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Del S. Ashworth and Joe H. Ashworth, D/B/A
Ashworth Architects, A Partnership v. Gene Glover,
D/B/A Genie Boys : Appellant's Brief

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**In the Supreme Court of the
State of Utah**

**DEL S. ASHWORTH and
JOE H. ASHWORTH, d.b.a.
ASHWORTH ARCHITECTS,
a partnership,**
Plaintiffs and Appellants,

vs.

**GENE GLOVER, d.b.a.
GENIE BOYS,**
Defendant and Respondent.

**CASE
NO. 10679**

APPELLANTS' BRIEF

Appeal from Judgment of the Fourth Judicial District Court,
Utah County, State of Utah
The Honorable Joseph E. Nelson, Judge

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FILE

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Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENTS	
INTRODUCTION	4
POINT I	
THE DECISION OF THE COURT IS CON- TRARY TO LAW AND THE CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE WEIGHT OF THE EVIDENCE	6
POINT II	
THE COURT'S FINDINGS OF FACT ARE ER- RONEOUS AND IN DIRECT CONTRADICTION TO THE EVIDENCE PRESENTED	25
CONCLUSION	37
CASES CITED	
DeSilva Construction Corp. vs. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962).....	17
Edgar H. Wood Associates, Inc. vs. Skeen, et al, Advance Sheets of the Supreme Judicial Court of Massachusetts (1964).....	7, 19
Gendell vs. Orr, 13 Phila. 191 (Pa. Common Pleas, 1879)	17
Kurfiss vs. Cowherd, 233 Mo. App. 397 (1938).....	17
Press Publishing Co. vs. Monroe, 73 Fed. 196.....	25

TABLE OF CONTENTS (continued)

	Page
Smith vs. Paul, 174 Cal. App. 2d 546, 77 ALR 1036 (1959)	7, 19
Star Publishing Co. vs. Donahoe, 58 A 513.....	25
State vs. State Journal Co., 75 Neb. 275, 106 N.W. 434	18-19
Tumey vs. Little, 18 Misc. 2d (N.Y.) 462 (1959).....	17
Wright vs. Eisle, 86 App. Div. (N.Y.) 356 (1903).....	17

OTHER AUTHORITIES CITED

15 Am. Jur. 536, § 127.....	17
34 Am. Jur. 681-683, § 2.....	20-21
34 Am. Jur. 685, § 6.....	22
18 Am. Jur. 2d 216, § 92.....	25
18 Am. Jur. 2d 422, §§ 135, 136.....	18
18 Am. Jur. 2d 423, § 136.....	17, 18
22 Am. Jur. 2d 215, § 149.....	18

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NO. 10679**

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for compensatory damages for unlawful conversion and unauthorized use of architectural drawings and ideas belonging to the Appellants and for punitive damages for theft and wilful misconduct for unlawful conversion and use of these valuable property rights.

DISPOSITION IN LOWER COURT

The court granted judgment for the Defendant and then denied the Appellants' (Plaintiff below) motion for new trial.

RELIEF SOUGHT ON APPEAL

The Appellants seek an order to amend the Findings of Fact, Conclusions of Law and Decree to conform to the facts proven and an order to enter judgment for the Plaintiff; or, in the alternative, Appellants seek a reversal of the judgment below and an order remanding the case to the lower court for a new trial.

STATEMENT OF FACTS

In 1960 Appellants, an architectural firm, designed a building to be used as a drive-in restaurant for Allen's Products, Inc., operator of a chain of drive-in restaurants called Hi-Spots or Hi-Spot Drive-Ins. The plans for this building were entirely unique and creative, involving new combinations of structural materials, color, dimensions and other architectural features in such a way that it was to be easily distinguishable from any other building. In preparing the plans, the Appellants also made extensive studies to achieve a design which would be economical and at the same time fit the particular aesthetic and commercial needs of a drive-in chain. Illustrative of the many distinctive features of the design was the large double-diamond roof, purposely designed in this unique fashion so it would become a symbol of the Hi-Spot Drive-Ins to the public.

Upon completion, the Appellants permitted a small number of copies to be used by Allen's Products and its

building contractor and subcontractors in constructing the Hi-Spot Drive-In in American Fork, Utah, since this is customary practice among architects and was necessary to the construction of the building. To assure that the plans would be returned and that their use would be limited to this particular building each contractor desiring to bid on the project was required to post a \$25.00 deposit with the Appellant to be given back when the plans were returned.

The testimony of the parties to the original contract is that it was on the A.I.A. form which contains a clause providing that ownership of the plans is to remain in the designer. Allen's Products recognized this when, in 1961, they asked Appellants to design another building in Springville, Utah, similar, but with certain modifications, to the Hi-Spot in American Fork. The Appellants followed the customary architectural practice, in dealing with established clients, of reducing the fee inasmuch as the original design could be revised for the same client.

In 1962, Respondent was considering beginning a drive-in restaurant business. Learning from Owen G. Richardson, an employee of Allen's Products and a long-time friend of the Respondent, that a copy of the Hi-Spot plans could be obtained, he got the plans from Richardson, who was then manager of the American Fork store, copied them in detail, and later returned them. All of this was done without asking for or receiving authority from the architects, even though Respondent was an experienced building contractor who was acquainted with the customs of the construction industry.

Not long after the plans were copied, Respondent finished a drive-in restaurant at approximately 7200 South

State, Salt Lake County, Utah, which is almost identical to the Hi-Spot Restaurants, both as to appearance and as to structural design and measurements. Respondent admits that he used the copied plans to draft the plans from which he constructed his building and that a great many of even the small details were copied and incorporated into the building. He also admits that the only architect he used did not design the buiding (TR 29-30).

Sometime after Richardson helped the Respondent get possession of the plans, he went to work for the Respondent as Manager of the new drive-in on 7200 South State, with the expectation that the employment would develop into a business relationship with Respondent (TR 19, 11, 13).

ARGUMENT

INTRODUCTION

The unauthorized use of architectural plans is not a subject which has been frequently litigated in this country; indeed, this is a case of first impression in Utah. The basic conduct, nevertheless, has the ring of the familiar to it. Is this not merly a repetition of the classic lawsuit in which something of value has been taken from its lawful owner without his consent, then used to the personal advantage of the taker without just compensation of the owner?

In this case, the owner happens to be the creator of the valuable object. He makes his living principally by preparing original ideas for use by his clients in the form of plans and specifications. The ideas, in their tangible form, are valuable not only because they are original, but because they have been put into a useful, technical form

without which it would be impossible to reproduce the building.

The simple facts are that the Respondent needed a proven design for his business, liked the Appellants' plans, took them and copied them. He never wanted, sought, nor obtained permission. The fact that Respondent got "permission" from his friend Richardson cannot relieve him of responsibility. Since the plans belonged to Ashworth Architects and carried their name, it was not Richardson's right to allow Respondent to take the plans, particularly since he knew why the plans were being taken (TR 15).

Not only was Richardson utterly without authority to give away Appellants' plans; even if he had possessed this authority, his actions were suspect in view of the fact that Richardson expected to go into business with Respondent at the time he delivered the plans (TR 19) and there is considerable evidence of a fraudulent conspiracy to pirate the plans (TR 11, 12, 13). This is not a case of an innocent oversight by a novice to the building world; this was a wilful, brazen conspiracy by an experienced professional contractor and his "inside man" to purloin a proven commercial design, the creative work product of another, without the usual necessity of giving just compensation to its creator.

There is nothing inequitable about expecting Respondent to pay for what he uses. In the classic case the solution is simple: the wrongdoer is required to fully compensate the owner and maker of the valued object for its use. This is what Appellants ask for today; and this is what justice and equity demand.

STATEMENT OF POINTS

POINT I

THE DECISION OF THE COURT IS CONTRARY TO LAW AND THE CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE WEIGHT OF THE EVIDENCE.

POINT II

THE COURT'S FINDINGS OF FACT ARE ERRONEOUS AND IN DIRECT CONTRADICTION TO THE EVIDENCE PRESENTED.

ARGUMENT

POINT I

THE DECISION OF THE COURT IS CONTRARY TO LAW AND THE CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Contrary to the decision of the lower court, the Appellants respectfully contend that they are the owners of the plans, specifications, ideas, design and artistic concepts from which the Respondent, Glover, constructed his building and on the date the Respondent obtained and copied the plans prepared by the Appellants, the Appellants had a copyright to the plans. There is no competent evidence to the contrary, and, in addition to the testimony of Dell S. Ashworth, there is other substantial and believable evidence to this effect (Exhibits 1, 2 and 3).

The only real issues of law before the Court today are as follows:

Do the Appellants have a common law copyright in

the ideas, concepts and artistic originations which it sells by reason of its architectural license?

2. Have the Appellants lost their common law copyright by publication?

3. What, if any, are the damages of the Appellants?

Addressing ourselves to the first two propositions, it is respectfully contended that these matters are settled by the cases of **Smith vs. Paul**, 174 Cal. App. 2d 744, 345 P2d 546, 77 ALR 1036, and **Edgar H. Wood Associates, Inc. vs. Skeen, et al**, Advance Sheets of the Supreme Judicial Court of Massachusetts (1964). These cases are the latest pronouncements on the subject in the United States. Both cases analyze in detail the previous cases, and the substance of both cases is to the effect that the architect retains a common law copyright and that filing its plans with the City Engineer or the zoning board or any other public agency does not constitute a publication of its copyright so as to lose it. Both cases further stand for the proposition that constructing a building does not constitute a publication nor a license to any third party to appropriate the said plans and specifications. It should be noted in passing that both the Smith case and the Wood case are cases of first impression. The Appellants set forth the salient portions of the Wood case, including its analysis of the previous cases, as follows:

“One Thomas Moylan retained Wood to draft plans for the erection of two sections of buildings, each section to contain 110 apartments, in Woburn. After acceptance of the plans by Moylan they were filed with the building department of Woburn and approved. Filing was required in order to obtain a building permit. Moylan then commenced erection of one of the two

sections. He and Wood had entered into an agreement under the terms of which Wood retained "all . . . (its) property rights, title and interest to the said plans for all times." Moylan employed the defendant Portugal to supervise construction of the building in accordance with the plans. About the same time the defendant Skene desired to erect on land owned by him in Norwood apartment houses similar to those of Moylan. As the result of a conspiracy between Skene and Portugal, Portugal left Moylan's employ, entered that of Skene, and took with him to Skene plans of the Woburn buildings. Other defendants, the Wallaces, organized a real estate trust under the name of Windsor Gardens Co. of Norwood, Massachusetts. The trust bought Skene's Norwood land. Skene transmitted the plans to the Wallaces who in turn gave them to the defendants, Alonzo B. Reed, Inc. and its employee Vincent Sullivan, to be copied. Reed's name and that of Sullivan were affixed to the copied plans. These plans were presented to the building commissioner of Norwood and to others. In sum, Wood's plans were copied and are being or were used to construct in Norwood buildings identical in design and specifications to the Woburn buildings being erected.¹

Wood did not resort to statutory copyright, and we are concerned solely with an examination of its rights under the common law. Common law copyright exists in this Commonwealth. "That the right of property which an author has in his work continues until by

¹ Neither the substitute bill nor the original bill states how close the first section of the Woburn project was to completion at the time the plans were copied by some of the defendants. We shall assume a total completion.

publication a right to their use has been conferred upon or dedicated to the public, has never been disputed." *Tompkins v. Halleck*, 133 Mass. 32, 35. See *F. W. Dodge Co. v Construction Information Co.* 183 Mass. 62, 63-65; *Baker v. Libbie*, 210 Mass. 599, 604." * * * *

"The princial issue in dispute is whether Wood lost whatever common law rights it had in its plans (1) when they were filed with the Woburn building department, or (2) when Moylan constructed a building from them. We deal with a matter of first impression in this Commonwealth. Only six cases are in point from other jurisdictions, none by a court of last resort. They are in conflict and so is such literature as exists on the subject.

The Reported Cases.

The first of the reported cases is *Gendell v. Orr*, 13 Phila. 191 (Pa. Common Pleas), decided in 1879. An architect and builder erected a porch "of a new and novel design and artistic beauty" (p. 191) along the front of his house, which stood bordering a highway. Later he sought to enjoin the construction of copies of his porch. The court held that the completion of such a design and its exposure to public gaze for three years constituted a general publication of the work.

There followed in 1903, *Wright v. Eisle*, 86 App. Div. N. Y.) 356. An architect had prepared plans for a private residence which were "duly filed with the building department of the city of Mount Vernon" (p. 357). After the residence was built, the defendant sought to procure a duplicate set of plans from the architect. He declined to meet the architect's price and thereafter retained a third party whose plans led to the erection of a building "conforming substantially" p. 357) to the first residence. The architect sought

recovery for the value of the second set of plans. The New York court held that when the architect had filed the plans in a public office, he had "published his work to the world" (p. 358) and lost his exclusive right to them.

In *Kurfiss v. Cowherd*, 233 Mo.App. 397 (1938), an architect drew plans to modernize an old house. As modernized the house was opened to public inspection. The pleadings indicate that the defendants made copies of the plans and used them in the construction of other houses. The original plans were not filed in a public office. It was held that "this unrestricted exhibition" (p. 408) of the modernized house was a publication of the plans.

In 1959, on the authority of *Wright v. Eisle*, *supra*, the Supreme Court of New York held that the filing of plans with a building department in connection with the erection of one house precluded the architect from recovery of compensation from one defendant who erected additional houses from the same plans which came to him from his codefendant for whom the first house had been built. *Tumey v. Little*, 18 Misc. 2d (N.Y.) 462.

The earlier cases were reviewed in an extended dictum in *DeSilva Constr. Corp. v. Herrald*, 213 F. Supp. 184 (M.D. Fla. 1962). The Court was of opinion that the filing of plans with a building department in order to obtain a construction permit was a publication that terminated the common law copyright (pp. 194-195). But the court stated that a completion and exhibition of the building did not constitute such a publication of the plans (pp. 195-196).

The final case, *Smith v. Paul*, 174 Cal. App.2d 744

(1959), differs from those already discussed.⁴ Smith was not a licensed architect but was "in the business of designing homes" (p. 746). He brought an action against the owner of a house and the contractor who built it on the ground that the plans employed in its construction had been drawn by him for a third person. The plans had been originally filed in a county office as required by law in order to obtain a building permit, and a house had been constructed from them. Smith had preserved his ownership in the plans in his contract with his client. Paul had copied them. The court held that there had been only a limited publication of the plans and hence that the designer had not lost his common law copyright in them. It pointed out that "(t)he purpose of the requirement of filing the plans in a government office is to protect the public from unsafe construction—not to take away from the architect his common-law property rights The architect derives no profit from the deposit of his plans with the building department. He does not thereby sell his work and has no intention of dedicating it to the public" (p.750). The court emphasized that a filing was necessary in order to build. The court also held that a mere viewing of the house by guests of the owner, limited in number, constituted no general publication of the plans. The reasoning was that while exhibition of the exterior to the public might cause a loss of the common law copyright to the exterior design, "it . . . (was) not a general publication of the detailed plans themselves" (p. 758).

⁴ The common law copyright which exists by virtue of the case law in this Commonwealth has been codified in California. Cal. Civil Code, Sec. 980-985.

General and Limited Publication.

The concepts of general and limited publication alluded to in *Smith v. Paul*, *supra*, were defined in the leading case of *Werckmeister v. American Lithographic Co.* 134 Fed. 321, 326 (2d Cir.). Only a general publication terminates a common law copyright. It is "such a disclosure, 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" (p. 326). A limited publication is "one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public" (p. 324). Further, to be general a publication must be such " ' . . . as to justify the belief that it took place with the intention of rendering . . . (the) work common property.' " *American Tobacco Co. v. Werckmister*, 207 U. S. 284, 299-300. *Continental Cas. Co. v. Beardsley*, 253 F.2d 702, 707 (2d Cir.) cert.den. 358 U. S. 816. See *White v. Kimmell*, 193 F.2d 744, 747 (9th Cir.). As more recently stated, "a . . . publication which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication,' which does not result in loss of the author's common-law right to his manuscript, but . . . the circulation must be restricted both as to persons and purpose, or it cannot be called a private or limited publication." *White v. Kimmell*, *supra*, 746-747. *American Visuals Corp. v. Holland*, 239 F.2d 740, 744 (2d Cir.). *Continental Cas. Co. v. Beardsley*, *supra*, 706-707. While the test is properly one of intention, it is clear that the unexpressed, subjective intention of the creator can-

not be allowed to govern (see *National Comic Publications, Inc. v. Fawcett Publications, Inc.* 191 F.2d 594, 598 (2d Cir.)); rather the implications of his outward actions to the reasonable outsider are controlling.

The Federal cases thus recognize fully that there may be a fairly substantial but limited distribution of material susceptible of statutory copyright without putting the material in the public domain and without forfeiture of the author's common law copyright in it. It remains to determine whether a general publication has occurred here."

* * * In the light of what has been said, we hold that the filing requirement and G. L. c 66, 10, give the public the right to inspect and, if necessary, to copy the filed plans for purposes reasonably related to the objectives behind the filing requirement, for example, to determine whether a building constructed in accordance with plans will comply with zoning and safety laws. That right does not extend to making copies which will impair the architect's common law copyright and property in the plans. It is not the purpose of the filing requirement to facilitate and permit architectural plagiarism, or enable one to obtain free of charge the benefit of another's work and thus "to reap where it has not sown." *International News Serv. v. Associated Press*, 248 U. S. 215, 239.

We conclude that the public filing of plans in the circumstances alleged is only a limited publication of them. No objective intention to make a general publication appears.

Construction of a Building

We next consider whether the completion and exposure of the building which is the product of the plans constitutes such a general publication as will justify a copy-

ing of the plans. *Gendell v. Orr*, 13 Phila. 191 (Pa. Common Pleas), *Wright v. Eisle*, 86 App. Div. (N. Y.) 356 (dictum), and *Kurfiss v. Cowherd*, 233 Mo. App. 397, suggest that it does. In *Kurfiss v. Cowherd*, *supra*, a house was modernized in accordance with plans and thereafter opened to general public inspection. The court reasoned although "it was not intended that the public could or would take measurements . . . (of the house) . . . the facts remain that there were no restrictions to keep any one from so doing" (233 Mo. App. at 408), and that there had been a general publication of both the house and the plans. We regard the correct rule as having been suggested by *Tabor v. Hoffman*, 118 N. Y. 30. In that case a repairman made copies of the construction patterns used in the manufacture of a pump. The issue was "whether there is a secret in the patterns that yet remains a secret, although the pump has been given to the world" (p. 35). The court held that "the patterns were a secret device that were not disclosed by the publication of the pump . . . While the defendant could lawfully copy the pump, because it had been published to the world, he could not lawfully copy the patterns because they had not been published, but were still, in every sense, the property of the plaintiff, who owned not only the material substance, but also the discovery which they embodied" (p. 37). See *Tompkins v. Halleck*, 133 Mass. 32,36. The rule of *Tabor v. Hoffman*, *supra*, can be, in our opinion, soundly extended to the facts in this case. It has been so extended in *Smith v. Paul*, 174 Cal. App. 2d 744, 750: "(T)he fact that a building is built from the plans and is open to the gaze of the public . . . may be a publication of the general design or idea of the building but not a publication of the exact plans whereby another may without effort other than that of tracing the work of the

architect completely duplicate the latter's effort."¹¹ It is contended that *Smith v. Paul*, *supra*, cannot serve as a guide in resolving this case because access there to a private home afforded to a limited number of people was quite different from access to the Woburn apartments afforded to the general public. The argument is inapposite: "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. It follows that building a structure and opening it to public gaze cannot be a publication of its plans." Katz, *supra*, at 236. See *White-Smith Music Publishing Co. v. Apollo Co.* 209 U. S. 1, 17-18; Nimmer on Copyright, 57.3.

Observation or measurement of the exterior and the interior of a completed building can hardly be said to approach an accurate copy of a set of plans. We do not suggest that a common law copyright in the plans is infringed by a drawing made from observation of the interior or exterior of the buildings. Such a doctrine could lead only to a multiplicity of law suits between parties who had erected successively structures

¹¹ A completed structure is no more a copy than the exhibition of an uncopyrighted moving picture film, the performance of an uncopyrighted radio script, or the broadcast of an uncopyrighted radio script, all of which acts have been held not to dedicate the contents to the public. (citations omitted.)" *Smith v. Paul*, *supra*, at 755. See also Nimmer, Copyright Publication, 56 Cal. L. R. 185, 197: "(A) sine qua non of publication should be the acquisition by members of the public of a possessory interest in tangible copies of the work in question."

of somewhat similar design. On the other hand, the right fully to reproduce plans is a far more substantial aid to a builder unwilling to pay for architectural services than the right to make sketches or drawings of a completed structure.

We thus hold that the construction of the building from the plans constitutes no publication of them at all.

We are of the opinion that the availability of Federal copyright protection for published material (17 U.S.C. [1858]) does not require the abandonment of the separate protection afforded to unpublished material by the common law. See *F. W. Dodge Co. v. Construction Information Co.* 183 Mass. 62, 66. The Federal cases are consistent with this view. And, as previously indicated, Congress has not enjoined such an abandonment upon the states. 17 U. S. C. 2 (1958). It would be burdensome to require statutory copyright of architectural plans not intended to be placed in the public domain as a condition of preserving property rights in them."

As the court in the *Wood* case pointed out, all previous cases had been decided in courts of inferior jurisdiction. While their holdings are not to be dismissed without examination, in no case should they be given the weight of the *Wood* case, which was decided by the highest court of the State of Massachusetts with full opportunity to examine, in retrospect, all previous case law, together with all the legal and public policy arguments which had been made. It was the considered opinion of the Massachusetts court that, despite a number of contrary early holdings, the trend of the law and the better, more equitable view favored protection of the architect's common law copyrights in his plans.

Not only are all the contrary cases not decisions of courts of last resort but they are, for the most part, either ancient, outdated cases decided 28 to 87 years ago. (**Gendell v. Orr**, supra [1879], **Wright v. Eisle**, supra [1903] and **Kurfiss v. Cowherd**, supra, [1938]), or cases decided in the same jurisdiction by later courts bound by the principle of **stare decisis** (**Tumey v. Little**, supra.) The only other contrary case cited in the Wood case, even though holding against the designer's assignee on other grounds, gave evidence of the liberal trend in the law when it stated unequivocally that completion and exhibition of the building did not constitute unlimited publication of the plans. (**DeSilva Construction Corp. v. Herrald**, supra.)

It would appear, therefore, that there remains before the Court the question of damages. We respectfully contend that the damages to the Appellants should be considered in the light of the following authorities:

Books, plans, portraits, heirlooms:

"The value to the owner has been held to be the measure of damages for the loss of books kept for his personal use or of a manuscript having no market value."
15 **Am. Jur.** 536, § 127.

Damages recoverable for invasion of common-law rights.

"In application of general principles relating to assessment of damages, determination of the amount of damages recoverable in case of invasion of common-law rights in literary property lies within the discretion of the jury upon consideration of the facts of the case, the fundamental rule of awarding a fair compensation and indemnity for loss apparently is applied.

* * *

18 **Am. Jur.** 2d 423 § 136

"Other elements of damage to be considered are the time spent by the party in preparation of his idea, costs to him, if any, in preparing his idea in concrete form for submission to a buyer, and the fact that his idea is of no further value to him after its use by the defendant." *ibid*

"There are many instances in which the item of personal property destroyed, injured, or taken has no market value in the normal sense of that term. A family photograph, a specially designed machine, a manuscript, some lecture notes, and plans of a draftsman can be examples of items of personal property which have no market value beyond the value of the paper or material which went into their construction. These items are not bought and sold on the open market, and continued adherence to a rule of damages which allows recovery only for a decrease in "market value" would result in awarding the plaintiff only nominal damages even though the court is convinced that the injury is substantial. In this type of case, the concept of measuring damages by the market value of the item destroyed, injured, or taken is often discarded by the courts. The rule most frequently adopted for these cases is to award either the "actual" or "intrinsic" value of the item or the "value to the owner" of the item."

22 **Am. Jur.** 2nd 215, § 149.

18 **Am. Jur.** 2nd 422 § 135, 136:

"NOTE: "and in the case of an unauthorized use of a published manuscript, the value of the use thereof."

"The measure of damages for the unwarranted use by a publishing company of uncopyrighted manuscripts and stereotyped plates entrusted to its care is not the value of the books produced, but the value of the use

of the property itself and any damages that may be done thereto in so using it , or, if the use amounts to a conversion there the measure of damages will be the value of the property itself."

State v. State Journal Co.,

75 Neb. 275, 106 NW 434

In **Smith v. Paul** (supra) the claimed damage was:

"The reasonable value of the use (of the plans) of which is \$3500.00'.

Perhaps the Court determined damages on this basis.

In **Wood v. Skene** (supra), the Court said Wood's damage would be:

"the fair market value of a set of its plans."

The footnote to this quote contains the following language:

"Analogously, the Federal copyright statute provides in part for the recovery of ' . . . such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement"

17 USC §101(b) (1958) See **Sammons v. Colonial Press, Inc.** 126 F2d 341 (1st Circuit).

The Appellants believe that the damages are the reasonable value of the plans and specifications of the Plaintiff ,to-wit: \$2,033.00. These are items that have no market value as such. The Respondent, Glover has been benefited by the reasonable value of these plans which he has without right or cause appropriated and converted. It would seem incongruous to allow him to obtain a \$2,033.00 value with no corresponding obligation for the same. These

cases are greatly similar to the case of a stolen heirloom or a unique writing which has no market value except in respect to the value to its originator or owner. Because the originator of this plan has, by his artistic talent, developed the arrangements which have a value, he should be entitled to the benefit of the value of these concepts, for there is no other way by which the Plaintiff can be compensated and the Respondent, Glover, not harmed. When considered in its ultimate light, the Respondent has received a benefit to this extent. Any other conclusion would be to allow the Respondent, Glover, by reason of his misconduct, to benefit and profit at the expense of innocent parties and at the expense of the effort and talent of another. The law does not condone nor favor misconduct and in cases of doubt, all questions and issues of value should be construed against the Respondent. We believe that by the decisions of the Paul case and Wood case the same result would be reached and damage value would be the same.

One could hardly say that the conduct of the Respondent, Glover, was not malicious and intentional. The Respondent well knew that what he was receiving was without right and was wrongfully obtained. He is not a novice in the custom of the industry and surreptitiously availed himself of the efforts of another for his own benefit. His conduct was intentional, which is always necessary to justify the award of punitive damages. According to 34 **Am. Jur.** 681-683, Malice can mean any of the following:

“In their legal sense the terms “malice” and “malicious” have been variously defined, respectively, as the intentional commission of a wrongful act by one person to-

ward another, without legal justification or excuse, or, in other words, the wilful violation of a known right, as the existence of a wrongful or harmful motive, not necessarily any positive malignity or corruption, but a wilful disregard of the rights of others, whether it is to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act knowing it to be such, although, according to some decisions, it is error to employ the term "malice" when all that is intended is an intention to commit an unlawful act, without reference to ill feeling; as a state of mind which prompts a conscious violation of law to the prejudice and injury of another, as a condition of the mind which shows a heart devoid of social consciousness and bent upon mischief, as characterizing an action flowing from any wicked or corrupt motive; as a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts, as denoting a wicked intention of the mind, or an act done with a depraved mind and attendant with circumstances which indicate a wilful disregard of the rights and safety of others; as a term of art importing wickedness and excluding a just cause or excuse; as characterizing an act done on purpose and with evil intent; and as a formed design of doing mischief to another or a wicked intention to do an injury to another. Legal malice is a presumption of law, and is sometimes called malice in law, in contradistinction to malice in fact, because the law draws the inference from the fact. Malice in this sense is sometimes referred to as implied malice."

"It has been noted in a prior section that a malicious motive or intent will be presumed or implied in law from the intentional commission of a wrongful act which causes injury to another. A wrongful act will be presumed to be malicious if the injurious conse-

quences following it are those which might naturally be expected to result from it, and which the person doing the act must be presumed to have had in mind at the time. Malice in law may be inferred from the absence of any just cause or excuse for the doing of an act which has caused injury to another. Similarly, the law will presume malice in some instances from a lack of probable cause. Again, the inference of a malicious intent to inflict injury which would be impossible in the case of one acting without concert with others may be drawn from the fact of conspiracy." 34 **Am. Jur.** 685, §6.

Malice as defined above, is not hard to see in the acts of the Respondent. The record shows clearly that Glover must have known his act was wrongful, for he knowingly took the plans without authority (TR 114):

"Q. You never called Mr. Allen and asked him if you could, did you?

A. No sir.

Q. Or Mr. Ashworth?

A. No.

Q. You never thought of calling them, did you?

A. No sir.

Q. You knew that architects charge for their services, didn't you?

A. Yes.

Q. You knew that what you were getting was a work product of their effort, didn't you?

A. Yes sir."

Glover must have known that the plans belonged to someone else because he knew they were not Richardson's (TR 33) and both Richardson (TR 16) and Glover reported that the plans bore the Appellant's name (TR 113):

"Q. (Continued by Mr. Howard) Now the Plans said, Allen's Hi Spot American Fork, Ashworth Architects", did they not?

A. Yes sir.

Q. You knew who drew the Plans, didn't you?

A. Yes sir."

It is also clear that the Respondent did not act out of innocence, for the record is clear that he was an experienced contractor (TR 24, 100, 103, 110). As such, it is incredible to contend that he did not know he was violating the proprietary rights of another. Even a child would have known it was wrong.

If the Respondent had merely taken a few ideas from the general design, the evil intent or wrongful motive necessary to malice would not be found. But where, as here, numerous drawings were made in which were copied the exact dimensions of the outside of the building, the interior, the thickness of the walls, size of rooms, counters and equipment, among other things, it is difficult to believe such an extensive "taking" could be committed without bad faith and selfish motives.

Finally, malice may also be implied from the fact that a conspiracy to take the plans existed between the Respondent and Mr. Richardson, the manager of the Hi Spot (TR 12, 13:

"Q. (Continued by Mr. Howard) When you say that your business that was with him was drive-in cafe business, what did you mean?

A. Well certain locations and in the cafe and drive-in business.

Q. Were you going to go in business with him?

A. Sort of, yes.

Q. And that idea originated prior to your termination with Allen's, is that true?

A. Yes.

Q. Would that idea have originated prior to October of 1963—strike that.

Prior to October of 1962?

A. I don't remember.

Q. Do you recall discussing the design and architectural features of the Drive In that you were operating in American Fork, with Mr. Glover?

A. Yes.

Q. Now when you say you were going to go into business with Mr. Glover, what was your relationship to be?

A. There was no definite plans.

Q. When you discussed the architectural and design features, what was the nature of that discussion?

A. I don't recall the exact discussion.

Q. Was anything said about obtaining Plans and Specifications for the American Fork Drive In as a basis for the drive-in's that you and Mr. Glover might construct?

A. Yes."

The fact of conspiracy is confirmed by the admitted fact that the Respondent later took Richardson in as his own manager. (TR 18, 26, 103, 104).

Although we believe we have proved malice, one does not have to prove it. Intent alone is sufficient. The following case stands as authority for this proposition, to-wit:

Press Publishing Co. v. Monroe
73 Fed 196.

In this case the Court allowed \$5,000.00 punitive damages where the defendant had published a poem prematurely. There was no evidence of malice. All that was required was that the act was wrongful and intentional. (See also 18 Am. Jur. 2d 216, § 92 and Star Publishing Co. v. Donahoe, 58 A 513).

POINT II

THE COURT'S FINDINGS OF FACT ARE ERRO-
 NEOUS AND IN DIRECT CONTRADICTION TO THE
 EVIDENCE PRESENTED:

A. Finding of Fact Number Three:

"That plaintiffs completed the plans and specifications and delivered a copy to the company and were paid in full for their services."

There are several reasons why this finding of fact is objectionable. The first is that it implies that the Appellants made a delivery of the plans in exchange and as consideration for the fee which they were paid. The very most that can be said, if the facts are drawn from the evidence presented is that the Appellants "gave" their client (permitted their client to use) a set of plans to facilitate construction, to aid the client if repairs or alterations became necessary, and to allow the client the satisfaction of seeing tangible evidence of the work done for him. Not only is this good business and good public relations; it is the near universal practice of architects everywhere. In view of the established custom, it is not too much to

say that "giving" a client a copy of the plans would be, in a sense, "expected" of an architect even though there existed a complete understanding that the ownership of the plans and right to control them remained with the designer.

In the instant case the record at no point indicates a "delivery" in the sense of an abdication of all one's rights in exchange for consideration. It does refer to "giving" the plans. (After referring to the standard American Institute of Architects contract, Mr. Dibblee asked Dell Ashworth: (TR 55)

"Q. (Continued by Mr. Dibblee) This Agreement is signed between you and Mr. Allen, is that correct?

A. Yes.

Q. And in accordance with this Agreement, I presume what you do, Mr. Ashworth, you give him a set of Plans don't you?

A. Yes.

Q. And you give him a set of the Specifications, don't you?

A. Yes.

Q. And he can make what use of the Plans that he may desire, isn't that right?

A. We assume that he will use them on this project.

Q. But I mean, he may use them for whatever he may desire, is that not right?

A. No, that is not exactly right."

Although the architect allowed the plans to be used, the record indicates that the parties considered the fee to be merely a payment for the limited use of the plans neces-

sary to the construction and maintenance of the particular building in question, not a sale or assignment of all rights in the plans to Allen's Products. The following are the responses of Dell Ashworth, the architect: (TR 50)

"Q. Is there a market value for Plans and Specifications as such, your Plans and Specifications as such?

A. In other words, do we have a fixed way of determining our fee?

Q. No, I am asking you if you sell Plans and Specifications as such?

A. No, we do not.

Q. Is there a market value, so far as you know, for these Plans and Specifications?

A. No."

It is obvious, then, that Appellants were not "paid in full so that they no longer had rights to compensation if the creative result of their past services were used again. If this is true in relation to a client who had paid them to design a first building, a fortiori it would be true of a third person who had never paid Appellants anything.

It might still have been argued that part of the fee was for services such as supervision of construction. But the record shows that this element of a usual fee was not even charged because these services were not performed (TR 63). Also, the uncontroverted testimony of Appellants is that an architect has exclusive ownership in the original design and has the right, if he chooses, to charge the full price even if he gives no additional service on a second building. But even if, *arguendo*, this testimony were ignored, it would still be error to find as did the trial court that the

Appellants "were paid in full for their services" because the evidence is clear that the use of the plans was the principal element of the fee.

B. Finding of Fact Number Four:

"That in supervising the construction of the drive-in, plaintiffs caused to have published and distributed to various building contractors, approximately 25 copies of a complete set of the plans and specifications which could later be purchased from plaintiffs by forfeiting a \$25.00 deposit; that plaintiffs did not restrict the use to be made of these plans."

The exact number of copies which Appellants loaned to the contractors, although probably less than 25 (TR 58, 59, is not being disputed here since, in any event, the publication was still a limited one, both as to number and as to manner of use. The Appellants do argue, however, and the record substantiates the fact, that the plans and specifications were **not** purchasable. The testimony of the architect has already been quoted in which he testified that the firm did not sell plans and specifications. (TR 50)

On a number of occasions, Mr. Dell Ashworth testified that while the plans and ideas had no known market value, the reasonable value to him was \$2,033: (TR 60)

"In answer to your lawyer's question, am I to assume that you say the Plans were worth \$2,033.00?

A. Yes.

Q. And that is what you are asking for here today?

A. I didn't say that, you asked me what the Plans were worth.

Q. Well how much are you asking for here today?

A. That is what I think the value of the Plans is.

Q. \$2,033.00?"

A. Yes."

(See also TR 51 and TR 52). Since this testimony stands unrefuted, it appears a bit ridiculous to say that the Appellants would be willing to sell the plans for a mere \$25.00. A thorough search of the record reveals nothing which would even suggest that the plans could be "purchased" with a \$25.00 deposit. Indeed, the record is replete with testimony to the contrary. Note the testimony of Dell Ashworth: (TR 66)

"Q. Did you put out the 25 or 30 copies?

A. 14, as I said.

Q. And you got your usual \$25.00 deposit?

A. Yes.

Q. And if the contractor does not bring the Plans and Specifications back, he keeps the Plans and Specifications?

A. The \$25.00 is to insure that he will bring them back."

(TR 58):

"Now in addition to giving the Plans to the owner, you also submit them to the contractor, is that correct?

A. Yes.

Q. And they pay a \$25.00 fee for the Plans, correct?

A. For the use of them."

To the knowledge of counsel for the Appellants, the only evidence in the record which gives any support to the finding that the plans were "purchased" by the contractors is testimony to the effect that the \$25.00 deposit

would be forfeited if the plans were not returned. But the very word "forfeit" itself makes it clear that the \$25.00 was merely a deposit required by the architects expressly to insure that the plans would be returned. The testimony already alluded to above shows that the plans were merely loaned and that a sale or purchase of the plans was never contemplated. A bit of reflection on the realities of the construction business will show that loans such as this are entirely necessary to the completion of any construction project and that the realistic architect could never guarantee that all the copies of his plans would be returned — the best he can do is require a small deposit to encourage return of the plans.

The fact that the contractor is expected to return them cannot be doubted (TR 58 and 66), nor can there be doubt that the contractors knew the plans belonged to the architects, both because of the customs of the trade and because it is stipulated in the specifications which each contractor is given (Exhibit 2). The architect's ownership of the plans is implicit in Section 14, Page 4 which requires the contractor to give the architect a deposit in return for the use of the plans. The architect's ownership is explicitly recognized in Article 7 of the American Institute of Architects' General Conditions of the Contract For the Construction of Buildings (Exhibit 3) which was incorporated by reference into Section 1 of the specifications and also made available separately (TR 45) to the contractors.

The aforementioned evidence is important not only because it establishes that the contractors must have known that the plans were the property of Appellants, but also because of the duties which such ownership implies to

the bailee of the plans. It was not necessary to expressly restrict the use to which the plans were put because it was understood by the parties involved that the plans were to be used in preparing bids and constructing the building, not for general publication. That this was an implied condition of the loan of the plans is evidenced by the customary procedure of requiring deposits rather than merely selling the plans to all interested parties. The fact that contractors evidently did honor this implied condition that they restrict their use of the plans to this particular project is still another evidence that they recognized that they were restricted and that the Appellants had a right to the exclusive use of the plans.

The apparent lack of restriction on the use of the plans by Allen's Products can also be explained. The Allens were old clients of the Appellants, having given them extensive business over the years in addition to the Hi-Spot Restaurant (TR 42). For this reason, and because the Appellants were working very closely with the Allens due to the peculiar requirements of this particular job, particularly with regards to the type and size of equipment ordered, Appellants found it necessary to allow their clients somewhat more freedom to use the plans than is ordinarily the case.

Not only were there special reasons for giving the Allens access to the plans, but it is standard practice to do so, and it is expected of the architect.—the standard contract of the American Institute of Architects even provides for it. (Exhibit 3, Article 4) This same standard form, which the record indicates was the one Appellants customarily used (TR 55, 90), also contains a provision that

ownership of the plans remains in the designer. Wasn't it, therefore, reasonable for Appellants to assume that they could safely allow their client to use a copy of the plans without jeopardizing their rights, especially since it was a custom and practice of the trade?

The reasons why such relative freedom of use has become a customary practice are logical enough: it satisfies the client's yen for some tangible evidence of what he has asked the architect to design; it facilitates the efforts of the client where, as here, he makes a contribution to the design; it makes possible future repair work and alterations, and it is necessary for reasons of convenience, so a copy will be available when and where it may be needed quickly (Exhibit 3, Article 6).

The last two reasons probably explain why the plans were left in the American Fork Drive In, making it possible for Mr. Richardson to remove them for the unlawful uses of the Respondent. Under the circumstances, the freedom which Appellants allowed their client in the use of the plans was reasonable and would not be inconsistent with their exclusive ownership and right even though Appellants might allow Allen's to use the plans indefinitely. The type of use which was granted was limited (TR 55, supra), as the Allens themselves recognized sometime later when they retained the Appellants again for the Springville Hi-Spot rather than use the plans without permission (TR 56).

C. Finding of Fact Number Six:

"That during the year 1961 Allen's Products Company used the plans and specifications in constructing a drive-in

at Springville, Utah, and plaintiffs were employed on an hourly basis to make modifications in said plans."

This Finding is directly contrary to the testimony given at the trial. It is not a fair statement of the facts to say that Appellants' fee for the Springville building was merely a payment for services figured on an hourly basis. The actual fee for the second building was computed by a combination of a fixed percentage of construction costs plus a charge for services based on an hourly rate (TR 65). Actually, whether a client is charged on a percentage or an hourly basis, even on an initial job with a client, is a matter to be decided at the discretion of the architect. Mr. Willard Nelson, an architect who testified as an expert at the trial, verified that fees may be and are commonly paid on either an hourly or a percentage basis (TR 78), so there was nothing particularly unusual or compromising to Appellants' interests about the fact that part of Appellants' fee for the Springville Hi-Spot was paid on an hourly basis.

The fact that the fee for the second building was somewhat less than it had been for the Hi-Spot in American Fork is likewise understandable and consistent with the Appellants' exclusive rights. Mr. Dell Ashworth explained it this way (TR 86):

"Q. You didn't get six percent on the second one, did you?

A. No, this was by our own determination, Your Honor.

Q. But if you did have the exclusive right, why didn't you charge the six percent?

A. It is common practice to charge something less,

and we merely charged for that work we do, where we are working for the same client."

(TR 65):

"Q. But you didn't get your usual architects fee the second time, did you?

A. We didn't ask for it.

Q. You didn't ask for it?

A. No, at the time we were employed on other work for him."

As all the testimony points out, the amount of the fee, although normally 6 percent of the construction cost, is customarily subject to the architects' discretion where the client has given the architect a great deal of business, and especially where the new project also incorporates much of a previously designed building, eliminating the need for the extensive research, calculations, and time upon which the normal 6 percent is based. The principle is not unlike that practiced by any business which gives a discount to good customers for volume buying. As Mr. Ashworth pointed out, it is a wise business practice which probably accounted for some of the return business which was later given to Appellants.

D. Finding of Fact Number Nine:

"Plaintiffs' contract of employment did not provide that plaintiffs retained all right, title and interest in and to the architectural plans and specifications."

The above finding is particularly offensive because there is not only abundant evidence to the contrary, but there is no positive evidence upon which to base such a

statement. The testimony of Mr. Ashworth that the contract used for the American Fork Hi-Spot was the Standard American Institute of Architects contract is repeated and unchallenged (TR 54 to 55):

"Q. In your contract, did you make any reference to the Plans?

A. Yes, in other words, we use the standard American Institute of Architects contracts.

Q. Is that Exhibit 3 here sir?

A. No.

MR. HOWARD: I will give you one here.

(Whereupon Mr. Howard handed to Mr. Dibblee document above referred to.)

MR. HOWARD: I have the standard Agreement if you would like to see it, Mr. Dibblee.

MR. DIBBLEE: I would appreciate it.

Q. (Continued by Mr. Dibblee) This Agreement is signed between You and Mr. Allen, is that correct?

A. Yes."

(TR 82):

"Q. Now before lunch, you stated that your agreement with Allen's was on a standard form agreement between owner and architect, is that true?

A. Yes."

(TR 90):

"Q. Are your contracts as to their general terms fairly standard?

A. Yes, we use the AIA standard form of contract.

Q. Now on your other dealings with Allen's, did you use the AIA standard form of contract?

A. Yes.

MR. DIBBLEE: Is that a question and answer?

MR. HOWARD: I just asked him a question.

Q. (Continued by Mr. Howard) In your relationship with Allen's, has it been on the basis of the AIA Standard contract?

A. Yes."

It is also clear that the Standard AIA contract contains a section (provision 9) specifying that ownership of the plans and specifications remains with the architect unless otherwise provided.

The Appellant never at any time prior to trial thought there was any dispute concerning the language of the AIA contract. It was explained to the Respondent in the deposition of Mr. Ashworth. At the time of the trial the proposed copy was not admitted because of the best evidence rule, but the content of the agreement was admitted in the form of the language in the specifications, (Exhibit 3) and the testimony of Mr. Ashworth which stands unrefuted.

In addition to the evidence already mentioned, it should be noted that a provision to the effect that the architect retained all rights and ownership in the plans (Article 7) is also part of the General Conditions of the Contractor for the Construction of the Building (Exhibit 3), incorporated into the written specifications by reference (TR 44, 46 and 47):

"All Drawings Specifications and copies thereof furnished by the Architect are his property. They are not to be used on other work, and, with the exception

of the signed Contract set, are to be returned to him on request, at the completion of the work."

The fact that both the contractors and the owners were aware of this provision in the specifications was also attested to by Mr. Ashworth (TR 45):

(After referring to Article 7, which specifies that ownership in the plans remains with the architect)

"Q. (Continued by Mr. Howard) I show you Plaintiff's Exhibit No. 3, and ask you if you can identify that?

A. This is the General Conditions of the Contractor for the Construction of the Building, as approved by the American Institute of Architects.

Q. You go over the Specifications and Conditions with the owner before letting them go to the contractors?

A. Yes.

Q. So the owner is familiar with the terms too, is that not true?

A. Yes."

Finally, it should be mentioned that the record is replete with evidence that Appellants believed they had reserved ownership to the plans in themselves (TR 65, 85, 86). In view of the one-sidedness of the evidence presented at the trial, Appellants wonder how the court below could have arrived at its finding.

CONCLUSION

Since this is a case of first impression in Utah the Court is free to consider the following public policy arguments:

1. The right of an architect to compensation for the use of his work-product is a relatively untrodden path of law. The decision reached by the Court will be noted and will have far-reaching importance on the law, on the architectural profession and the construction industry, not only here in Utah, but nationally and perhaps further. This is true because of the dearth of decisions, but is made even more true by the fact that this is only the second time such a question has come before a court of last resort.

This is a rapidly developing area of the law with half the decisions coming since 1959. The trend is clearly towards greater protection for the designer and a concern for the equities of the situation. A decision in favor of the Appellant would reinforce the trend and continue the development of the law; a contrary decision would be a significant backward step, a reversal in the progress the law has made and a throwback to the technicalities and artificialities of outmoded "legalism for its own sake." The better rule, the equitable result toward which the courts should be moving, is that which both protects the architect and discourages piracy.

2. The wrong decision in this case could have disastrous effects upon the architectural profession both locally and nationally. Appellant in this case has followed the customary practice of the profession in the limited manner in which the plans were published and filed, in the manner in which fees were charged for the second Hi-Spot, and in the way restrictions were placed on the use of the plans and specifications. If Appellant loses this appeal, all architects will find themselves in an impossible position: Their clientele naturally expect them to allow their plans to be

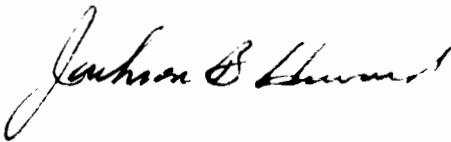
filed and used by the contractors and owners as a necessary part of construction; on the other hand, if they allow the plans to be so "published" they stand in danger of the claim that they "sold" their plans if one single contractor loses or fails to return his plans; if one set inadvertently falls into the hands of an opportunist like the Respondent, the architect may very well lose his ownership.

Affirmance of the existence of a common law copyright which is broad enough to protect most architects as they customarily practice is essential to the well-being of the architectural profession. Very few architects copyright their plans formally, and they should not have to except in rare cases. The cost in construction delays, inefficiency and money would be tremendous. Realistic recognition of the actual practices and demands of the construction industry is imperative so architects may be given more protection. Otherwise, grave injustices will surely result.

3. A decision against the Appellant would hurt the construction industry as much as it would harm architects. If ideas and plans did not have to be paid for once the first reproduction was built, the builder would be idiotic to retain an architect, since proven plans could be had for, at most, the cost of a forfeiture for not returning them. If the plans themselves could not be "bought" in this manner, wholesale theft of ideas, a kind of architectural plagiarism, would certainly be encouraged. Standards of construction might well be lowered if it became more profitable to copy, borrow and steal in order to make one's own plans rather than use the services of a competent, professionally trained architect.

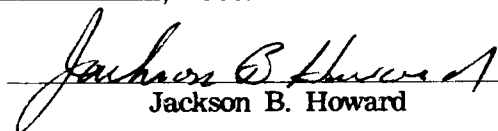
4. There is something intrinsically inequitable about a legal principle which allows even the possibility that the creative effort of one person might be taken from him without payment by the taker. The architect's creation is closely analogous to the work-product of the lawyer or any other technical creative effort. While borrowing of the general design features may be only borderline immoral behavior direct wholesale copying of the plans of another is flatly unethical conduct and should be denied the support of the law.

To summarize the Appellants' position, a valuable property right belonging to the Appellants has been taken and used without the consent of the Appellants. Respondent has been allowed to enrich himself, wilfully and unjustly, without ever compensating or attempting to compensate the owner. This gross inequity should be rectified by a reversal of the trial court's judgment; or, in the alternative, the case should be remanded to the lower court for a new trial.



Respectfully submitted,
s/s Jackson B. Howard
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Mailed a copy of the foregoing, postage prepaid, to
Richard Dibblee, Attorney for Respondent, 530 Judge Build-
ing, Salt Lake City, Utah, on the 27th day of
August, 1966.


Jackson B. Howard