COPYRIGHT PROTECTION & ARCHITECTURAL PLANS, DRAWINGS AND DESIGNS

An 'architect' expresses his thought and reveals his artistic personality in his 'writings'. In this respect, he is similar to all other creators of intellectual properties. Unlike the writer of books, the architect is not limited to words. In addition to words, he uses, among other things, technical signs and symbols and graphic representations to communicate his ideas. The architect might be compared to the composer of music. The architect’s signs, symbols, and graphic representations are to the builder what a composer’s notes and performance instructions are to the musician.

Generally speaking all of the architect’s writings are put under the collective caption of ‘plans, drawings and designs’. Architects, generally use the ‘drawings’ to cover all written expressions of their art.

How much protection is available to the creator of architectural plans, drawings, and designs under copyright principles? How the protection to architectural works came to be recognised? And whether this protection is similar in scope to that granted to such producers of intellectual property as authors, artists, and composers? are the major queries which this chapter undertakes to examine. It also examines issues such as ownership of property, copyright in plans, infringement of copyright in architectural works and the question of publication in this regard etc.

(A) ARCHITECTURAL WORKS UNDER BERNE CONVENTION:

The original Convention of 1886 covered ‘les oeuvres de dessin
It also included *les lithographies* together with illustrations and geographical charts. These are ""artistic works", *par excellence*, as distinguished from literary works. They are different form of expression of the intellect. The expression *œuvres de dessin* is very broad in the French language, comprising even sculptures.

Architectural works were not included in the Convention of 1886, except that "plans, sketches and artistic works relating to architecture were enumerated in Article 4. While the claim of the architect to copyright in his plans, designs and sketches was widely recognised, that of copyright in the construction was generally not. At the three Berne Conferences which elaborated the Convention of 1886, the question was not discussed. It was in 1890 that the Belgian author Jules de Borchgrave for the first time raised a plea for the protection of architects, and following further discussion, especially at the Congresses of the International Association, a proposal was made by many delegations at the Paris Conference of 1896, for the inclusion of works of architecture, besides works of sculpture, in the enumeration of artistic works. It was rightly argued that an edifice may embody an original creation on the part of an architect, the same as an artistic work of a sculptor. The protection afforded by the prohibition of copying the plans or drawings of an architect was not sufficient, because this did not protect against copying of the architectural work itself. Plans or drawings are not absolutely essential to the construction of such works.

This proposal was objected to on the part of the German delegation on the ground that there are constructions lacking any artistic
character, and their reproduction could not be considered an infringement of a work of art. The British and Norwegian delegations were also opposed to the inclusion. The fact was that in no country at that time were architectural works explicitly protected by legislation, although in some countries the law was construed to afford copyright protection to such works. It was, therefore, agreed to insert in the Final Protocol a stipulation on works of architecture similar to that of choreographic works.

Thus paragraph 1 of the Final Protocol, as amended by the Additional Act of Paris, provided:

In the countries of the Union in which protection is granted not only to architectural plans, but also to the actual works of architecture, such works are admitted to the benefit of the provisions of the Conventions of Berne and of this Additional Act.

It was clearly understood, in view of the general principle of Article 2, that in countries in which this protection existed, nationals of other countries of the union were to be protected without condition of reciprocity.

At the Berlin Conference in the year 1908, the German government abandoned in this, as in several other questions, its previous narrow attitude, and proposed the works of architecture be protected by the convention. This was agreed upon, and the works in question were inserted in the enumeration of literary and artistic works in Article 2. It was understood at the conference that protection was to be secured on original artistic works of architecture, and not on common constructions which did not reveal the personality of the author. The purpose for which the building was to be used should be immaterial. A building
might at the same time be useful and artistic. It mattered not that its utilitarian value predominated over its artistic character.

Works of architecture include palaces, churches, triumphal arches, monumental fountains, and the like. Ornaments, forming an inseparable part of a building, may constitute the principal characteristic of a construction, and they are to be deemed covered by the protection accorded to architectural works. On the other hand, such ornaments, when separable, such as statue within a niche, are works of sculpture and protected as such. The protection of these works involves protection against their being copied by the construction of similar edifices as well as the graphic reproductions (drawings, photographs, etc.)

Several countries of the Union, before or after the Conference at Berlin, amended their laws, with the view of affording protection to architectural works.

(B) COPYRIGHT IN ARCHITECTURAL WORKS UNDER COMMON LAW:

As said above that an architect expresses his thought and reveals his artistic personality in his “writings”. To cover all written expressions of their art, the architects normally use the word “drawings”. However, the word has acquired too narrow an interpretation in the average person’s vocabulary to warrant its use as a complete description of an architect’s writings. Nor is the term “design” an apt means of describing all of an architect’s writings. Like a carefully phrased campaign promise, it means different things to different people. For our purposes, a design is not only a two dimensional model of such work,
it is also any eye-pleasing drawing, detail, pattern, form or arrangement of material which is primarily intended to have an artistic or ornamental effect. The artistic use of wood strips, or "trim" on the exterior of a house to enhance its charm is an example of the latter use of the term "design".

In addition to drawings and designs, an architect uses the "plan", a two dimensional medium, to express his ideas for the erection of three dimensional structures. For structures such as houses, the most basic plan is the "floor or ground plain". This is a graphic or schematic drawing which delineates the form, size, room arrangement, and construction features of one floor of a structure as if seen from overhead, ceiling or roof removed. The floor plan gives a horizontal structural description. To describe vertical planes, such as walls, windows, doors or facades, "elevations" are employed. These may be "framing elevations" which reveal the construction details, or "skeleton" of a structure, or they may represent the completed vertical planes with their "skin" on. And, of course, there are interior and exterior elevations.

The modes of expression or writing available to the architect are many. Yet the law was clear that his unpublished work, be it denominated plan, drawing or design, was protected under common law principles from any unauthorized use. The wrong-doer was enjoined and, in some cases, held liable for damages.

Of course, the work must be original as well as unpublished, that is, it must be the result of independent labour and not of copying. However, the work need not be first of its kind. Although the concept of newness or novelty is a prerequisite in the law of patents, it has no place in the fields of common law or statutory copyright.
Novelty is a concept incapable of clear cut definition. Novelty does have some measurable basis where its scope is limited in territory and time. To require an author, who has created something original, to warrant and prove that it is also novel, that it has never been done before anywhere at any time, is to confront him an obstacle too difficult to overcome. History has recorded numerous incidents where two gifted men, working unaware of the other's efforts, have arrived, almost simultaneously, at the same results or discoveries. Yet if absolute novelty must be proven before either could restrain the unauthorized publication of his work, neither would receive protection. It should be sufficient that the work of each author is new to him, that is, that it is original with him, and not copied from the work of another.

An original unpublished "naked idea" was not protectable at common law. The undeveloped idea that a house should be built in a circular form to permit all the rooms to receive sunshine at sometime in the day is an example. At this stage, the idea is nothing but a thought - ephemeral, intangible, impermanent. To be protected at common law, the unpublished original work must be expressed in a concrete or tangible manner. This does not mean that the author's thought must be set forth in some kind of writing, and that each premise must be completely developed. The requirement of concreteness for intellectual productions would appear to be satisfied where the creator's thoughts are contained in such non-abstract form as would permit the impress of his mark of ownership.

Should the unpublished work be "not capable of distinguishable proprietary marks" because of its vagueness of expression, it would
be proper to deem it non-concrete. It would be non-protectable because non-persuasible, and non-persuasible because it lacked *indicia certia*.

As an eminent English jurist has observed:

> The subject of property is the order of words in the author's composition: not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, not the ideas expressed by those words, they existing in the mind alone, which is capable of appropriation.

As indicated, the architect employs a specialized form of writing. He expresses himself, primarily, by the use of technical signs, symbols, and graphic representations. Substitute these terms for the term "words" in the above quotation, and one will note its applicability to an architect's intellectual productions.

Publication counsel could advise, "do this - avoid doing that", and all would be well - the common law copyright would be preserved against any unauthorized reproduction. But, alas! the law was not clear. the theory of publication is simple enough, but its correct application to a particular set of facts is another matter.

At least in three reported cases from United States of America, courts have discussed as to what constitutes a publication of architectural plans, drawings, and designs. A New York Appellate Division case held that the filing of unpublished plans in a municipal building department which required such filing before construction could be approved, was such a publication of the plans as to destroy the architect's common law rights in them. A Missouri Appellate Court and a Philadelphia city court have held that the building of structure from
hitherto unpublished plans, and its exposure to public gaze, was also such a publication as destroyed the common law copying in the plans.

It is submitted that these cases are wrong in principle and destructive in practice of an architect's intellectual property. Should these three lower court cases be deemed to represent the true state of the law, an architect may never properly exploit his unpublished intellectual productions. The two acts which the nature of an architect's calling require him to perform, in order to earn his living, are turned, by these three decisions into the very means of depriving him of the right to profit from his own labour at the exact moment such profit is realisable.

From the business point of view as well as law, these decisions are unjust and unsound. This contention is supported by an examination of the authorities on the concept of publication.

(i) **Publication** :

"'Publication', as a legal term, is possessed of many definitions. It means one thing in the law of wills, another thing in the law of defamation, and yet another in the law of copyright. The act publication *communicates* the content of a work to others, generally by the circulation of copies. However, the copyright law distinguishes between communications which divest one of his common law rights in his work, and communications which do not. The former act is deemed a *general publication*, the latter, a *limited publication*. "The use of the word "'publication" in these two senses is unfortunate, and has led to much confusion,""24

By definition, a *general publication* is such a disclo-
sure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public.

A *limited publication* is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public.

The above definitions are certainly succinct. But, as a matter of practice, how may one type of publication be distinguished from another? The nature of the work concerned has some bearing on the question. For example, the performance of a dramatic piece or a musical composition is never any kind of a publication thereof. Here the law admits of no doubt. However, the certainty one seeks in the law becomes less apparent when other intellectual productions are examined. For instance, it is not only wholly clear whether the act of exhibition *per se* of a painting is a publication, and, if so, whether it is general or limited. In so far as the technical writings of an architect are concerned, they are neither dramatic or musical works, nor intended solely for exhibition purposes. It is evident, therefore, that they are capable of being published, in the fullest legal sense of that term.

But the nature of the intellectual production aside, what other factors determine whether a communication is a publication, and if so, whether it is general or limited? Is the printing of copies a general publication? Does the amount of copies matter? May a work be
published generally by the circulation of manuscript copies?

It is submitted that the mechanical means employed to reproduce a work, or the number of copies made and distributed are not determinative of the question of general publication. The test is one of intention. The U.S. Supreme Court has declared:

'It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public as to justify the belief that it took place with the intention of rendering such work common property.

Clearly, an author is not to be lightly divested of his common law protection, and hence of his property, without clear indicia of his intentions. For the law to find a general publication, the facts surrounding the publication must reveal a desire to abandon all rights in the work. A creator of intellectual productions who by conduct, custom or contract, restricts the use or circulation of his work has made no general publication. Thus an architect who discloses his unpublished plans drawings or designs to a prospective client, or services of clients, does not do so with the intention of abandoning his rights in his work. Such publication as he makes is certainly a limited one.

Does an architect intend to make a general publication when, in conformity with the dictates of a building ordinance, he files his plans in a governmental office? Obviously not. The purpose of the filing requirement is to protect the public from unsafe construction - not to divest the architect of his property. Conversely, if the filing is intended as a condition precedent to the states' action of granting a limited
monopoly to the creator, as where a patent right is concerned, the filing is tantamount to a general publication. This is wholly proper. Since the creator has obtained the exclusive right to exploit his work for a limited time, he is not harmed by having his production exposed to public examination. The filing of architectural plans for building permit purposes should be held, at most, to be a limited publication. The architect files solely with the intention of receiving government approval of his plans.

The requirement that plans must be filed and approved before a building permit is issued is a valid exercise of a municipality's police powers. It is submitted, however, that such an ordinance is patently unconstitutional where it is construed as working a general publication of an architect's plans. In effect, such an ordinance takes an architect's property without due process of law.

Let us examine the question whether the architect intends to make a general publication of his plans by building the structure they describe. The answer must be in the negative. It is only by repeated uses of the same set of plans (or modifications thereof) that the architect commences to profit from his intellectual production.

But business intentions aside - is it legally sound to suppose that a completed structure is a publication of its plans? It is submitted that it is not. For a work to be published it must be reproduced, that is, there must be an issuance of copies to the general public. A completed structure is no more a copy of its underlying plans than a phonograph record is a copy of its underlying musical notations. An architectural plan is a technical writing. It is capable of being copied only by similar
technical writings that is by other plans etc. A structure is the result of plans, not a copy of them.\(^3\) It follows that building a structure and opening it to public gaze can not be a publications of its plans.

After the Paris Act of 1971, the construction of a work of architecture is not a publication thereof in most countries.

For the above reasons, it can be concluded that neither the filing of plans in a government office, nor the erection of the structure described in such plans constitutes a general publication of the ideas.

An examination of Anglo-American legal history explains dual-ity of copyright i.e. common law as discussed above and statutory copyright to be discussed below. The first English Copyright Statute (8 Anne, c.19) as noted in chapter on historical development was passed in 1709. It was designed to aid authors of published works by giving them the right to have penal sanctions applied to infringers. The court of king's Bench interpreted this statute in 1769 in *Miller V. Taylor*. It held that the act was declaratory of the common law, that it was a penal statute which gave an additional remedy to an author in his fight against literary piracy, and that it was not intended to divest the author of his perpetual common law right in his property, whether published or unpublished.\(^4\)

In 1774 the Statute was again subjected to scrutiny. The case of *Donaldson V. Becket*\(^5\) come before the House of Lords upon an appeal from a decree by the Lord Chancellor which had made perpetual the injunction granted in *Miller V. Taylor*. It was the defendant's argument that, the Statute of Anne was not declaratory of the common law. But introductive of a new law, to give learned men a property they had not
before. By a court of six to five, the eleven judges hearing the argument of the case voted to reverse Millar V. Taylor. They held that the statute did take away an author’s common law right in his published work.\(^{41}\)

The law in the United States remained in accord with Donaldson V. Becket till 1976 revision of Copyright Act. The Statute of Anne, c. 19, not being a part of the common law, was never applicable to the United States. Nevertheless, the United States Supreme Court in Wheaton V. Peters\(^{42}\) cited the above decision as its authority for holding that the first federal copyright law, the Copyright Act of 1790,\(^{13}\) destroyed common law rights in published works. Thus, in both the United States and the United Kingdom, copyright in published works was earlier deemed to be a creature of Statute.

Since the passage of the Copyright Act of 1911, there has been no common law copyright in the United Kingdom, all intellectual productions, published or unpublished, being protected only by statutory fiat. In United States, the dual system continued till 1976 because the U.S. Copyright Act of 1909 itself provided that nothing in the Act should be construed to annul or limit the right of the another of an unpublished work, at common law, or in equity, to prevent the copying, publication, or use of such unpublished work without his consent.

But this dual system proved unwieldy, particularly in view of technological advances which diminished the importance of publication as the principal factor determining which body of law applied. By passing the 1970 Act, congress intended to abolish the dual system and to adopt a single system of federal statutory copyright from “creation”, that is, from the time a work is “fixed” in a copy or phonorecord. For
the first time, the Copyright Act of 1976 now provides that on and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright, whether created before or after that date and whether published or unpublished, are governed exclusively by the Federal Copyright Act, and that after such date no person is entitled to any right in any such work under the common law or statutes of any state. After the effective date of the Act, all legal and equitable rights equivalent to copyright are governed exclusively by the new Act.

(C) STATUARY COPYRIGHT PROTECTION TO ARCHITECTURAL WORKS

As noted above that it was at the Berlin Revision of Berne Convention in 1908 that copyright protection to architectural works was guaranteed and parties to the convention were held to be bound to grant protection.

The Committee appointed by the British Government, in the year 1909, to consider what alterations in the English law were necessary in order that England should come into line with the other countries who were parties to the Revised Berne Convention, only by a majority reported in favour of the inclusion of works of architecture amongst the subjects of copyright. Further opposition to the claims of architecture was met during the passage of the Copyright Bill. The architects, however, triumphed to this extent, that "architectural works of art", were included amongst the works to be protected under the Copyright Act of 1911, although the remedies for the infringement of the copyright
in those works were considerably less drastic than those inserted in the Bill as originally laid before Parliament.

The Act of 1911, therefore, not only preserved the right of the architect to copyright in his plans, which had existed under the old law, but created a new right by including "architectural work of art" amongst artistic works capable of enjoying copyright protection. It was unsuccessfully contended in the case of *Meikle V. Maufe* that there could not be a separate copyright in building, as distinct from a copyright in the plans on which the building is based, and in fact there seems no reason to doubt that the Act of 1911 created a new and distinct right.

Then came in the U.K. Copyright Act 1956 which governed the copyright law till recently. The 1956 legislation had confirmed the position of architects by including, in the definition of "artistic work", "work of architecture, being either buildings or models for buildings."

So far as plans and sketches are concerned it was little curious that under the Act of 1911, plans were protected as "literary works", and sketches as "artistic works". This resulted from the definition of "literary works" contained in that Act, which included amongst literary works, "maps, charts, plans, tables, and compilations". whereas an "artistic work" included "drawings". The Act of 1956, however, while continuing to include "drawings" in the definition of "artistic work" then proceeds to define "drawing" as including any diagram, map, chart or plan. Consequently, under the 1956 law, all of an architect's work is included in the definition of "artistic work, whether consisting of sketches, plans, elevations, diagrams or other two dimensional representations, or whether it consists of actual building or
models for buildings. Though the Acts of 1956 employed a simpler
definition and protects original works of architecture, being either
buildings or models for buildings, "building" being defined as includ­
ing any structure. It is thought, however, that the simpler definition has
not produced any substantial alteration in the law. While drawings and
plans are protected "irrespective of artistic quality", these words are
omitted in relation to works of architecture. Thus the position under the
Act of 1911 under which architectural works were required to have "an
artistic character or design" is in effect, maintained.

An architectural creation is, thus, capable of protection at three
stages; (a) as a two dimensional technical writing, that is, as a plan,
drawing or design; (b) as a two dimensional artistic representation of
the projected structure- or as a three dimensional model of the said
structure and (c) as a completed structure.

All the three stages are protected in most of the countries of the
world including United Kingdom and India. Unhappily for the Ameri­
can architect, such is not the case in the United States. Architectural
plans, drawings, and designs have been the subject of statutory protec­
tion in United States only since the passage of the Copyright Act of
1909. It is not yet clear, to what extent, if any, this statute protects the
contemplated structure itself. This uncertainty stems from the language
of the Act. In addition to the basic right "to print, reprint, publish, copy
and read the copyrighted work", the statute grants a collateral right
"to complete, execute and finish it (the copyrighted work) if it be model
or design for a work of art." However, there is no express provision in
the law, as there is in the U.K. Act, which affords copyright protection
to an architectural work such as a building or other structure. 56

The creator of a copyrighted model or design for a work of art has the exclusive right to execute and complete the contemplated structure or object. Architecture is one of the arts. The copyright office has long accepted models or designs of architectural works such as dwelling places, manseleums, and other structures for registration as models or designs for works of art. It would appear that an architect may obtain the exclusive right to build the structure he has designed if he registers a claim to copyright in his model or design - as opposed to merely copyright in his plans. Indeed, a leading writer on copyright has observed. 57:

.... no good reason seems to exist under this section [1(b)], why adequate protection may not be obtained by architects if they copyright their model or designs.

The right under section 1(b) is apparently limited to completing the contemplated work only. Thus, if an architect designed a civic monument and copyrighted his design or model, he had the exclusive right "to complete, execute and finish it". But having once constructed the monument, others could now freely copy it - provided they did not thereby copy those technical writings which the architect may have also copyrighted.

To the architect who designs "one of a kind" structures, such as bridges, sky-scapers, and luxuriously -built houses, the protection afforded by Section 1(b) is adequate. This would not be the case where the architect was engaged in designing private dwellings for small rental units. Here repetition, with limited variations, of the basic model or design is the means whereby the architect collects the bulk of his
fees. Section 1(b), under the above interpretation, would protect him only in the completion of the first structure. Therefore, such protection as was available would have to come from the copyrighting of his technical writings: his plans, drawings, and designs.

Section 1(a), which grants to the copyright proprietor the exclusive right "to print, reprint, publish, copy and vend the copyrighted work", extends its protection to architectural plans, drawings, and designs. No other section of the copyright law is applicable to these technical writings. The section is designed solely to prevent the protected work from being "copied"; that is, there may be no unauthorized printing, reprinting, publishing, copying or vending of the work. Any use of the intellectual production which does not constitute a copying is not an infringement of Section 1(a).

The creators of such intellectual production as books, periodicals and maps are adequately protected under Section 1(a). The moment, a book, periodical or map is published, it can be fully exploited, culturally as well as commercially. These works need merely be sold to be of value to their creators and to be read, to be of value to the user. Nothing more must be done. The prevention of copying gives the authors of these works all the protection they need.

However, there are many intellectual productions which are neither economically nor intellectually complete when rendered solely as published copies. Music is not fully exploited merely by the printing of notes on paper. It springs into life only when these notes are played. A lecture may be enjoyed when published as book, nevertheless, to be fully exploited, it is necessary that it be delivered before an audience.
Dramatic works (and these include motion picture) may be read and disseminated as plays and scripts. However, they are of limited value unless they are performed. A representation of a contemplated piece of sculpture will not impart the true nature of the work until the representation is executed. By the same token, an architect’s plans, drawings, and designs are of little practical value until their information is turned into a structure. Clearly, something additional must be done with certain works to make them more valuable to the creator and the public. Section 1(a) is concerned solely with the “copyright”. It is incapable of adequately protecting works which are primarily intended to be played, delivered, performed or executed. Architectural plans, drawings, and designs are no more an end in themselves than is a piece of sheet music. They are primarily intended to be executed, to be turned into structures. The publishing and vending of copies is purely incidental. Nevertheless, under the law as discussed above, in the United States, the architect doesn’t have the exclusive right to build the structure embodied in his technical writings. He is limited to such protection as is afforded to him by his “copyright” in these writings.

Under the Copyright Act of 1976, architectural and engineering drawings also fall within the subject matter of copyright since it is the custom of the profession that architects retain ownership of plans unless an express agreement to the contrary exists. Support for the holding that congress intended copyright protection to continue to extend to architectural drawings and plans is also found in the definitional Section of the Copyright Act of 1976 which includes “technical drawings, diagrams and models” in the definition of pictorial, graphic,
and sculptural works. In some cases the copyrightability of architectural plans has been assumed. Thus where a developer paid an architectural firm for architectural plans for an apartment project and then used such plans for the construction of another apartment complex on an adjoining place without further payment to the architectural firm, the developer and contractor employed by it were held jointly and severally liable for copyright infringement.

In United States the protection afforded, in economic terms, to the copyright owner of architectural plans, seems quite questionable in view of that the courts have stated that while copyright protects an architects' drawings, it does not grant him the exclusive right to use the idea or concept contained in the drawings and does not cloth their author with the exclusive right to construct the structure depicted in the drawings.

Under the prior law, the unauthorized construction of a building based upon copyrighted plans was held not to constitute copyright infringement of the plans, since, even if an architect's plans and drawings were protected by copyright, copyrightability did not necessarily extend to the structures themselves since the latter were considered "useful articles" and as such, had an intrinsic utilitarian function which is not copyrightable. Thus under the 1976 Act, purely nonfunctional or monumental structures are subject to copyright protection as are artistic sculptures or decorative ornamentations or embellishments added to a structure. Where the only elements of shape in an architectural design are conceptually inseparable from the utilisation aspects of the structure, copyright protection will not be available.

As far as the position of the architects under Indian copyright law
is concerned, it is found that the copyright protection to architects under the Indian Copyright Act 1957 is similar to one under the British Act of 1956. As India is also a signatory to the Paris Revision (1971) of Berne Convention, all the rights which are guaranteed by the convention are also available to foreign architects.

Under the Indian Act of 1957, "architectural work of art" means any building or structure having an artistic character or design, or any model for such building or structure. The definition of the British Act of 1956 is somewhat broader in the sense it does not require "artistic character or design".

The definition of "artistic work" given under the Act also includes "an architectural work of art". It thus provides -

"artistic work" means --

(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

(ii) an architectural work of art; and

(iii) any other work of artistic craftsmanship;

It is interesting to note that here the requirement of "artistic quality" has been abandoned and thus the restrictive definition of "architectural work of art" which emphasized "artistic character" is somewhat broadened.

The Act clearly lays down that the copyright under the Act subsists throughout India in original artistic works. Then in the case of architectural work of art, the work must be located in India. The copyright protection of an architectural work of art shall subsist only in
artistic character and design and is not available to processes or methods of construction.\textsuperscript{72}

**D) OWNERSHIP OF COPYRIGHT IN ARCHITECTURAL PLANS:**

The law as to the ownership of copyright in architectural designs is almost similar in both United Kingdom and India. There is no custom or any general binding usage to the effect that the plans belong to the architect and not to his employer.\textsuperscript{73}

While the position of the plans presents little difficulty, it may not be easy to decide the ownership of the very large number of miscellaneous documents and correspondence which normally come into existence during the course of the architect's administration of a building contract. It is suggested that the test is whether a document comes into existence or is obtained by the architect as a part of the discharge of his function as an agent of the employer for which he is paid.

So far as copyright is concerned, in the absence of express provision in the contract of employment, the copyright in all plans and drawings remains with the architect.\textsuperscript{74} Independently of this copyright, the architect has a copyright in the artistic character or design of the building itself (but not of any process or method of construction), so that, for example, if the employer commissions an extension internal layout of an existing building, there will be a breach of the copyright in the building owned by its original architect even if his plans are long lost and not used for extension or addition.\textsuperscript{75} This does not, however, mean that the original architect has any right to be employed on later work, or that his damages for breach of copyright have any connection with the project he would have earned had he been engaged on the later project.\textsuperscript{76}
As noticed above that copyright law doesn't alter the rule as to the *prima facie* ownership of an architect's plans, namely, that these generally become the property of the client. But that does not mean that copyright passes to the client. This would only be so if the architect assigned the copyright in writing, or he were under a contract of service with his client. However, an architect, by an agreement in writing made before the plan or building is created, can confer on the client the future copyright in the work so that, when the work comes into existence, the client will be the owner of the copyright therein.

But unless the client has acquired the copyright in the plans, he may not copy them, nor may he reproduce the building in which copyright subsists as a work of architecture. It was held, under the Act of 1911, that a client for whom an architect had designed an existing building could not reproduce the plans or the building, even for the purposes of making extensions to that building. This appears still to be the law, though it is provided in the Act of 1956 that where copyright subsists in a building as a work of architecture, the copyright is not infringed by any reconstruction of that building. Then, no copyright is violated where the architect has parted with the copyright if he reproduces part of his work in a subsequent work by use of sketches, plans, models or studies made for the purposes of earlier work provided he does not repeat the main design of the earlier work.

**E) PARTIAL SERVICES BY ARCHITECT:**

Two cases came before the courts in England dealing with the position where the architect had prepared plans but his engagement had
been terminated before completion of his service and the then applicable R.I.B.A. condition of engagement made no express provision for the position as to copyright. In the first, the architect was engaged to prepare plans suitable for obtaining full planning approval. He did this and charged the full scale fee applicable for work at that stage. Subsequently the owner sold the land and handed over the plans which were used by the builder. It was held that there was no breach of copyright because the architect had granted an implied licence to the owner. In the second case, the architect again agreed to carry out certain design work with a view to obtaining planning approval. Both parties were familiar with the then R.I.B.A. scale of fees. They agreed upon a fee to 100 guines which was nominal in comparison with the full stage payment. It was held that while it was necessarily implied that the architect licensed the owners to make use of the drawings for the purpose of obtaining planning permission, there was no implication, in the circumstances, of a licence to use the drawings for erecting a building. While the particular implication must depend upon the express terms and the surrounding circumstances in each case, it seems, from the cases just referred to, that the implied licence, if any, will only take effect from the time of payment (or, probably, tender of payment) by the client.

There is, therefore, no necessary implication that whenever an architect is engaged to prepare plans for the purpose of obtaining planning permission, his client has a licence to use such plans, not only for that purpose, but also inter alia, for the purpose of erecting the building, should planning permission be granted. The decision referred
above, however, leave unresolved the further questions whether the implied licence extends to modifying the architect's plans and building in accordance with the plans so modified, and whether the implied licence is dependent on the architect having been paid his agreed fee. All that can be said is that the extent of the implied licence in each case will depend on its own facts, one important factor being the amount of the architect's remuneration.

(F) INFRINGEMENT OF COPYRIGHT:

Copyright is infringed by the production of something which, to the eye, is a copy of the original, and the use of processes or methods of construction would, it is thought, constitute an infringement. No great significance seems to have been attached, in decisions under the U.K. Act of 1911, to the requirement of "artistic character or design", and it is doubted whether this meant more than that there must be something beyond the use of common stock features which would not be sufficient to constitute a copyright. It was held that the requirement of originality did not imply more than that the work was the personal effort of the architect. Not only this, it has also been held that there was copyright in the design of certain semi-detached villas on the ground that they exhibited something apart from the common stock of ideas and which struck the eye as uncommon.

Architects are concerned with infringements of their rights in three different forms. These are, copying of plans in the form of other plans, the copying of plans in the form in the buildings and the copying of a building by another building.
The definition clause of the Indian Copyright Act does not define infringement as such; but the definition of an infringing copy\(^9\) provides some standards and criteria for the determination that an infringement has occurred. As regards an artistic work an infringing copy is that copy which is a "reproduction thereof otherwise than in the form of cinematograph film". The familiar question with regard to unauthorized reproduction of copyrighted work raises the standard issues regarding meaning of originality, copying and extent of reproduction. On the issue of reproduction it is said that, "In India, the expression 'infringing copy', without doubt means copies which reproduce the whole of the infringed work".\(^9\) The reasons for this view are that the term 'infringing copy' has been for the first time defined in India by the 1957 Act. The 1914 Indian Act, which followed the British Act of 1911, did not define the term. But a position had emerged, both in U.K. and India that a copy was an infringing copy if it reproduced a substantial part of the original work.\(^9\) Whereas the U.K. Act of 1957 made this position clear,\(^9\) the Indian Act of 1957 choose not to define the extent of reproduction as an aspect of the 'infringing copy'. Even the 1994 Amendment did not touch this aspect. Thus under the present Indian law unless the whole of an architect's work has been reproduced, no infringement of copyright occurs. It is suggested that the Indian law should be amended on the lines of the British Act so that the requirement of reproduction of the whole work is substituted by "substantial reproduction". As seen above the requirement of whole reproduction makes it almost impossible for an architect to claim copyright protection because the infringers can simply escape by making minor modifi-
cations or alterations in the architect's work.

It can, therefore, be said by way of conclusion that copyright protection to architectural designs has been a controversial issue. The protection offered to architects under the U.S. law prior to 1976 was highly insufficient as compared to the protection enjoyed by their counterparts in United Kingdom and India. The 1994 Indian Amendment has in fact further broadened the protection to the architects by replacing the term 'architectural work of art' by 'work of architecture' which is a much wider expression. But then unless an awareness of their copyright is created amongst the Indian architects, the protection afforded to them shall remain only on the Statute book and their plight by virtue of large scale infringements shall continue.
1. Term “architect” should be recognised as referring to “designers” as well.

2. The courts (both in U.K. and U.S.) have given a liberal interpretation to the term “writings as contained in the constitutional provision authorising copyright protection. The leading decision on the point is Burrow - Giles Lithographic Co. v. Sarowy, III U.S. 53 (1884).


4. In the meantime, Germany legislated for the protection of architectural works in Article 2 of the law of January 9, 1907.

5. Designs, in the latter sense, may be protectable under either the copyright or patent laws, or under both. Copyright protection is not dependent upon the intended use of the object upon which the copyrighted design is placed. Rosenthal v. Stein, 98 U.S. P.Q. 180, 205.

6. DRONE, S. EATON, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (1879), 101, 102.


9. "Originality is alone the test of validity (of a copyright)". Hand, J., in Fisher V. Dillingham, 298 Fed 145, 149-152 (S.D.N.Y. 1924); DRONE, supra note 6, at pp. 198-199. Also see YANKWICH, ORIGINALITY IN THE OF INTELLECTUAL PROPERTY, II F.R.D. 457 (1951).

10. DRONE, S. EATON, Supra note 6, at p.208.

11. "No one doubts that two directories, independently made, are each entitled to copyright, regardless of their similarity, even
though it amount to identity. Each being the result of original work, the second will be protected, quite regardless of its lack of novelty”, Hand J., in Fisher V. Dillingham, 298 Fed 145, 150.

12. DRONE, S. EATON, supra note 6, at pp. 199-200.

13. “Unlike the subject matter of a patent, copyrighted material need not be new, but only original”. Clark, C.J., in Baker V. General Electric Co., 162 F. 2 d 141 (2nd Cir, 1947); Chamberlin V. Urin Sales Corp., 150 F. 2d 512 (2nd Cir 1945); Fisher V. Dillingham, 298 Fed 145 (S.D.N.Y. 1924).

14. Nimmer. B. Melville in his article ‘The Law of Ideas’, 27 Calif L. Rev. 119 (1954), points out the confusion engendered by many courts by their misuse of the terms originality and novelty. Confusion must result as to the true nature of copyright where the courts interpret the element of novelty as an aid to establishing the originality of a work in those cases where both the plaintiff’s and defendant’s properties use similar stock incidents and characters. It is submitted that when courts speak of the requirement of “a new conception or novel arrangement” they mean only that an author’s work must be sufficiently different in expression or development as to indicate that it is original and not copied from the protected work of another or from public domain material to which the plaintiff had access. See Simonton V. Gordon, 297 Fed 625 (S.D.N.Y. 1924).

15. However, an unpublished “naked idea” which has been revealed through a breach of trust or confidence is protectable under common law principles. Here the protection is not the affirmative kind. It is negative in nature, the wrongdoer is prevented from profiting from his tortious acts. See COPINGER AND SKONE ON THE LAW OF COPYRIGHT 38, 39, 8th ed (1948).

16. “The best rule both of reason and justice seems to, to assign to everything, capable of ownership a legal and determinate owner”. MAUGHAM, A TREATISE ON THE LAWS OF LITERARY
PROPERTY 4(1928); Also see, the survey of Anglo-American decisions in Pannone, "Property Rights is an Idea and the requirement of concreteness", 33 Boston U.L. Rev. 396 (1953).

17. Millar V. Taylor, 98 Eng Rep. 201 (K.B. 1769). But a work is protectable if it does have a capacity to be distinguished, at, 2340.


22. Gendell V. Orr, 13 Phil. 191 (1879). It is difficult to agree with the reasoning of this case or of Kurfiss V. Cowherd, ibid., persuasive on the point that erection of a building is a publication of its technical writings.

23. If the filing of plans, drawing, and designs in governmental offices, or the erection of the structure they describe is held to throw these technical writings into the public domain, the architect is literally forced to direct himself of his exclusive property, contrary to his own desires. He cannot build unless he files; the moment he files he loses his common law rights. His writing then being free for the taking, he can rarely sell more than one copy of these writings, nor receive more than one royalty for their use. Katz, S., Arthur, supra note 19.


26. Townsend, J., in Werckmeister V. American V. American Litho­
graphic Co., supra note 24. See also judge Yankwich's scholarly

treatment of the point in white V. Kimmell, 94 f. Supp. 502 (S.D.
Calif., 1950).
28. Ferris V. Frohman, 223 U.S. 424 (1912) established this point in
American law. The same rule obtains by statute in Britain,
Copyright Act, 1911, 1 & 2 GEO, 5, c. 46.
29. WEIL, AMERICAN COPYRIGHT LAW (1917) 149-150; Also
See DRONE, S. EATON, supra note 6, 285-292.
30. "... a work is published when it is communicated to the general
public ... the general unrestricted circulation of printed copies is
such a publication, and the principle would seem to be the same
when manuscript copies are circulated. But it is clear that a
private circulation for a restricted purpose is not a (general)
publication ... not with standing that the copies so distributed are
printed." DRONE, S. EATON, supra note 6, 115-121, 290.
31. Day, J., in American Tobacco Co. V. Werckmeister, 207 U.S. 284,
299-300 (1907).
32. "the law recognises a vital distinction between the public and
private circulation of copies. The owner may circulate copies of
a work among a limited number of persons; with the understand­
ing and on a condition that it is not to be made public. In such
case no publication takes place, notwithstanding that the copies
so distributed are printed." DRONE. S. EATON, supra note
6. 290.
33. Korzybski V. Underwood, 36 F. 2d 727, 729 (2d Cir. 1929).
34. BROWN, "Due Process of Law, Police Power and the Supreme
Court", 40 Haw. L. Rev. 943 (1927).
35. The United States Copyright Law, 17 U.S.C. (Supp. 1952), does
not define the term "publication". The concept that publication
requires an issuance of copies of the work to the public is found
in the United Kingdom's Copyright Act, 1911 and repeated in Copyright Act of 1956. "Publication", for the purposes of the 1956 Act, means "issue of reproduction of the work to the public".

A publication presupposes the preservation, in tangible form, of the work concerned so that it is capable of being made available to others. It is for this reason that the performance of a play is not a publication of the play. This viewpoint is further reinforced by Article VI of the Universal Copyright Convention, 1952:

"Publication, as used in this Convention, means 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.

The U.S. is a signatory to Universal Convention and has also ratified it.

Article 3(3) of the Paris Revision of Berne Convention, 1971 now clearly lays down:

The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies provided the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

36. The copyright definition of the term "copy" bears this point: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by original". Bailey, J. in West V. Francis, 5 B & Ald. 743 (1822). 38. Supra note 17.
37. A two or three dimensional model or design for a work of art may be copied by a completed structure based on model on design. One seeing the completed structure will be seeing a longer representation of the under laying model or design. James Bron Co. V. Under Koffler, 16 F-Supp. 729 (M. D. PA. 1938). But this is not the case when the information embodied in a plan is turned into a structure.

38. Supra note 17.

39. For a detailed examination of the decision, see, DRONE ON COPYRIGHT, Supra note 6; Also see Katz, S. ARTHUR, "The doctrine at Moral Right and American Copyright Law - A Proposal", 24 CALIF L. REV. 375 (1951), FOURTH COPYRIGHT LAW SYMPOSIUM 78 (ASCAP 1952).


41. Supra note 39.

42. 8 Pet. 591 (U.S. 1834).

43. Prior to the passage of this Act by the Second Session of the First Congress on May 31, 1790, 1 STAT 124, twelve of the original thirteen states (Delaware being the exception) had passed copyright laws. With the adoption of the federal Constitution these states statutes were, of course, superseded by federal legislation. For the text of these statutes see COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA 1-24 (Copyright Office 1952).

44. Klekas V. EMI Films, Inc (2d Dist) 150 Cal App 3d 1102, 198 Cal Rptr 296.

45. U.S. Copyright Act 1976, Section 301.

46. Editorial Photocolor Archives, Inc. V. Granger Collection, 61 NY 2d 517.

47. (1941) 3 ALL.E.R. 144.

48. COPINGER AND SKONE ON COPYRIGHT, Supra note 15, at p.244.
49. U.K. Copyright Act 1956, Section 3(1) (b).
50. U.K. Copyright Act 1911, Section 35 (1).
51. U.K. Copyright 1956, Section 3 (1) (a).
52. Ibid., Section 48 (1).
54. U.S. Copyright Act 1909, Section 1(a).
55. U.S. Copyright Act 1909, Section 1(b).
56. U.K. Copyright Act 1956, Section 3 (1) (b); Also see Meikle V. Maufe, 85 S.J. 378 (1941).
57. WEIL, AMERICAN COPYRIGHT LAW 83, 84 (1971).
58. Katz, S. ARTHUR, supra note 19. at p.239.
59. Schuchart & Associates, Professional Engineers, Inc. V. Solo serve Corp (WD Tex) 540 F supp 928, holding that such drawings are within the subject matter of copyright for purposes of section 301 of the Act, dealing with premption.
60. Meltzer V. Zoller (DC NT) 520 F Supp 874.
62. Schuchart & Associates V. Solo Serve Corp, Supra note 59.
64. Supra note 59.
65. Imperial Homes Corp. V. Lamont, 173 USPQ 519; Scholz Homes. Inc. V. Maddox, 154 USPQ 197
67. Ibid.
68. Indian Copyright Act 1957, Section 2 (b).
69. Indian Copyright Act 1957, Section 2 (c)
70. Indian Copyright Act 1957, Section 13 (1) (a).
71. Indian Copyright Act 1957, Section 13 (2) (iii).
72. Indian Copyright Act 1957, Section 13 (5).
74. HUDSON'S BUILDING AND ENGINEERING CONTRACTS, (10th ed.), by I.N. DUNCAN. P. 140.
75. Meikle V. Maufe, Supra note 56
76. Ibid.
77. U.K. Copyright Act 1956, Section 36; U.K. Copyright, Designs & Patents Act 1988, section 90; Indian Copyright Act 1957, Section 18 (1).
78. U.K. Copyright, Designs & Patents Act 1988, Section 11 (2); Indian Copyright Act 1957, Section 17 (c); U.S. Copyright Act 1976, Section 101.
79. Meikle V. Maufe, Supra note 56.
80. U.K. Copyright Act 1956, Section 9 (10); Also seen, The Copyright Committee 1977 (Cmnd. 6732); para 695 recommended the retention of section 9 (a) and (10).
81. U.K. Copyright Act 1956, Section 9 (9)
85. Supra note 83.
86. COPINGER, Supra note 15, P. 262
88. See Czezowski V. George W. Wass & King (1959) 173 Estates
Gazetter 735; Ancher Mortlock Murray and Wodey Pty. Ltd. V. Hooker Homes Pty. Ltd. (1971) 2 N.S. W.L.R. 278.


94. Indian Copyright Act 1957, Section 2 (m).


97. U.K. Copyright Act 1956, Section 49 (1).