Here again, in the relatively rare instances of a structure which is deemed to be a "work of art," such as a monument, it may be feasible to secure copyright in the structure;³⁰ and protection would thereby be secured against the unauthorized reproduction of the work of art in another similar structure. But there appears to be no provision in the statute for protection in the far broader area of functional structures which, though attractively designed, do not qualify as "works of art."³¹

III. PROPOSALS IN PRIOR REVISION BILLS

The series of bills introduced between 1924 and 1940 to revise the copyright law all contained some provisions for the protection of architectural works. In the specification of copyrightable works all those bills mentioned, as does section 5(i) of the present statute, drawings and plastic works of a technical character;³² as pointed out above, this is deemed to include architectural plans and models. But the revision bills generally went further: most of them also mentioned both "works of architecture" (i.e. structures) and "models or designs for architectural works,"³³ with the qualification that copyright extended only to the artistic character and design of such works and not to the processes or methods of construction.³⁴

Under the various bills, models or designs for artistic architectural structures would apparently have been protected, not only against reproduction as models or designs, but also against reproduction in the form of structures. Some of the bills would probably have produced this result under a general provision (with some variations in language) giving copyright owners of all classes of works the exclusive right to "reproduce" or to "transform" the copyrighted work in any medium or form or in any manner.³⁵ Some of them broadened the present section 1(b)—which provides for the exclusive right "to complete, execute, and finish * * * a model or design for a work of art"—to apply to all classes of works;³⁶ while others extended this exclusive right specifically to models or designs for "a work of architecture."³⁷

²⁹ In practice, architectural plans have generally been registered in the Copyright Office as "technical drawings" under § 5(i) of the statute. A number of designs for artistic monuments have been registered as "designs for a work of art" under § 5(g); but in recent years at least, no registrations under § 5(g) have been found for architectural drawings of structures other than monuments.

³⁰ Some registrations of copyrights in monuments as "works of art" have been made in the Copyright Office, with photographs being deposited as provided in 17 U.S.C. §§ 12 and 13 and in 37 C.F.R. § 202.16.

³¹ It has been thought that the Willis bill in the 86th Congress, H. R. 8873 (1957), and the recently introduced O'Mahoney bill in the 86th Congress, S. 2076 (1959), for the protection of "original ornamental designs of useful articles", would extend the protection therein provided to the ornamental designs embodied "useful" architectural structures.

³² Dallinger bill of 1924, H. R. 9137, 68th Cong. 1st Sess., § 15(i); Perkins bill of 1925, H. R. 11258, 68th Cong. 2d Sess., § 9(i); Vestal bill of 1930, H. R. 12549, 71st Cong. 2d Sess., § 37(i); Sirovich bill of 1932, H. R. 10976, 72d Cong. 1st Sess., § 3(i); Duffy bill of 1935, S. 3047, 74th Cong. 1st Sess., § 4(a), retaining the present § 5(i); Thomas bill of 1940, S. 3043, 76th Cong. 3d Sess., § 15(f).

³³ In the bills cited in note 32 *supra*: Dallinger, § 15(m); Perkins, § 9(o); Vestal, § 37(o); Duffy, § 4(d); Thomas, § 15(m). The two Sirovich bills mentioned only plans, models, or designs for architectural works: 1932 bill, § 3(i); 1936 bill, § 5(i).

³⁴ In the bills cited in note 32 *supra*: Dallinger, § 68(a); Perkins, § 14; Vestal, § 8; Duffy, § 1(b); Sirovich 1936, § 1(b); Thomas, § 15(m).

³⁵ In the bills cited in note 32 *supra*: Dallinger, § 1(a); Perkins, § 12(a); Vestal, § 1; Sirovich 1932, § 2; Sirovich 1936, § 1(b); Thomas, § 4(a).

³⁶ In the bills cited in note 32 *supra*: Dallinger, § 1(f); Vestal, § 1(e).

³⁷ In the bills cited in note 32 *supra*: Duffy, § 1(b); Sirovich 1936, § 1(b); Thomas, § 4(f).

Inasmuch as artistic architectural structures were designated in most of the bills as copyrightable works, such structures would no doubt have been protected against the reproduction of their artistic features in similar structures. Some of the bills provided, however, that copyright in a work of architecture would not be infringed by the making and publishing of two-dimensional pictures (other than architectural drawings and plans) of the structure.³⁸ It was apparently contemplated that the reproduction of an artistic structure in the form of architectural drawings and plans would be an infringement.³⁹

With respect to the remedies for infringement in the building of a structure, some of the bills provided that no injunction to restrain the construction of an infringing building if substantially begun, and no order for its demolition or seizure, should be issued.⁴⁰

Other provisions in some of the revision bills concerning architectural works specifically may also be noted: that the construction of an architectural work would not constitute publication;⁴¹ that for copyright registration of a work of architecture, identifying photographs and drawings may be deposited;⁴² and in one bill, that statutory damages were not available for infringement of architectural works, or models or designs for such works, unless infringement was willful.⁴³

IV. INTERNATIONAL CONVENTIONS AND FOREIGN LAWS

The copyright laws of the foreign countries that are members of the Berne Union are based largely on the Berne Convention. The original Berne Convention of 1886 mentioned, among the categories of works to be protected, "plans, sketches, and plastic works relative to * * * architecture" (art. IV). The Berlin Revision of 1908, in addition, mentioned "works of * * * architecture" (art. 2), and provided that "the construction of a work of architecture shall not constitute a publication" (art. 4). These provisions were continued in articles 2 and 4 of the Rome Revision of 1928 and the Brussels Revision of 1948.

The two principal conventions between American Republics—the Buenos Aires Convention of 1910 (to which the United States adheres) and the Washington Convention of 1946 (to which the United States does not adhere) both mention, among the categories of works to be protected, "plans, sketches or plastic works relating to * * * architecture" (arts. 2 and 3, respectively). Neither of these two conventions mentions works of architecture (structures).

The Universal Copyright Convention (to which the United States adheres) makes no reference either to architectural plans or models or to architectural structures.

The laws of various foreign countries on this subject are typified by those of the United Kingdom, France, and Germany (members of the Berne Union) and those of Mexico and Argentina (parties to the Buenos Aires and Washington Conventions).

³⁸ In the bills cited in note 32 *supra*: Dallinger, § 27(3); Perkins, § 14; Vestal, § 8; Thomas, § 12(c).

³⁹ This would probably follow from the general provisions cited in note 35 *supra*.

⁴⁰ In the bills cited in note 32 *supra*: Dallinger, § 26(b); Perkins, § 14; Vestal, § 8; Duffy, § 17; Thomas, § 12(c). The last three bills also precluded an injunction against the use of an infringing building.

⁴¹ In the bills cited in note 32 *supra*: Dallinger, § 3; Perkins, § 53. The same result might have ensued from the general definition of "publication" in Sirovich 1932, § 40 (c); Sirovich 1936, § 65(b); Thomas, § 3.

⁴² In the bills cited in note 32 *supra*: Perkins, § 46; Vestal, § 38; Sirovich 1932, § 19(c); Duffy, § 9. The same result would apparently have ensued from the general provisions in Dallinger, § 16; Thomas, § 14(3).

⁴³ Duffy, § 17, note 32, *supra*.

The United Kingdom Copyright Act, 1956,⁴⁴ provides for copyright in "works of architecture, being either buildings or models for buildings," as a species of "artistic works" (sec. 3(1)(b)).⁴⁵ Such works are protected against reproduction "in any material form" (sec. 3(5)(a)). However, this is limited, as applied to architectural works, by other provisions: as regards the use of plans in erecting a structure, section 9(8) provides that a two-dimensional artistic work is not infringed by a three-dimensional object which would not appear, to persons who are not experts, to be a reproduction of the artistic work;⁴⁶ and the copyright in a structure is not infringed by the making and publishing of a two-dimensional picture of the structure, or by its inclusion in a film or television broadcast (sec. 9(4) and (6)).⁴⁷ Moreover, the copyright in a structure, or in the drawings or plans therefor, is not infringed by reconstruction of the structure (sec. 9(10)). The construction of a work of architecture and the issue of pictures of such a work do not constitute publication (sec. 49(2)(c)).

The United Kingdom Act of 1956 also provides for certain limitations on the remedies for infringement as applied to architectural structures. No injunction or other order is to be made to prevent the completion of a building after construction has begun, or to require its demolition (sec. 17(4)).

The French copyright statute of 1957⁴⁸ protects "works of * * * architecture" and "plans, sketches, and plastic works relative to * * * architecture" (art. 3). It may be presumed that this would not change the effect of prior rulings by the French courts that copyright in a work of architecture relates to its aesthetic features and not to processes or methods of construction.⁴⁹ The statute specifies generally that authors of all kinds of works shall have the exclusive right of "reproduction" (arts. 21, 40, 71) which is defined as "the material fixation of the work by all methods that permit of indirect communication to the public" (art. 28). It is specifically provided that "in the case of architectural works, reproduction shall also consist in the repeated execution of a plan or standard draft" (art. 28). The statute contains no other provisions dealing specially with architectural works.

In the German statute,⁵⁰ protected "works of art" are defined as including "architectural works of an artistic character" and "plans for architectural works" of such character (§ 2).⁵¹ The author is given the exclusive right to "reproduce" the work, and "in the case of architectural works or plans for architectural works, copying by

⁴⁴ 4 and 5 ELIZ. 2, ch. 74. For an exposition of the law in the United Kingdom concerning architectural works see COPINGER AND SKONE JAMES, *LAW OF COPYRIGHT* (9th ed. 1958) ch. 15. An enlightening discussion of the general problem of copyright protection for architectural works is found in the *Minutes of Evidence Taken Before the Law of Copyright Committee*, presented to the British Parliament in 1910 [Cd. 5051], pp. 1-9 and 171-178.

⁴⁵ The earlier U.K. Copyright Act, 1911, 1 and 2 GEO. 5, ch. 46, referred to "architectural works of art" (§§ 1, 2, 35), and provided that protection "is confined to the artistic character and design, and does not extend to processes or methods of construction" (§ 35(1)). Such is the present law of Canada: *Rev. Stat. of Canada, 1952, ch. 55, § 2(a), (b)*. COPINGER, *op. cit.* note 44 *supra*, at 255-256, states that the 1956 U.K. Act is not thought to change the effect of the 1911 Act under which the courts did not require artistic merit but did require "something beyond the use of common stock features."

⁴⁶ An elevation of a shop front was held infringed by the erection of a shop reproducing the elevation in appearance: *Chabot v. Davies*, 155 L.T. 525 (1936). But COPINGER, *op. cit.* note 44 *supra*, at 258, submits that a "ground plan" would not be infringed by erecting a building based thereon.

⁴⁷ "The only form of infringement therefore is the reproduction of the building or the reproduction of a substantial part of the building in another building": COPINGER, *op. cit.* note 44 *supra*, at 259.

⁴⁸ Law No. 57-296 on Literary and Artistic Property, March 11, 1957.

⁴⁹ See DESBOIS, *LE DROIT D'AUTEUR* (1950) at 111.

⁵⁰ Act concerning Copyright in Works of Art and Photography, Jan. 9, 1907, as amended.

⁵¹ Copyright protects only the aesthetic features of an architectural work, not processes or methods of construction: ULMER, *URHEBER UND VERLAGSRECHT* (1951) at 61-62.

building shall be considered reproduction" (sec. 15).⁵² The exterior only of architectural structures located on public roads, streets or squares may be reproduced in pictures, but not in another structure (sec. 20). Provisions for the destruction of infringing copies are not applicable to works of architecture (sec. 37).

The copyright statute of Mexico⁵³ protects "all * * * scientific * * * and artistic works capable of publication or reproduction," including specifically "plans, sketches" and "plastic works relating to * * * architecture" (art. 2).⁵⁴ It provides, in general terms, that copyright shall not extend to the industrial application of ideas contained in scientific works" (art. 3).⁵⁵ The statute does not specify the rights accorded to architectural works specially; it provides generally, for all works, the exclusive right to "reproduce" the work "in any form" (art. 1(g)) and to "transform" the work "in any manner" (art. 1(f)). However, copyright does not extend to "publication by way of photography, television or cinematographic films of works of art or architecture that are visible from public places" (art. 15(b)). The general requirement for the deposit of copies is fulfilled by deposit of photographs "in the case of * * * sculptures and works of a like kind" (art. 124). There are no special provisions regarding the application of remedies against infringing structures.

The copyright statute of Argentina⁵⁶ protects all "scientific" and "artistic" works, including specifically "works of * * * architecture" and "plans" (art. 1). Rights in architectural works are not specified separately; the author's exclusive rights, provided for in general terms relating to all works, include the right "to reproduce" the work "in any form" (art. 2).⁵⁷ The deposit requirement for "works of * * * architecture" calls for "a sketch or photograph of the original, together with such supplementary particulars as to permit of their identification" (art. 57). There are no special provisions regarding the pictorial representation of structures or the application of remedies against infringing structures.

V. ANALYSIS OF THE ISSUES

The foregoing summary of the present law in the United States regarding the protection of architectural works, the previous proposals for revision of the present law, and the laws in other countries, suggests that the problem of providing protection for such works should be considered in the preparation of a new copyright law.

As previously pointed out, the problem concerns two kinds of works—architectural plans (including drawings and models) and architectural structures—each involving somewhat different questions. They will therefore be dealt with separately.

⁵² The statute prohibits unauthorized reproduction "irrespective of the methods by which it is effected, and irrespective of the number of copies involved" (§ 17). Reproduction for personal use, otherwise permitted, is not permitted "by means of building" (§ 18).

⁵³ Law of Dec. 29, 1956.

⁵⁴ Architectural structures are apparently included among the works protected, in view of the provisions of Art. 15(b), noted below.

⁵⁵ This would seem to deny protection for processes or methods of construction embodied in architectural plans.

⁵⁶ Law No. 11,723 of Sept. 28, 1933, as amended by Legislative Decree No. 12,063 of Oct. 2, 1957.

⁵⁷ Correspondingly, Art. 72(a) provides for penalties against any person who "reproduces" a work "through any medium" without authorization.

A. ARCHITECTURAL PLANS

1. *As copyrightable works.*—Though not mentioned expressly as a separate category of copyrightable works, architectural plans (including drawings and models) are copyrightable under the present statute as a species of the specified class of “drawings or plastic works of a scientific or technical character.” Statutory copyright may now be secured by the registration of such plans as unpublished works, or by their publication with the prescribed copyright notice.* There is thus no problem regarding the status of architectural plans as copyrightable works.

A question does arise as to whether the building of a structure constitutes publication of the plans. There are two decisions of inferior courts, as noted above, holding that under the common law the building of a structure in a public place is such a publication of the plans as will terminate the common law property rights in the plans. Assuming that these decisions are sound as a matter of common law, which may be open to question, it does not necessarily follow that the building of a structure would constitute publication of the plans for the purpose of statutory copyright. It can be argued, on the contrary, that under the statutory scheme of securing copyright by publishing “copies” of the work with a copyright notice, the structure is not a copy of the plans and its erection is not a publication of the plans. It may seem anomalous to hold, for example, that affixing a notice on the structure is the means of securing copyright in the plans as such; or that once a structure has been built without bearing a notice, the plans as such could not thereafter be copyrighted by their registration as published works, or by their publication in the form of plans with a copyright notice; or that after copyright has been secured in the plans by publishing copies with a notice, the building of a structure without the notice would terminate the copyright in regard to the reproduction of the plans as plans.

No case has been found dealing with these situations or with the general question of whether the building of a structure constitutes publication of the plan within the purview of the statute. Perhaps this question should be clarified in the statute. As noted above, some of the prior revision bills proposed to define publication so as to exclude the building of an architectural structure,⁵⁸ and the Berne Convention so provides explicitly.⁵⁹

2. *Rights in copyrighted plans.*—It seems clear that copyrighted plans are protected against their unauthorized reproduction and distribution in the form of plans. No problem is seen here.

Copyrighted plans are apparently not protected against their use in the building of a structure, at least as far as the functional ideas or the processes or methods of construction are concerned. It may be that in the relatively rare cases where a planned structure would qualify as a “work of art,” copyright in the plans (as a “model or design for a work of art”) would protect the plans against their use in building the structure.

Where no artistic features are present, the courts have been inclined to the view that the use of plans in the building of a structure

* *Supra* at note 41.

⁵⁸ Art. 4 of the Berlin (1908), Rome (1928), and Brussels (1948) Revisions. See also the United Kingdom Copyright Act, 1956, § 49(2) (c).

is merely the use of the ideas, processes, or methods disclosed in the plans.⁶⁰ This may be seen as an application of the fundamental concept that copyright in a drawing or picture of a useful article (as distinct from a work of art) does not extend to the production of the article depicted.⁶¹ In this view, there would be no warrant for copyright protection of architectural plans against their use in building a structure unless the structure is artistic in character.

This approach is reflected in most of the prior revision bills⁶² and in some of the foreign laws,⁶³ where the "works of architecture" (structures) given copyright protection are confined to those of an artistic character.

As noted, the present statute protects a copyrighted "model or design for a work of art" against unauthorized completion, execution, or finishing (sec. 1(b)); and this has been held to protect a copyrighted drawing of a design for an artistic cemetery monument against the unauthorized construction of the monument.⁶⁴ That provision would no doubt protect a sketch for an artistic sculpture against the making of the sculpture, and an artistic architectural structure might be equated with a sculpture. Even aside from that analogy, architectural structures of an aesthetic character (as distinguished from merely functional structures) are a traditional art form.

It might be argued, therefore, that insofar as architectural plans represent the design for an "artistic" structure, such plans are entitled to protection against the reproduction of the artistic features in the form of a structure. Thus, some of the prior revision bills, in addition to protecting "artistic" architectural structures, would also have extended to "models or designs" for such structures the right now provided in section 1(b) "to complete, execute, and finish * * * a model or design for a work of art."⁶⁵ A similar result is provided for in some of the foreign laws.⁶⁶

The difficult question of what constitutes an "artistic" architectural structure will be dealt with below. Suffice it to say here that if certain structures are given copyright protection as works of art, the plans for such structures (insofar as the artistic form of the structure is concerned, as distinct from the processes or methods of construction)⁶⁷ might well be given protection against their use to build the structure.

B. ARCHITECTURAL STRUCTURES

1. *As copyrightable works.*—The present copyright statute makes no reference to architectural structures. Except as such structures might possibly be treated as coming within the protected category of "works of art" (sec. 5(g)), they are apparently given no copyright protection.

⁶⁰ See cases cited *supra* at notes 9, 10, 20. Processes or methods, if they are novel and inventive, may be proper subjects for patent protection, as distinguished from copyright protection.

⁶¹ See, for example, cases cited *supra* at notes 21-25.

⁶² See *supra* at note 34.

⁶³ *E. g.*, see *supra* at notes 45 and 46 regarding the United Kingdom and Canada; note 49 regarding France; note 51 regarding Germany.

⁶⁴ See *supra* at note 26.

⁶⁵ See *supra* at notes 36 and 37.

⁶⁶ See *supra* at note 46 regarding the United Kingdom; text following note 49 regarding France; at note 52 regarding Germany.

⁶⁷ *Cf.* Copyright Office Regulations, 37 C.F.R. § 202.10(a), which defines "works of art" as including "works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned."

As a parallel to the observations made in the preceding analysis regarding architectural plans, ordinary structures embodying ideas, processes, or methods of construction, but having no artistic features, would not seem to be appropriate subjects for copyright protection. On the other hand, consideration should be given to providing explicitly for some kind of protection of architectural structures that are artistic in character. Most of the prior revision bills,⁶⁸ as well as foreign laws generally,⁶⁹ provide for protection of "artistic" architectural structures (as to their artistic character but excluding processes or methods of construction).

The prior revision bills and foreign laws do not resolve the question of what constitutes an "artistic" structure. This difficult question of definition is apparently the same, in the specific field of architecture, as the familiar and troublesome question of what constitutes a "work of art" in other areas of three-dimensional objects that may be utilitarian or aesthetic or both in combination. Like the general term "work of art," the concept of "artistic" structures eludes precise definition.⁷⁰

Some broad delineations, however, can be suggested. The ordinary structure designed for functional use (such as dwellings, shops, office buildings, factories, etc.) though attractive of its kind, would rarely, if ever, qualify as a "work of art." A monumental structure which is to be enjoyed, not in any functional use, but in the contemplation of its aesthetic form and the evocation of feeling, may readily qualify. Between these two extremes is a range of structures (of which some churches, museums, or auditoriums may be examples) which have both functional use and artistic form in varying degrees. It is in this last category that the dividing line between the primarily utilitarian and the primarily artistic (with the other being present to some extent) becomes shadowy, sometimes leaving much to subjective judgment as to whether a particular structure is or is not a work of art.

It has been suggested that the long-term protection of the copyright statute should be extended only to architectural structures that are solely artistic in character with no functional utility; or at most, to those that are primarily artistic though having some utilitarian aspects. If this view is adopted, perhaps some other form of protection for a relatively short term would be appropriate for the features of artistic embellishment incorporated in a primarily utilitarian structure. Such protection might be given, for example, under general legislation like that recently proposed for the protection of "ornamental designs of useful articles."⁷¹

2. *Publication.*—If architectural structures of an artistic character are to be copyrightable, the question of whether such a structure located in a public place is a "published" work should be resolved.⁷² This question would have particular significance if, as under the present statute, a copyright notice is to be affixed to published "copies" of a work.⁷³

⁶⁸ See *supra* at notes 33 and 34.

⁶⁹ See *supra*, part IV.

⁷⁰ For an attempt to indicate broadly the scope of the term "work of art" in the present copyright statute, see Copyright Office Regulations, 37 C.F.R. § 202.10.

⁷¹ See the Willis bill, H.R. 8873, 85th Cong. (1957) and the O'Mahoney bill, S. 2075, 86th Cong. (1959).

⁷² This is not necessarily the same as the question discussed earlier of whether the building of a structure constitutes publication of the plans. The question here is whether the structure is a published work in itself.

⁷³ See 17 U.S.C. § 10.

A structure built in a public place is accessible to the public and its artistic form is thereby disclosed to public view.⁷⁴ But public disclosure is not synonymous with "publication."⁷⁵ The concept of "publication" in the copyright law generally denotes that copies have been reproduced and circulated to the public.⁷⁶ Some of the prior revision bills provide that the construction of a work of architecture shall not constitute publication.⁷⁷

Assuming that architectural structures are to be treated as published works for other purposes, it would still be possible, if desired, to exclude them from any general requirement that a copyright notice be affixed to published copies.

3. *Rights in copyrighted structures.*—As reflected in the prior revision bills⁷⁸ and in foreign laws,⁷⁹ the copyright protection of an artistic architectural structure is basically against its unauthorized reproduction in the form of another structure, and perhaps in the form of plans from which another structure could be built; and such protection relates only to its artistic form, not to the structural processes or methods utilized.

Beyond that, inasmuch as architectural structures are exposed to public view, and their artistic appearance is intended to be enjoyed by the public, they are commonly reproduced pictorially in drawings, photographs, motion pictures, and television broadcasts. Such two-dimensional portrayal of the appearance of an artistic structure (other than in the form of architectural plans) does not compete with the architect's interest in the structural use of his artistic work. In view of these considerations applicable specially to architectural structures, most of the prior revision bills⁸⁰ and some foreign laws⁸¹ provide explicitly that architectural structures are not protected against their representation in a two-dimensional picture.⁸²

4. *Remedies for infringement.*—Special limitations may be needed on the application to infringing architectural structures of some of the remedies provided for copyright infringements generally. A person who, in building a structure, infringes the copyright in architectural plans or in a similar structure, should presumably be liable for damages in the same manner as the infringer of any other class of copyrighted works. But when the infringing structure has been erected to a substantial extent, the public interest would seem to

⁷⁴ Such public disclosure has been held in two cases to constitute publication of the design of the structure under the common law. See *supra* at notes 5 and 8.

⁷⁵ Thus, a public performance of a dramatic or musical work, though a form of public disclosure of the work, does not constitute publication. See Strauss, *Protection of Unpublished Works*, *supra* note 2, part II.

⁷⁶ The present statute defines "the date of publication" as meaning "in the case of a work of which copies are reproduced for sale or distribution . . . the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed . . ." (17 U.S.C. § 26). In Art. VI of the Universal Copyright Convention, "publication" is defined as meaning "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived."

⁷⁷ See *supra* at note 41. Similar provisions are found in the Berne Convention (1908 and subsequent revisions, Art. 4) and in the United Kingdom Copyright Act of 1956, § 49(2)(c).

⁷⁸ See *supra* at notes 34, 35, 38, 39.

⁷⁹ See *supra*, part IV, particularly in regard to the United Kingdom, France, Germany, and Mexico.

⁸⁰ See *supra* at note 38.

⁸¹ See *supra* at note 47 regarding the United Kingdom; German Act of Jan. 9, 1907, § 20; Mexican Law of Dec. 29, 1956, Art. 15(b).

It should be noted that the recent United Kingdom Copyright Act, 1956, contains a novel provision that the copyright in an architectural structure is not infringed by any reconstruction of an existing structure, and that the copyright in the plans for an authorized structure is not infringed by use of the plans in such reconstruction (§ 9(10)). This provision was apparently prompted by the fact that many buildings in the United Kingdom, some of which are still under copyright protection, were damaged during the Second World War.

⁸² The same considerations would seem to apply also to other three-dimensional works of art, such as sculptures, situated in a public place. Some foreign laws make similar provisions permitting two-dimensional pictures of any three-dimensional work of art so situated. See, e.g., United Kingdom Copyright Act, 1956, § 9(3); German Act of Jan. 9, 1907, § 20; Mexican Law of Dec. 29, 1956, Art. 15(b).

militate against the economic waste involved in enjoining its completion or in requiring its destruction.⁸³ So, most of the prior revision bills⁸⁴ and some foreign laws⁸⁵ contain provisions specifying that the general remedies of injunction and destruction are not applicable to an infringing architectural structure after its construction has substantially begun. Even in the absence of such an express provision, it seems unlikely that the courts, in whose discretion these remedies lie, would enjoin the completion of an architectural structure or order its demolition.

VI. SUMMARY OF MAJOR ISSUES

A. *As to architectural plans (including drawings or models):*

1. Should the copyright in such plans (which now protects them against unauthorized copying and publishing in the form of plans) be extended to protect them also against their unauthorized use in the building of a structure?

2. If so, should protection against such use be confined to the building of an artistic structure that would qualify under the statute (see B 2, below) as a copyrightable work in itself?

B. *As to architectural structures:*

1. Should artistic structures be protected as copyrightable works in themselves?

2. If so, how should the structures to be protected under the copyright statute be defined: (a) in terms of those that are solely artistic in character with no utilitarian function, or (b) in terms of those that are works of art in their general appearance though also having some utilitarian function, or (c) in some other terms?

3. Should the building of a structure in a public place constitute publication of the plans or of the structure? If so, should a copyright notice (if required generally on published copies of works) be required on architectural structures?

4. Should copyright protection of structures be limited to the reproduction of their artistic form in another structure or in architectural plans (thereby excluding protection against reproduction in two-dimensional pictures)?

5. Should the statute specify that the remedies of injunction and destruction shall not be available in respect to infringing structures substantially begun?

⁸³ Under § 101 of the present copyright statute, the remedies available generally for copyright infringement include an injunction (subsec. (a)) and the destruction of "infringing copies or devices" (subsec. (d)). For a general discussion of these remedies, see Strauss, *Remedies Other Than Damages for Copyright Infringement* (Study No. 24 in the present series of committee prints).

⁸⁴ See *supra* at note 40.

⁸⁵ See United Kingdom Copyright Act, 1956, § 17(4); German Act of Jan. 9, 1907, § 37.

COMMENTS AND VIEWS SUBMITTED TO THE
COPYRIGHT OFFICE
ON
COPYRIGHT IN ARCHITECTURAL WORKS

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT
OFFICE ON COPYRIGHT IN ARCHITECTURAL WORKS

John Schulman

SEPTEMBER 21, 1959.

The Strauss study on "Copyright In Architectural Works" is quite complete. It discloses the difficulty of trying to deal with a copyright law piecemeal.

In my view the protection of architectural works in the form of buildings and other structures, is more akin to the problems of industrial designs than to copyright as such. If treated at all, it should be in that area.

All that really belongs in the copyright statute is the protection of drawings, plans, etc., against reproduction in that form. Otherwise, the problems will be endless and insoluble.

On the other hand, I think that a new statute should reject the view that the building of a house or the filing of plans destroys copyright protection for the architect's drawings. These certainly should not be publication in a dedicatory sense, any more than the performance of a play destroys copyright.

As to the exact treatment, that of course depends on the structure of a new statute.

* * * * *
JOHN SCHULMAN.

Joshua B. Cahn

SEPTEMBER 29, 1959.

In the portion of the study entitled "Analysis of the Issues," there is a rather extended discussion of architectural work as a work of art and the following statements are made:

"The ordinary structure designed for functional use (such as dwellings, shops, office buildings, factories, etc.) though attractive of its kind, would rarely, if ever, qualify as a "work of art." A monumental structure which is to be enjoyed, not in any functional use, but in the contemplation of its aesthetic form and the evocation of feeling, may readily qualify. Between these two extremes is a range of structures (of which some churches, museums, or auditoriums may be examples) which have both functional use and artistic form in varying degrees. It is in this last category that the dividing line between the primarily utilitarian and the primarily artistic (with the other being present to some extent) becomes shadowy, sometimes leaving much to subjective judgment as to whether a particular structure is or is not a work of art."

I feel that distinctions drawn along the lines suggested are undesirable. Dwellings, shops, office buildings, and factories are more and more conceived of and executed as works of art and too often churches, museums, and auditoriums are erected which are without artistic value. The unexpressed notion appears to be that if a considerable portion of the cost of the building has been for decoration, it may be considered a work of art, whereas, if form has followed function, the building is not a work of art. This is a dangerous notion and one which could plunge us into the midst of a bitter artistic controversy.

Many churches and museums have been built in the "international style," bare and undecorated. Many ornate, decorated office buildings and homes have also been built. I believe it would be a great mistake to have any copyright law which required the courts or the Copyright Office to make aesthetic judgments.

Builders of business structures spend millions in the course of a year to secure the services of architects as consultants on the basis of the superior aesthetic qualities of the work of such architects. The motivation of the builders is in part aesthetic and in part it is to attract tenants by reason of the superior artistic quality of the structure. The design of a factory or an office building often calls

for more expenditure of money and talent for aesthetic effects than that of a monument, church, or museum.

What then is the solution to this problem? Before considering what architectural structures should be protected by copyright, we should reconsider whether architectural structure (as opposed to architectural plans) should be protected at all.

This brings us back to fundamentals; the purpose of the copyright law: "To promote the Progress of Science and useful Arts by Securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Constitution, art. I, sec. 8, clause 8).

Will architecture be stimulated with resultant benefit to the people of the United States by preventing others from copying a structure which has been erected? I doubt it. It may very well be argued to the contrary, that the dissemination of new ideas in architecture is stimulated by freedom on the part of all architects to use the buildings of others. Will architects get better pay if their employers have the exclusive use of their designs? There is no reason to think so. Doesn't the public benefit more from the rapid dissemination of architectural innovations than from exclusivity?

What would constitute an infringement of a work of architecture? In the nature of things, an architectural structure is usually composed of standard elements capable of being synthesized by craftsmen and therefore the individualized artistic flair is often less apparent than in the work of the writer, painter, or sculptor. Would it be desirable to give to the courts the additional problem of determining when there has been copying? Would architects be influenced by others at their peril? What criteria would the court or the architect use to determine the line?

In accordance with the notions expressed above, I would answer the questions listed under "Summary of Major Issues," as follows:

A. 1. The plans should not be used but, if they have already been incorporated in a structure, the structure itself may be copied.

A. 2. No.

B. 1. No.

B. 2. No.

B. 3. The building of a structure should not constitute publication of the plans and no copyright notice should be required on architectural structures.

B. 4. No protection should be given against reproduction of structures in two or three dimensional form.

B. 5. No.

JOSHUA B. CAHN.

Melville B. Nimmer

OCTOBER 19, 1959.

I have read William Strauss' interesting study on "Copyright on Architectural Works." With respect to the major issues posed by Mr. Strauss, I have the following comments:

1. The copyright in plans should very definitely protect against the unauthorized use of such plans in the building of a structure. A copyright in architectural plans which does not include the exclusive right to erect structures based upon such plans makes no more sense than copyright in musical or dramatic compositions without the exclusive right of public performance. In order to be meaningful the copyright must include rights which give the work economic value.

2. Copyright protection for architectural works should not be limited to such works as may be determined to be "works of art." I think it sufficient that the copyright be limited by the existing principle of originality (i.e., only those elements which are original with the copyright claimant may be protected), and the principle of *Mazer v. Stein* that the copyright protects the artistic as distinguished from the utilitarian aspect of any work.

3. I see no reason why architectural structures in themselves should not likewise be the subject of copyright protection, and here again I think it undesirable to make any arbitrary distinction as to "artistic" structures. If the form of the structure may be said to be original, this should be sufficient.

4. With respect to publication of a building structure, I would suggest that the definition of publication suggested in my article "Copyright Publication," 56 *Columbia Law Review* at page 197, is here applicable. That is, publication should not be said to occur unless members of the public receive a possessory

interest in tangible copies of the work in question. Such, of course, would not be the case merely by virtue of the building of an architectural structure.

5. Copyright protection for architectural structures should limit the reproduction of either another structure or of plans for another structure. To the extent that there is economic value in either creating another structure or in creating plans therefor, the copyright proprietor should be entitled to control such value.

6. I see no more reason for modifying the injunction and destruction provisions of the copyright act with respect to architectural productions than with respect to other forms of copyrighted works involving considerable financial expenditure, e.g., motion picture productions.

MELVILLE B. NIMMER.

Samuel W. Tannenbaum

OCTOBER 20, 1959.

I have carefully examined Mr. William Strauss' fine study of the problems of "Copyright In Architectural Works."

As there appears to be unanimity in the protection of architectural plans under the U.S. Copyright Act, in my opinion, there is, therefore little need for a discussion of that question.

However, without attempting to discuss the constitutional question of whether a structural work of architecture might be considered the "writing" of an "author," I believe some comment on the protection of such structural works is warranted.

Assuming that structural works are entitled to protection, we are immediately faced with the problem of whether such protection should be limited to artistic, as opposed to utilitarian structures. If such a limitation is deemed wise, the courts will be presented with an almost insurmountable task of interpretation. Is a structure, designed, for example, by Frank Lloyd Wright purely as a dwelling, any less a work of art than, for example, the Lincoln Memorial, almost totally void of utilitarian purpose?

It is evident that structural works of architecture cannot properly fit into the ordinary concepts of copyright. Is a building in a public place a published work, even though not an object reproduced in copies generally distributed to the public? If the structure be deemed a published work, what would be the date of publication? Would the owner of the structure require the permission of the architect to make a structural alteration years after the completion of the building?

Then too, if the structure warrants statutory copyright protection should the period be the 28-year plus a renewal of 28 years?

As architectural structures and designs become obsolete in a comparatively short period, a shorter term of protection would be advisable. This is an added reason for having it the subject of special legislation. It might be included in the pending Willis bill in the 85th Congress, H.R. 8873 (1957) and the O'Mahoney bill in the 86th Congress, S. 2075 (1959).

These, and countless other problems, indicate that this is an area, like the field of industrial design, which requires special consideration, and should be the subject of special legislation outside of the Copyright Act.

SAMUEL W. TANNENBAUM.