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Architecture and copyright: a quick survey of the law

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Abstract: Architecture has a special place within the law of copyright. The Courts have held that the unique design contained in an architectural drawing is capable of protection by copyright. The law does not restrict the development of architectural ideas and concepts; it does, however, prevent the copying of plans. This poses many interesting questions. The test is whether the plan or building was a copy of the concept or style and therefore legitimate or a copy of the author's original manifestations of that concept or style and therefore an infringement. Another interesting aspect of architectural works is that they usually take the form of a professional commission. This, in turn, creates a range of rights for all parties involved.

1 Legal context

"We shape our buildings; thereafter they shape us".¹

Architecture has a special place within the law of copyright. This paper is intended to give a practical overview of copyright in relation to architecture and architectural issues. Copyright is essentially a negative right which prevents others from making copies of the work of an author. Copyright subsisted in the form in which ideas are expressed not in the ideas themselves.² It is a partial monopoly; although, the law allows a number of exceptions wherein a work may be copied legitimately without infringing the rights of an author.

The important area for architects is Section 4(1) which defines 'artistic work' as:

- a. a graphic work (including painting, drawing, diagram, map, chart, or plan, engraving, etching, lithograph, woodcut, or similar work), photograph, sculpture or collage, irrespective of artistic quality
- b. a work of architecture being a building or a model for a building, or
- c. a work of artistic craftsmanship.³

In this Part – 'building' includes any fixed structure, and a part of a building or fixed structure (Garnett et al., 1999).⁴ It should also be noted that copyright also exists in the architect's plans as drawings (graphic or artistic work).⁵ Authorship determines first ownership. The author of a work is the person who creates it.⁶ In most work, this is self-evident. Most works of copyright are created for the author's own pleasure or amusement. However, there are some exceptions to this basic rule. Where a work is made by an employee in the course of his employment, his employer is the first owner subject to any agreement to the contrary.⁷ It is not required that the agreement to the contrary has to be between the employer and employee, whether express or implied, but can be between the employer and a third party.⁸ It also appears certain that a builder cannot claim copyright in a work of architecture, where the architect is regarded as the author.⁹ Copyright may be expressly assigned,¹⁰ and sometimes is assigned to the employer in the terms of engagement. An assignment of copyright must be recorded in writing and signed by the assignor, so any assignment of copyright by an architect must be recorded

in a signed contract, preferably his contract of engagement. Even if his copyright is assigned, the architect retains the right to reproduce part of an earlier work in a subsequent work, provided he does not repeat or imitate its main design.¹¹ The architect may also authorise others to use his copyrighted material, while himself retaining copyright. His client has an implied licence to use plans produced for him. The extent of this licence probably depends on circumstances and in particular on the architect's fee.¹² It will normally extend to publication of the plans in a brochure produced for prospective purchasers,¹³ and to copying ¹⁴ and variation of the plans by a new architect.¹⁵ It may not extend to use of distinctive design features in an extension of the original building.¹⁶ The owner of copyright in a work can grant a license to a third party to reproduce his work. A license can be an express term of an agreement between the architect and the client or it can be implied. In the UK architects have a professional body which helps with these issues: The Royal Institute of British Architects (RIBA).¹⁷ Architects tend to be reluctant to assign their copyright, preferring instead to license it. RIBA's Conditions of Engagement expressly state that the Architect owns the copyright in the work produced by him.¹⁸ A license is, in essence, a permission granted by the owner of a right or interest to another person allowing him to do something in respect of that right or interest. If an architect is retained without a written agreement or on an agreement which does not expressly address copyright, then a license is implied. It would be difficult to give an agreement between an architect and his client commercial efficacy if the client was not entitled to use the architect's designs.

Architectural works usually take the form of a professional commission which is likely to follow one of the Standard Forms of Agreement of the Institute. RIBA's Conditions of Engagement for the Appointment of an Architect (CE/99) grant an express license to the Client to copy and use and to allow other Consultants and contractors to use and copy drawings and documents for purposes related to the project.¹⁹ These can be varied expressly. The 1992 version of the Form for Appointment of an Architect states that the copyright in all documents and drawings prepared by the architect remains his or her property.²⁰ However, the client is licensed to reproduce the design by building on the site or part of the site to which to design relates, provided that the architect has completed the scheme design or provided detailed design and production information and has been paid as agreed.²¹ The Architect may suspend the license for the use of copyright material upon giving seven days notice of his intention to do so, where the Client is in default of payment of fees.²² Until a scheme design is complete, the client has no right to proceed without the consent; but if the architect's services are limited to making and negotiating a planning application, consent may not unreasonably be withheld.²³

The terms of any implied license depend on the intention of the parties when entering into the contract. The court would be likely to take into account the normal terms of engagement and consider the provisions of the RIBA terms of engagement. The suspension or revocation of the license to use his work by an architect will not affect work completed before suspension or revocation. That work was done under license and does not constitute an infringement. The architect is entitled to claim damages for breach of contract. When retaining an architect, a client may wish to consider making the license irrevocable, so that the architect's only remedy for default would be damages, so

ensuring that the work can be completed without infringing copyright. The architect would wish to retain his right to suspend or revoke the license.

Like an assignment, licenses may be limited in scope and duration. For example, if an architect is retained to design one building, then the license is only for that one building and no more. The use or adaptation of the same plans for subsequent buildings would be outside the scope of the license and amount to infringement. The client must ensure that the project is broad enough to allow the use of the designs for whatever purposes he has in mind. Likewise the architect should ensure that the project is precisely defined and reflects any limitations he wishes to place on the use of his designs. If the owner sells the site, the implied license may extend to the purchaser.²⁴

In *Stovin-Bradford v Volpoint Properties Ltd (CE/99)*,²⁵ the license granted by the architect was held to extend only to the use of drawings for obtaining planning permission. The architect had charged a nominal fee, hoping to be retained if planning permission was granted. The court held that the client could not pay only a nominal fee, refuse to employ the architect under the building contract and yet claim that he had an implied license to use the design. The client may wish to seek a warranty from the architect that the designs will be his own original work and will not infringe any third party copyright. Copyright can also subsist in specifications and lists of materials. Unregistered design right may subsist in components, even if it is not applicable to the structure itself.

2 Key points

Under the law of the United Kingdom, the copyright owner has a bundle of exclusive rights which he can prevent others from exercising.²⁶ The so-called 'restricted acts' include the right to:

- copy the work (the reproduction right)²⁷
- issue copies to the public (distribution right)²⁸
- perform, show or play the work in public²⁹
- to rent or lend the work to the public³⁰
- to broadcast the work or include it in a cable programme service³¹
- to make an adaptation of the work or do any of the above in relation to the adaptation.³²

Copyright in a work is infringed by a person who, without the licence of the copyright owner, does, or authorises another to do so, any of the acts restricted by copyright.³³ An example is the case of *Jones v Tower Hamlets LBC (No. 2) Times*.³⁴ Mr. Jones, the architect, had been asked to design several housing developments in Bow in London in 1988 by Assured Developments Ltd. In 1992 the company went into liquidation and the council took over completion of the developments. Mr. Jones claimed that in completing the development, the council had copied his designs.³⁴

The court held that the unique design contained in an architectural drawing was capable of protection by copyright. The law does not restrict the development of architectural ideas and concepts, it does, however, prevent the copying of plans. An architect might

legitimately inspect an original plan or building and then, having absorbed the architectural concept, might apply that concept in an original plan prepared by him.³⁴ There is, however, clearly a dividing line between the legitimate development of ideas, and a process whereby an architect studies and then copies a plan or building. The test is therefore whether the plan or building was a copy of the concept or style and therefore legitimate or a copy of the author's original manifestations of that concept or style and therefore and infringement.³⁴

The extent of the similarity is often the most revealing element on the question of copying. It is also particularly important to know how the alleged infringer went about preparing his drawing. Mr. Jones' design of a wrap around partition for a bath was to all intents and purposes a unique solution to the problem of the confined interior. It was a visually significant part of the design of the building. Thus, it is protected by copyright. As such, the design of the partition is unique and the only inference that can be drawn is that the council must have copied it.³⁴

In a similar case in Australia, an implied license to use the architectural plans for a site was held to exist. The parties had originally entered into a joint venture to develop a piece of land. The Justices noted that in the absence of any agreement to the contrary, a co-owner of land who uses his professional skill as an architect to prepare development plans free of charge, for him and other co-owners implicitly consents to the plans being used for the purposes for which they have been prepared. In this case, the plans had been prepared for the purpose of development and development consent had been granted.³⁵ When land for which architectural plans have been prepared is sold, an implied license to use the plans generally passes to the purchaser of the land.³⁶ This license may be implied regardless of whether payment had been made to the architect for the plans.³⁷ Architects (and other designers of copyright works) should ensure that their contracts with clients define any express permission to use the plans and state which, if any, rights are assignable to third parties. Similarly, in order to ensure the commercial certainty, developers should ensure that their right to use plans, and their ability to transfer those plans to third parties, is expressly agreed with the copyright owners of those plans at the outset.³⁵ The architect may want to prevent this by granting an express license, assignable only after payment of all fees or the license could be stated to be revocable at any time until he has received his fees.

Once a work qualifies for copyright protection two distinct sets of rights may arise. In addition to the economic rights that are granted to the first owner of copyright, there are also moral rights (Cornish, 1989; Durie, 1991).³⁸ Moral rights protect an author's non-pecuniary or non-economic interests (Ginsburg, 1990).³⁹ The CDPA provides authors and directors with the right to be named when a work is copied or communicated (the right of attribution),⁴⁰ the right not to be named as the author of a work which one did not create (the right to object against false attribution),⁴¹ and the right to control the form of the work (the right of integrity).⁴² The moral rights recognized in the UK are more limited than the rights granted in some other jurisdictions.⁴³

Infringement of a moral right is actionable as a breach of statutory duty⁴⁴ and will result in an award of damages. The right of attribution provides that when the work is dealt with in certain ways, that authors and directors have the right to be identified as author of the work. In order for the right of attribution to be infringed, it is necessary to show that:

- 1 the author has not been properly identified
- 2 the work has been dealt with in circumstances where attribution is required
- 3 none of the defences and exceptions applies.

In order to be properly identified, the name of the author must appear in or on each copy of the work in a clear and reasonably prominent manner.⁴⁵ Where it is not appropriate for the name of the author to appear on each copy of the work, the name must appear in a manner which is likely to bring their identity to the notice of a person acquiring a copy of the work.⁴⁶ Where the relevant work is a building, their identification should be visible to persons entering or approaching the building.⁴⁷ The author of a work of architecture has the right to be identified on the building as constructed. If a series of buildings are made, however, the architect only needs to be identified on the first building to be constructed. The right to object to false attribution applies to persons wrongly named as the authors of literary, dramatic, musical, and artistic works and as the directors of films. This applies whether or not the claimant is an author. The right is infringed by a person who issues copies of a work to the public, or exhibits in public an artistic work on which there is a false attribution (rather than by the person who makes the false attribution). The right can also be infringed by a person who performs, broadcasts, or shows the work and who knows that the attribution is false. Section 84(5) also provides for infringement where certain commercial acts are done with the knowledge that the attribution is false.⁴⁸ Whether a work has been attributed to the wrong person depends on 'the single meaning which the . . . work conveys to the notional reasonable reader.'⁴⁹ There is no need for the complainant to prove that attribution actually caused him or her any damage.⁴⁹ The right of integrity is the right to object to derogatory treatment of a work, or any part of it. The basis for this authorial prerogative is that the artist, through the act of creation, has embodied some element of his or her personality in the work that ought to be protected from distortion or mutilation.⁵⁰ In order for this right to be infringed; an author must be able to show that:

- 1 there has been a 'derogatory treatment' of the work
- 2 the work has been dealt with in circumstances where the author is protected from derogatory treatment
- 3 none of the exceptions apply
- 4 the right has not been waived or the action consented to by the author.

In the case of a work of architecture, the right is infringed by a person who issues to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work.⁵¹ However, this does not apply to a work of architecture in the form of a building; but where the author of such a work is identified on the building and it is the subject of derogatory treatment he has the right to require the identification to be removed.⁵²

3 Practical Significance

The civil remedies available for infringement of copyright are damages, injunctions, accounts, 'or otherwise'.⁵³ Where an alleged infringing work is a work of architecture, it may be possible to register a caution against dealing with land under the Land Registration Act 1925 s 54(1) (Arnold, 1997).⁵⁴ This may be particularly useful in the case of a house being built for sale which is alleged to infringe the copyright of an architect's drawings, as the limitation on injunctions under the Copyright Act of 1954 s 17(4)⁵⁵ has no equivalent in the 1988 Act. Whilst it would be extremely unlikely that an infringing building would be ordered to be demolished, registering a caution could focus the alleged infringer's mind wonderfully. However, a person lodging a caution must not do so without reasonable cause and is under a duty to any person who suffers damage in consequence of the breach of that duty.⁵⁶

3.1 Statutory defence of fair dealing in UK

The only thing that can be said with any degree of certainty is that whether a particular act falls within the meaning of 'fair dealing' depends very much on the circumstances surrounding that act.

1 *Purpose*. Conceivably, it might be fair dealing to take a copy of an entire work, such as a journal paper, for the purposes of research or private study. But it will not normally be fair dealing to take a large amount of another's work for the purpose of criticism or review.⁵⁷

2 *Proportion*. Within a particular form of fair dealing, proportion might be important. For example, it may be fair dealing for the purposes of criticism or review to take 5% of a work, but not take 40%.⁵⁸

3 *Motive*. If the motive for the act was to compete with the other work, this is unlikely to be fair dealing.⁵⁹

4 *Status of other work*. That is whether it is confidential or published. It is unlikely to be fair dealing if the work taken has not been published, or in the case of a 'leak'.⁶⁰

Further, the Copyright, Designs and Patents Act 1988 however makes highly specific provision for unauthorised but legitimate copying of certain works in Section 62:

(1) "This section applies to:

- (a) buildings
- (b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.

(2) The copyright in such a work is not infringed by:

- (a) making a graphic work representing it
- (b) making a photograph or film of it, or
- (c) broadcasting or including in a cable programme service a visual image of it.

(3) Nor is the copyright infringed by the issue to the public of copies, or the broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of this section, not an infringement of the copyright."⁶¹

To copy an artistic work for the purpose of advertising its sale and issuing those copies to the public is another exception to infringement.⁶² Where the author of an artistic work is

not the copyright owner, he does not infringe the copyright by copying the work in making another artistic work, provided he does not repeat or imitate the main design of the earlier work.⁶³ Finally included in 'fair dealing' is the incidental inclusion of a work protected by copyright in an artistic work, sound recording, film, broadcast or cable programme.⁶⁴

3.2 Other exceptions

"Anything done for the purposes of reconstructing a building does not infringe any copyright: (a) in the building, or (b) in any drawings or plans in accordance with which the building was, by or with the licence of the copyright owner, constructed."⁶⁵ This ensures that an owner of a building is able to carry out repairs without having to seek approval of the copyright owner. This exception could possibly extend to the demolition of the building. An example of this would be the Dutch case of the 'Wavin' building in Zwolle which was designed by Jelles and built in 1967. The town contacted Jelles to discuss its destruction and offered to allow him the opportunity to document the building.⁶⁶ Jelles sought an injunction against the demolition on moral rights ground, specifically, the right to not have his work treated in a derogatory manner.⁶⁷ Jelles considered the destruction of his building the ultimate mutilation and that it would harm his reputation. The courts did not agree with him at any stage.

The Supreme Court held that Article 25(1)(d) was derived directly from Article 6bis of the Berne Convention which was not meant to include the destruction of copyrighted works.⁶⁸ The Court further held that total destruction cannot be considered 'mutilation'; although, the destruction of a copyrighted work could be deemed a tort in certain circumstances. For example, when the design is considered to be of particular interest from the perspective of art history, the owner of a building may be obliged to allow the architect to document the building before it is demolished. In this case, the city of Zwolle had valid reasons for the destruction and had offered Jelles the opportunity to document the building.⁶⁹

In Switzerland, the Court held that in order to be protected by copyright, a work may not consist of elements taken from the common property only; it must contain elements created by the author, which have an individual character or are the expression of a new original idea. Individuality or originality are the essential elements of a protected work.⁷⁰ Swiss copyright law protects authors in their personal relationship with their work. In ATF 114 11 370, the Swiss Supreme Court had granted absolute protection to the author against anyone who modifies a work without regards to whether the change mutilates or improves the work.⁷¹ Works of art and the object embodying them often cannot be separated. But consideration must be given to the fact that when the artist sells or transfers the object, he has surrendered control over it to a certain point. As such, the abandonment has consequences in copyright. This is even more so if the object fulfils a useful function and the owner needs to modify it in order to meet his changed needs, as so often is the case with buildings.⁷²

The architect has no extra claim based on personality or integrity for having his work preserved. Buildings are designed to be functional and useful rather created with artistic

aims in mind. Architects should accept this and take it into consideration when designing their buildings. These works are intended to last a long time and thus will likely be modified in that time. The problem must be solved by weighing the interests of the architect with that of the owner. Taking into consideration the original scope of the work, changes may not be forbidden. Changes should, however, correspond as much as possible with the existing work while respecting the individuality of that work and its statistical uniqueness. Neither the architect nor the owner should invoke their rights in an abusive manner.⁷³

5.3 Public policy defence

Finally, in very limited circumstances, the Courts may permit infringement on public policy grounds including where this is to guarantee the right of freedom of expression under the Human Rights Act 1998.

6 Conclusion

As has been shown the Courts have deemed architectural drawings capable of protection by copyright. They did not restrict the development of architectural ideas and concepts. They did prevent the outright copying of plans. They developed a test: “Did the plan or building copy the concept or style of another which is legitimate, or did the plan or building copy of the author’s original manifestations of that concept or style and infringe? As most architectural works are in the form of a professional commission, knowledge of the range of rights for all parties is necessary.

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Notes

1Winston Churchill, 28 October, 1943, to the House of Commons (meeting in the House of Lords)quoted in Time, 12 September, 1960 found at <http://www.winstonchurchill.org>

2Jones v Tower Hamlets LBC (No. 2) Times, 14 November, 2000 (ChD).

3Copyright, Design and Patent Act of 1988 and amended (CDPA) s (4)(1).

4CDPA s 4(2); Copinger argues that, based on the Copyright Act of 1911, a work of architecture needs to have an artistic character or design to benefit from copyright protection. See generally Garnett et al. (1999).

5So it is possible to infringe copyright in a building (as distinct from its plans) by, for example, copying the original building in an extension to a building, as in *Meikle v Maufe* (1941) 3 All ER 144, which involved an extension to the Heal's building in Tottenham Court Road, London; at the time (in the middle of the Second World War) this case generated a lot of controversy given that in the past architects had tended to view such copying as a compliment rather than insisting on their legal rights and also given the context of the immense amount of rebuilding (and hence 'copying') foreseen after the war. In any event there are a number of specific exceptions to copyright infringement for buildings and models for buildings (e.g., ss 62 and 65).

6CPDA s (9)(1).

7CDPA s (11)(2).

8*Cyprotex Discovery Ltd v University of Sheffield*, (2004) RPC 887.

9*Meikle v Maufe* (1941) 3 All ER 144.

10CDPA 1988, ss 90–92.

11CDPA 1988, s 64.

12*Stovin-Bradford v Volpoint Properties Ltd* (1971) Ch 1007, (1971) 3 All ER 570, (1971) 3 WLR 256, CA; *Blair v Osborne and Tomkins* (1971) 2 QB 78, (1971) 1 All ER 468, CA.

13*Robert Allan & Partners v Scottish Ideal Homes* 1972 SLT (Sh Ct) 32.

14*Blair v Osborne and Tomkins* (1971) 2 QB 78, (1971) 1 All ER 468, CA.

15Cf *Barnett v Cape Town Foreshore Board* (1960) 4 SA 439.

16*Meikle v Maufe* (1941) 3 All ER 144.

17<http://www.architecture.com/>

18Royal Institute of British Architects, Conditions of Engagement (CE/99); The same is true of the Association of Consulting Engineers Conditions of Engagement 1995 2nd Edition 1998 Agreement D.

19Royal Institute of British Architects, Conditions of Engagement (CE/99) Clause 6.2; see also, Association of Consulting Engineers Conditions of Engagement 1995 2nd Edition 1998 Agreement D.

20Conditions of Appointment, para. 1.7.1.

21See e.g., *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd and others*, (1996) 2 All ER 487. "The property in the unissued drawings was vested in the architects. In addition, as was made clear by cl 3.15 of the Royal Institute of British Architects (RIBA) Conditions of Engagements, the architects had reserved the copyright in the drawings and designs, though they granted a licence to Glengate to reproduce the designs after completion of work stage D of the contract between the architects and Glengate".

22Construction Act on Standard Forms from Shadbolt & Co, SFA/1999, Clause 6.2.3; see also, Royal Institute of British Architects, Conditions of Engagement (CE/99) Clause 6.2.1.

23Conditions of Appointment at para. 2.3. The Form of Appointment of an Architect to Design and Build (para. 2.3.2) provides that, even if no scheme or design has been completed, consent to use is not to be unreasonably withheld.

24*Blair v Osborne and Tomkins* (1971) 2 QB 78, (1971) 1 All ER 468, CA.

25(1971) 3 All ER 570.

26CDPA s 16.

27CDPA s 17.
28CDPA s 18.
29CDPA s 19.
30CDPA s 18A.
31CDPA s 20.
32CDPA s 21.
33CDPA s 16(2).
34(2001) RPC 23 (14 November, 2000 (Ch D)).
35Catherine MacKenzie, *Case Comment: Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd.*, (2007) Conveyancer and Property Lawyer 461.
36*Beck v Montana Constructions*, (1964–1965) NSWLR 229; *Blair v Osborne & Tompkins*, (1971) 1 All ER 468, (1971) 2 WLR 503.
37*Ng v Clyde Securities Ltd.*, (1976) 1 N.S.W.L.R. 443.
38For in depth discussion of this area see, Cornish (1989) and Durie (1991).
39See Ginsburg (1990). This does not mean that they cannot be used to secure economic benefits.
40CDPA ss 77–79.
41CDPA s 84.
42CDPA ss 80–83.
43See Sherman and Stowel (Eds.) (1994).
44CDPA s 103.
45CDPA s 77(7).
46CDPA s 77(7)(a).
47CDPA s 77(7)(b).
48CDPA s 84(5).
49*Clark v Associated Newspapers* (1998) 1 All ER 959, 968; (1998) RPC 261.
50See Dietz (1994).
51CDPA s 80(4)(c)(i).
52CDPA s 80(5).
53CDPA s 96(2).
54See Arnold (1997).
55No injunction or other order shall be made to prevent a building from being completed or to require its demolition. CA 1956 s 17(4).
56Land Registration Act 2003 s 77.
57See, *Hubbard v Vosper* (1972) 2 QB 84.
58See, *Walter v Steinkopff* (1892) 3 CH 489.
59See, *Weatherby v International Horse Agency & Exchange Ltd* (1910) 2 Ch 297.
60See, *British Oxygen Co Ltd v Liquid Air Ltd* (1925) 1 Ch 383.
61CDPA s 62.
62This is an important exception to auction houses. CDPA s 63.
63CDPA s 64.
64CDPA s 31. By way of example, should an art critic be filmed walking through the Aberdeen Art Gallery with the odd incidental shot of works still in copyright; this would appear to be incidental inclusion. However, if they were to be filmed in front of a work whilst commenting upon it this would clearly not be incidental. However, it would be likely to be fair dealing for the purposes of criticism or review. See *IPC Magazines Ltd v*

MGN Ltd (1998) FSR 431 – incidental inclusion was considered to mean that the inclusion was casual, inessential, subordinate or merely background (at 441).

65CDPA s 65.

66See Krikke (2004).

67Article 25(1)(d) of the Dutch Copyright Act grants an author of a work the right to “oppose any distortion, mutilation, or other impairment of the work that could be prejudicial to the name or reputation of the author or his dignity as such”.

68Discussions held during the Diplomatic Conference in Brussels in 1948.

69Krikke, *supra*.

70See Troller (1993).

71ATF 114 11 370.

72Troller, *supra*.

73Article 2 of the Swiss Civil Code.