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Copyright and the Art Museum

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Copyright and the Art Museum

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I. INTRODUCTION

1.1 *Introductory Example*

Perhaps more than any other institution, the art museum is a daily setting for a wide range of copyright problems. Consider the following sequence of events: an art museum is having an exhibition of the work of a prominent photo-realist painter.¹ At the same time, the museum is considering for purchase two of the artist's works, one painted in 1970 and another painted in 1979. The exhibition will consist of works on loan from other museums, works on loan from private collections, and one painting from the museum's own collection. Photographers hired by the museum have taken photographs of the artist at work and several of his paintings. These will be used for promotion of the exhibition and for didactic purposes. In a small gallery located next to the exhibition, the museum staff has prepared an audio-visual program about the artist, accompanied by music. The museum staff has prepared a catalogue for the exhibition containing photographs of the paintings, as well as critical essays contributed by several scholars, including the museum's curator of contemporary art. In the bookstore, the museum will sell the catalogue, postcards of several paintings from the exhibition, and a poster advertising the exhibition.

During the exhibition, a dance troupe from the local university will perform a program in the museum's auditorium. It has prepared a program of modern dance choreographed to contemporary music, and set against a background of changing slide images of photo-realist paintings.

1.2 *Importance of Copyright in the Museum Context*

This typical sequence of events, involving an exhibition of contemporary art, illustrates how administrators of an art museum almost daily confront the law of copyright.

Among the many questions arising from this introductory example are:

1. Photo-Realism, or photographic realism, is a style of painting developed in the late 1960's. A painting was made to resemble the impression of a sharply focused photograph, the sharpness and precision of detail being evenly distributed over the whole with no subordination in deference to variations of psychological interest.

The Oxford Companion to Twentieth-Century Art at 433, (H. Osborne ed. 1983). Some artists who paint in this style include Richard Estes, Chuck Close, Don Eddy and Audrey Flack. L. Meisel, Photo-Realism (1980).

Are the works under purchase consideration subject to copyright protection?² Are they affected by the New Copyright Act which came into effect in 1978?³

What are the copyright implications in displaying⁴ the works of art on loan from museum or private collections and reproducing⁵ them in posters, publicity materials⁶ and the exhibition catalogue?

Are photographs copyrightable?⁷ If so, who owns the copyright on the photographs commissioned by the museum,⁸ the photographers or the museum? Similarly, who owns the copyright for the exhibition catalogue, the museum or the contributing scholars? Would the contribution by the museum's own employee present different ownership questions?⁹

What formalities should the museum take in protecting its copyright as to affixation of notice and registration?¹⁰ How long does the copyright last?¹¹

What are the copyright problems involved in performing the modern dance with its musical and visual accompaniment?¹²

Obviously museum administrators need a solid understanding of copyright law and an awareness for situations where copyright problems might arise.¹³ With this article we wish to provide the museum

2. For discussion of publication and forfeiture problems under the 1909 Copyright Act [Act of March 4, 1909, Ch. 320, 35 Stat. 1075] and the 1976 Copyright Act [17 U.S.C. §§ 101-810 (1982)], see *infra* § 4 (notes 77-102 and accompanying text).

3. For a discussion of copyright infringement generally, see *infra* § 10 (notes 265-79 and accompanying text).

4. For a discussion of exclusive rights generally, see *infra* § 8 (notes 167-70 and accompanying text); for the display right in particular see *infra* §§ 8.12-8.13 (notes 214-20 and accompanying text).

5. For discussion of reproduction and adaptation rights, see *infra* §§ 8.2-8.4 (notes 171-84 and accompanying text).

6. For discussion of fair use as a defense to infringement, see *infra* § 11 (notes 280-93 and accompanying text).

7. For discussion of copyrightability, see *infra* §§ 2-3 (notes 24-76 and accompanying text).

8. For discussion of ownership, generally, see *infra* § 9 (note 221 and accompanying text).

9. For discussion of works made for hire, see *infra* § 9.5 (notes 240-56 and accompanying text); for collective works, see *infra* § 9.6 (notes 257-59 and accompanying text).

10. For discussion of formalities generally, see *infra* § 5 (notes 103-28 and accompanying text); for notice and affixation, see *infra* § 5.2 (notes 116-28 and accompanying text); for registration, see *infra* § 5.1 (notes 103-15 and accompanying text); and for recordation, see *infra* §§ 9.3-9.4, (notes 230-39 and accompanying text).

11. For discussion of duration, see *infra* § 6, (notes 129-41 and accompanying text); and for discussion of renewal, see *infra* § 7 (notes 142-66 and accompanying text).

12. For discussion of performance right see *infra* §§ 8.7-8.11 (notes 195-213 and accompanying text).

13. Questions concerning copyright may be of concern to others in the museum in addition to the director and his immediate administrative staff. These include the registrar, curators, particularly the curator of contemporary art, the librarian, the slide librarian and the education staff.

administrator and the non-specialist attorney with an overview of copyright law as it affects the museum environment.¹⁴ We also wish to show that copyright considerations in the art museum context transcend the immediate concerns of acquisition and exhibition.

By our introductory example, it is apparent that from a copyright perspective, the art museum is much more than a place which houses and exhibits works of art.¹⁵ In addition to these functions, the art museum both creates and uses copyrighted works to educate the public about art and artists. Its staff creates copyrighted works, such as catalogues, gallery guides, articles for museum publications,¹⁶ and audio-visual materials.¹⁷ The museum also commissions outside experts to create works such as the photographs¹⁸ and the dance program referred to in our introductory example.

The museum is also a central location where events in the performing arts take place, sometimes to complement an exhibition, and other times as a regular museum program.¹⁹ The museum administrator

14. For an introduction to some of these problems, see S. Weil, *Beauty and The Beasts: On Museums, Art, The Law, and The Market* (1983); M. Phelan, *Museums and The Law*, (1982) 77-91; and Ward, *Copyright in Museum Collections: An Overview of Some of the Problems*, 7 *J. of Coll. & U.L.* 297 (1980-81).

15. For a description of the types and frequency of educational and cultural programs offered by museums, see *Museums, USA; A Survey Report* (1975) [hereinafter cited as *Museums, USA*]. See generally *The Art Museum As educator* (1978); *Museums, Adults and the Humanities* (1981); *America's Museums: The Belmont Report* (1969); and E. Alexander, *Museums in Motion* (1979) at 193-229 [hereinafter cited as *Museums in Motion*].

16. C. Hamilton, *Education and Scholarship, On Understanding Art Museums* at 127-28 [hereinafter cited as *Hamilton*].

17. Audio-visual components of a museum exhibition can be important to establish historical context or to include aspects of a theme which would not be suitable for normal gallery spaces, e.g., films of dance for an art and dance exhibition. In addition, individual narration systems or "recorded tours" may give the viewer didactic information not included in labels. Telephone interview with Rose Glennon, Coordinator of Gallery Education, The Toledo Museum of Art, June 25, 1983. For museum utilization of audio-visual equipment, see also Miller & Crosman, *A Cure for Videophobia*, 55 *Museum News* at 38 (March, April, 1977) and Newman, *Video Discs: The Emerging Picture*, 59 *Museum News* at 28 (Jan.-Feb., 1981) discussing the possible use of video discs for archival storage and distribution of "books" of slides, in addition to gallery and classroom.

18. Photographs are specifically included in the classification of "pictorial, graphic and sculptural works" of the Copyright Act, 17 U.S.C. § 101 (1982). Copyright was initially extended to artistically conceived photographs in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1883). Through the years, most photographs were held to be sufficiently original to satisfy copyright requirements. See 1 M. Nimmer on Copyright, § 2.08[E](1978) [hereinafter cited as *Nimmer*].

19. A survey conducted for The National Endowment for the Arts showed that 41% of art museums scheduled performing arts presentations on a regular or occasional basis *Museums, USA* at 41. For example, during the 1981-82 season, the Metropolitan Museum of Art held 241 concerts and lectures. The Metropolitan Museum of Art Annual Report for the Year 1981-82 at 59. See also *Museum Sponsorship of the Performing Arts*, 53 *Museum News* at 24 (June 1975);

must recognize copyright problems relating to musical, dance,²⁰ and dramatic performances, both for the classroom and general public.

Today's art museum is a big business which both creates and uses copyrighted works. It cannot ignore the legal environment of its activities. It publicizes its events²¹ and hires photographers and other personnel to develop advertising materials. Many museum shops are lucrative ventures which sell art reproductions, postcards, posters, tee-shirts, and books.²² What is surprising is that many museum administrators either ignore or are unaware of certain pervasive copyright considerations. We direct this article to the administrators of museums and to their non-specialist counsel as a comprehensive review of the major aspects of copyright law affecting the art museum.²³

Gravesmill, *Museums and The Performing Arts*, 45 *Museum News* at 29 (Jan. 1967); National Endowment for the Arts, *Audience Studies of The Performing Arts and Museums: A Critical Review* (1978).

20. Choreographic works are specifically included in the listing of "works of authorship," 17 U.S.C. § 102(a)(1982), although no definition is included under § 101. See Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 *New Eng. L. Rev.* 227 (1981); and Note, *Moving to a New Beat: Copyright Protection for Choreographic Works*, 24 *U.C.L.A. L. Rev.* 1287 (1977).

21. Many museums send out calendars of programs to members. These may include photographs of works of art and activphotographs from museum programs. See Cruger, *Eventful Calendars*, 57 *Museum News* at 40 (Jan.-Feb., 1979). Both the text and the photographs are copyrightable subject matter. See *infra* notes 49-63 and accompanying text.

22. For example, in 1982, gross revenues from merchandise operations for The Metropolitan Museum of Art amounted to \$22,578,788. The Metropolitan Museum of Art, *Annual Report for the Year 1981-82* at 70. Revenues for the same period from the sales shop of the Philadelphia Museum were \$665,601. Philadelphia Museum of Art, *106th Annual Report 1981-82* at 43. For the Dallas Museum of Fine Arts, revenues from the museum shop were \$420,806. Dallas Museum of Fine Arts, *Report for the Fiscal Year October 1, 1981-September 30, 1982*. See also Taylor, *The Art Museum in the United States in On Understanding Art Museums* at 48-9; and Trucco, *The Shopping Boom at Your Local Museum*, 76 *Art News* 56, (October 1977). The Museum Store Association, an organization of approximately 600 members, publishes a journal, *MUST*, devoted to issues of interest to museum stores. One concern, particularly with the expansion of the types of merchandise carried in these stores, has been the maintenance of tax exempt status. Museum stores sales must be related to the tax exempt purpose of the institution, §501(c)(3) IRC. See Gilbert, *Coming to Terms With the Tax Man*, 61 *Museum News* at 18 (Sept.-Oct. 1982); and Liles and Roth, *The Unrelated Business Income Problems of Art Museums*, 10 *Conn. L. Rev.* 638 (1978).

23. For the non-specialist lawyer who may be unfamiliar with copyright law, the leading source is a four-volume treatise, *Nimmer on Copyright*. Shorter, but useful works are N. Boorstyn, *Copyright Law* (1981) [hereinafter cited as Boorstyn]; A. Latman, *The Copyright Law: Howell's Copyright Law Revised and the 1976 Act*, (5th ed. 1978), [hereinafter cited as Latman]; and W. Strong, *The Copyright Book* (1981) [hereinafter cited as Strong]. For a focus on copyright law and fine arts, see T. Crawford, *The Visual Artist's Guide to the New Copyright Law* (1978); Millinger, *Copyright and The Fine Artist*, 48 *Geo. Wash. L. Rev.* 354 (1980); Brenner, *A Two-Phase Approach to Copyrighting the Fine Arts*, 24 *Bull. Copyright Soc'y* 85 (1976); and Gottlieb, *Pictorial, Graphic and Sculptural Works Under the New Copyright Act in Current Developments in Copyright Law* at 415 (1980).

2. WHAT IS COPYRIGHT?

Copyright law creates a system of property rights for the protection of art, literature, and music. Unlike other kinds of property, land or objects, a copyright occupies no physical space; it is an intangible property right conferred on certain kinds of expressive information called works of authorship.²⁴ Although a copyright is essentially intangible, it springs into existence when an author, *e.g.*, an artist, a composer, a choreographer, embodies the work of authorship in a relatively permanent form. In the language of the current Copyright Act, "copyright subsists in original works of authorship fixed in a tangible medium of expression . . ."²⁵ We will now discuss the meaning of these key requirements for copyrightability: fixation and tangible medium of expression. We will later turn to the question of originality and authorship.²⁶

2.1 Fixation

From the above definition, copyright protection begins when an author has fixed his work²⁷ in a tangible medium of expression. A copyright is not granted by the government, as is a patent,²⁸ but comes into being when an author places his artistic expression in a material object. The object could be a piece of paper, a canvas, a tape, or a block of marble. This concept is one of the most misunderstood of copyright law because many believe that a copyright protection begins when the Copyright Office registers the work. Although there are many excellent reasons for registering a claim for copyright in the

24. Works of authorship include the following:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings

17 U.S.C. § 102(a) (1982). The introductory example includes a variety of works of authorship, *e.g.*, the exhibition catalogue (literary work), the musical accompaniments for audio-visual program and dance (musical work), the modern dance (choreographic work), the paintings, photographs, postcards and posters (pictorial works), the audio-visual program (audio-visual works), the recordings of the music (sound recording). This statutory listing is not exhaustive and Congress has the power to include, by legislation, new types of works of authorship. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 124 (1976) at 51, [hereinafter cited as H.R. Rep.].

25. 17 U.S.C. § 102(a) (1982).

26. See *infra* notes 49-76 and accompanying text.

27. For stylistic convenience, words of the masculine gender are intended to include the feminine.

28. 35 U.S.C. § 1 (1982).

Copyright Office, it²⁹ is the act of the author placing his work in a tangible medium of expression, rather than the act of registration, which creates the copyright.

What constitutes a tangible medium of expression? In the language of the Copyright Act, there are two basic varieties of objects in which works are embodied: copies³⁰ and phonorecords.³¹ Phonorecords encompass tapes, discs or similar objects in which sound is recorded, whereas the term "copy"³² defines a residue category which includes all things, other than phonorecords, in which works are placed. For example, a work of music may be embodied on a phonorecord in tape or disc form or in a copy by notation on a sheet of paper. Whether an object is called a copy or a phonorecord is of little importance. What is important is that one must conceptually distinguish the material object from the work of authorship, that is, the copyright.

When one refers to "media of expression," what most often comes to mind are books, tapes, canvasses and the like. As with the development of sound recording in the early twentieth century, technological advances often produce new forms of expression. The current Copyright Act takes into account those yet to be discovered media of expression.³³ A newly discovered medium will qualify as copy or phonorecord as long as it meets the requirement of tangibility.

29. See *infra* notes 103-115 and accompanying text.

30.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

17 U.S.C. § 101 (1982).

31.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

17 U.S.C. § 101 (1982).

32. Argues Nimmer,

An unnecessary complexity in a necessarily complex statute could have been avoided by defining copies to include all material objects in which works of authorship are fixed, regardless of whether or not the work itself consists of sound.

1 Nimmer, § 2.03[C] at 2-32.

33.

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed

17 U.S.C. § 102(a) (1982) (emphasis added). As the House Report states,

As stated above, a copyrighted work must be tangible as well as fixed.³⁴ To meet the requirement of tangibility, the artist must render his work in a sufficiently permanent and stable form. There are many works which involve great creativity, such as a sand sculpture, a fence running along the countryside,³⁵ a window display in a store, or a stage set, but which do not exist in a relatively permanent form. None of these works would meet the tangibility requirement.³⁶ Similarly, a museum curator's installation of an exhibition may entail great planning and imagination,³⁷ and, as with the other examples, be the subject of written commentary;³⁸ but, because there is no stable embodiment of a work of authorship, it is not subject to copyright protection.

2.2 *Material Object and Copyright*

As stated, one must conceptually separate ownership of the material object and ownership of the copyright. The copyrighted work may be

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend . . . to freeze the scope of copyrightable technology. . . .

H.R. Report at 51.

34. See *supra* note 33. Works that are not fixed in a tangible medium of expression are left to protection under state common law copyright. Even though state law is a possible form of protection, it is an inadequate substitute for protection under federal law. Rights in an unfixed work are much more difficult to protect because their very nature and existence are difficult to prove. Further, state courts vary in their attitudes toward their own copyright laws and the outcome of a suit based on state common law principles is difficult to predict. See Dunlap, *Copyright Protection for Oral Works—Expansion of the Copyright Law into the Area of Conversations*, 20 *Bull. Copyright Soc'y* 285 (1973).

35. Perhaps the best known sculptor of "temporary monuments" is Christo, the originator of packaging art, who has wrapped cars, buildings and islands, in addition to sections of coastline. See Alloway, *Christo* (1969); *Christo: Oceanfront* (1975).

36. For arguments that displays and environmental works of art, such as Christo's "Running Fence," fulfill the constitutional and statutory requirements of copyright, see Note, *Copyright Protection for Short-Lived Works of Art*, 51 *Fordham L. Rev.* 90 (1982).

37. Installation of an exhibition, either a temporary one or one that is more permanent, may involve extensive work, including selection of objects, planning the layout and arranging the objects, lighting, label preparation, and the development of audio-visual and other didactic materials. The ultimate goal may be to "provide fresh ways of looking at objects that enhance their impact and meaning." *Museums in Motion* at 182. For the extensive amount of work which exhibition installation design can entail see, e.g., Ciulla and Montgomery, *Creative Compromise: The Curator and the Designer*, 55 *Museum News* 31 (March-April 1977).

38. For criticism of otherwise widely praised installation of American Art at Yale University Art Gallery, where, for example, chairs were hung from walls, where they could be seen as objects, rather than as pieces of furniture: "A wall of chairs can be a thing of beauty in itself . . . but chairs were meant to be sat on, and were designed to be seen from different angles than high on a wall." Hamilton, *supra* note 4, at 122. The installation of the photo-realist exhibition's overall design and layout is not copyrightable, the photographs and didactic labels used as part of the installation are copyrightable works of authorship.

a literary work printed on pages of a book, pigment painted on a canvas, or a musical work pressed into the grooves of a phonorecord. Books, canvasses and phonorecords are sold to the public, but their acquisition does not confer ownership of the copyright in a literary, artistic, or musical work.³⁹

A misunderstanding of this basic principle can lead to unfortunate results for the art museum. Even if the museum owns a painting, bought at great expense, it does not hold the copyright on the painting unless it is specifically transferred by the artist.⁴⁰ The museum may believe erroneously that ownership of the object includes ownership of the copyright and therefore the right to reproduce the work on a poster or postcard for sale in the museum shop. Many museums make this error because of a fundamental misunderstanding of the intangible nature of copyright, by failing to separate conceptually ownership of the copyright from ownership of the material object. Perhaps they make this mistake because many works of art are unique and valuable. But the museum, absent a specific grant, no more owns the copyright on the painting than if it were to acquire the copyright in a literary work by buying a paperback book at a bookstore.

Returning to the introductory example, concerning the acquisition of the two paintings, the museum should consider acquiring both the paintings and their copyrights. Most often, the artist will have no objection to transferring the canvas and its copyright, but as artists become more sensitive to copyright, the two aspects of ownership, material object and copyright, may become the subject of separate negotiation.

39.

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (1982).

40.

. . . copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under copyright, and this includes transfer of the copy or phonorecord . . . the photographic negative, the unique painting or statue . . . in which the work was first fixed.

H.R. Report at 124. For a discussion of the change this requirement of specific transfer had made in the common law, see *infra*, notes 260-64 and accompanying text.

2.3 *Idea and Expression*

An owner of a copyright owns certain rights to an intangible intellectual creation, but not all creations of the mind enjoy copyright protection. One such major limitation is that copyright does not protect ideas, only the expression of ideas.⁴¹ This is one of the most elusive concepts in copyright law, but one which affects all aspects of copyrightable subject matter. Once public, an idea becomes public property free for anyone to use. It makes no difference how intricate, clever, or beneficial the idea may be. Examples are systems of bookkeeping,⁴² abstract outlines of fictional plots⁴³ and historical discov-

41.

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(b) (1982).

42. See *Baker v. Selden*, 101 U.S. 99 (1879), a landmark decision of the U.S. Supreme Court, which held that a system of bookkeeping, illustrated by ruled lines and blank columns was not copyrightable. While the expression of the idea was copyrightable, e.g., the book, the underlying idea, e.g., the bookkeeping system, was not. See 1 Nimmer, § 2.18[B], [C], for a discussion of the *Baker v. Selden* doctrine; and 37 C.F.R. § 202.1(b), (c) (1982), for a codification of these principles. Where the expression of an idea is limited in form, it has been held not to be copyrightable. See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967), denying copyright protection to sweepstake contest rules.

When the uncopyrightable subject matter is very narrow, so that the topic necessarily requires . . . , if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party . . . could exhaust all possibilities of future use of the substance.

See also *Taylor Instrument Co. v. Fawley-Brost Co.*, 139 F.2d 98 (7th Cir. 1943) (chart for recording temperatures held not copyrightable); and *Aldrich v. Remington Rand*, 152 F. Supp. 732 (N.D. Tex. 1942) (forms for keeping tax records held not copyrightable). But, cf., *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 517 (S.D.N.Y. 1971) (holding that printed answer sheets, created for use in conjunction with student achievement and intelligence tests and designed to be graded mechanically were copyrightable); and *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958) (blanket bond forms held copyrightable).

43. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), in which the author of the play, "Abie's Irish Rose," sued the producer of the movie, "The Cohens and the Kellys." Both were comedies dealing with religious intermarriage. Judge Learned Hand held for the defendant on the grounds that the theme of the play fell in the realm of unprotected "ideas." See also cases cited in *Latman*, supra note 23, at 32; and *Warner Bros., Inc. v. Am. Broadcasting Co.*, 654 F.2d 204 (2d Cir. 1981) (holding that the television comedy, "The Greatest American Hero" did not infringe the copyright in cartoon strips and movies of "Superman" because the theme of a character with superhuman powers who battles the forces of evil is not copyrightable although the expression of such an idea could be). For an excellent discussion of the protection of literary dramatic characters, see *Authors League Symposium on Copyright*, 29 J. of Copyright Soc'y 611 (1982).

eries of fact.⁴⁴ Similarly, one might devise an elaborate theory of art,⁴⁵ discover a new work by an Old Master,⁴⁶ or devise an ingenious method for installing an exhibition. These intellectual creations would, however, be considered as belonging to the realm of ideas and therefore unprotectable under copyright law. There is a limited basis for protecting an idea under state law by privately disclosing it under circumstances which expressly or through implication indicate confidentiality.⁴⁷ But such contractual protection of an idea only extends to the parties subject to the disclosure and not to third parties who find out about it some other way.⁴⁸

44. While historical facts themselves, even newly discovered ones, may not be entitled to copyright, it may be argued that their selection and arrangement in a particular work provides sufficient originality to warrant protection. This problem displays the inherent tension in copyright law between the underlying and competing policies of protecting the interests of an author who may have spent great time and effort on his product, and the benefit to the public in the wide dissemination of facts. See generally Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963); Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. of Copyright Soc'y 560 (1982); and Denicola, *Copyright in Collections of Facts: A Theory for The Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516 (1981). The question of the copyrightability of research often arises when a second work, e.g., a television movie, is based upon facts uncovered in an earlier work. See, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (the life story of Howard Hughes); *Miller v. Universal City Studios*, 650 F.2d 1365 (1981) (kidnapped victim who was buried alive); and *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir. 1980) (the destruction of the Hindenberg). This decision is extensively criticized in Guinsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after Hoehling v. Universal Studios*, 29 J. Copyright Soc'y 647 (1982). Holding that these works are collections of facts, rather than the expression of ideas, copyright protection has been denied to maps, *Amsterdam v. Triangle Publications, Inc.*, 189 F.2d 104 (1951); *Moore v. Lighthouse Pub. Co.*, 429 F. Supp. 1304 (S.D. Ga. 1977); and directories, *New York Times Co. v. Roxburg Data Interface*, 434 F. Supp. 217 (D.N.J. 1977), but cf., *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977) (gardening directory held copyrightable when made by substantial independent effort and selection).

45. See, e.g., A. Breton, *What Is Surrealism* (1934), reprinted in *Theories of Modern Art* (1968), at 402-27. Breton's concepts of the origins of surrealism would not have been copyrightable and would therefore be freely appropriable by other writers. Of course, the actual expression of his ideas could be protected under copyright.

46. E.g., in 1954, a ceiling sketch, "Allegory of The Planets and Continents," by Giovanni Battista Tiepolo (1696-1770) was discovered in the Hendon Hall Hotel in London. E. Fahy, *Paints, Drawing in The Wrightsman Collection, The Metropolitan Museum of Art at 239-40* (1973).

47. See, e.g., *Desny v. Wilder*, 46 Cal. 2d 715, 299 P.2d 257 (1956) (writer alleged express promise by movie producer to pay for story if used). The California Supreme Court stated, "The person who can and does convey a valuable idea to a producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price should likewise be entitled to recover." *Id.* at 734, 299 P.2d at 267. See also *Davies v. Krasna*, 245 Cal. App. 2d 535, 54 Cal. Rptr. 37 (1966); *Donahue v. Ziv Television Programs*, 245 Cal. App. 2d 593, 54 Cal. Rptr. 130 (1966); and *Minnear v. Tors*, 266 Cal. App. 2d 495, 72 Cal. Rptr. 287 (1968).

48. For extensive discussion of protection under state law, see 3 Nimmer, § 16.03.

3. COPYRIGHTABLE SUBJECT MATTER

3.1 *Originality and Authorship*

The Copyright Act confers protection on original works of authorship fixed in a tangible medium of expression. We have already discussed the concept of fixation, tangibility and the medium of expression. We now turn to the question of what is an original work of authorship.

The copyright law sets forth broad categories of works of authorship which include literary works, drama, pure and applied art, audio-visual works and sound recordings.⁴⁹ The art museum in one way or another might make use of the entire range of this subject matter. Our purpose in this section, though, is not to discuss the intricacies of the various forms of copyrightable subject matter, but rather to focus on the concepts of "originality" and "authorship" which concern all categories of copyrightable works, whether a literary work, audio-visual, or pictorial work.⁵⁰

Originality and authorship are concepts whose meanings have developed through the years by their construction in courts of law.⁵¹ Generally, an original work of authorship is one which owes its origin to an author, while demonstrating at least a minimal amount of creativity.⁵² The original work of authorship need not be novel, as long as the author's work is independently created. Thus, it is entirely possible that copyright protection could be enjoyed by two identical works if the second author had not copied from the first.⁵³

The other aspect of originality, that of minimal creativity, embodies no conception of artistic merit. Very early in the century an oft-cited Supreme Court case established the above proposition.⁵⁴ This case, which concerned the copyrightability of a circus poster, explicitly established that courts should not inject their view on what constitutes artistic merit when deciding questions of copyrightability.⁵⁵

49. 17 U.S.C. § 102(a) (1982).

50. For an analysis of the requirement of "originality" as applies to the visual arts, see Oppenheimer, *Originality in Art Productions*, 26 J. of Copyright Soc'y 1 (1978).

51. See H.R. Report at 51.

52. See *infra* notes 64-76 and accompanying text.

53. See *infra* note 268 and accompanying text.

54. *Bleistein v. Donaldson*, 188 U.S. 239 (1903).

55.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Id. at 251-52.

Since that time, both the courts and Copyright Office have uniformly refused to exercise their conception of artistic quality in determining questions of originality.⁵⁶

56. See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) ("No matter how poor artistically the 'author's' addition, it is enough if it be his own.") This constraint is incorporated into the new copyright law. According to the House Report, [t]he phrase, "original works of authorship," which is purposely left undefined, is intended to incorporate without change "the standards of originality" established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them

H.R. Rep. at 51.

Considerations of creativity and originality aside, a troublesome question through the years has been the availability of copyright protection under the classification "work of art" for works of applied art, as compared to works of fine art. This is particularly difficult when the object combines both "utilitarian" and "artistic" features, because utilitarian articles fall outside copyright protection. In the leading case of *Mazer v. Stein*, 347 U.S. 201 (1954) the Supreme Court held that the statuette of a dancing figure which constituted the base of a lamp constituted a "work of art." However, in 1978, the U.S. Court of Appeals in *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979), refused copyright protection as "works of art" to outdoor lighting fixtures. The Court held that the overall shape of a utilitarian object is not copyrightable and distinguished *Mazer* on the grounds that the dancing figures were capable of existing as a work of art independent of the utilitarian article in which they were incorporated.

Although the original Senate version (S. 22) of the 1976 Copyright Act contained a provision for copyright of design, this was deleted in the final version of the bill. However, the 1976 Act did add language to the definition of "pictorial, graphic and sculptural works," stating:

Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article.

17 U.S.C. § 101 (1976). See also, H.R. Report at 54-55. The distinction between works of utilitarian design and works of art was further confused by the decision in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) granting copyright protection to two belt buckle designs. The court, referring to the concept that "separability" may occur either physically or conceptually held that "[t]he primary ornamental aspect of the . . . buckles is conceptually separable from their subsidiary utilitarian function" at 993. In sum, in spite of Bleistein's pronouncement that courts of law should not discriminate against various art forms, industrial design which is precluded from protection is a notable exception. Although industrial design at this time appears in large part outside the realm of copyright, design patent is an alternate form of protection. See 35 U.S.C. § 171 (1982). Obtaining design patent protection, however, is both time-consuming and expensive and application is subject to intense scrutiny by the Patent office as to meeting the rigorous standards of patentability, novelty and non-obviousness. Draft, Second Supplementary Report of the Register of Copyrights on The General Revision of the U.S. Copyright Law, Chapter VII (1975). Therefore, a museum such as the Museum of Modern Art, which collects works of contemporary design, must be aware of possible copyright and patent implications. For recent articles in this area see generally Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 *Minn. L. Rev.* 707 (1983); Paul, *Functional Works of Art: Copyright, Design Patent, or Both?*, 3 *Comm/Ent. L.J.* 83 (1980); and Note, *Works of Applied Art: An Expansion of Copyright Protection*, 56 *So. Cal. L. Rev.* 241 (1982).

Although the quality of art is not an issue in determining copyrightability, a certain quantum of originality, or creative authorship, is required.⁵⁷ This is largely a *de minimis* standard and easy to meet, but copyright has been denied to fragmentary words or phrases,⁵⁸ slogans,⁵⁹ slight variations of musical compositions,⁶⁰ and a paraphrase of standard business forms.⁶¹ On the other hand, almost any trivial variation will satisfy the standard for creativity. Thus courts have found originality in such banal creations as the label on a box of cake⁶² and plastic flowers.⁶³

3.2 *Originality and Derivative Works: Reproductions of Works of Art*

Much artistic work is consciously based on one or more preexisting works. Examples are art reproductions,⁶⁴ musical arrangements,

57.

Copyright protection subsists . . . in *original works of authorship*. . .

17 U.S.C. § 102(a) (1982) (emphasis added).

In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form.

37 C.F.R. § 202.10(a) (1982).

58. E.g., *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705 (7th Cir. 1972) (holding that the phrase "most personal sort of deodorant" is not copyrightable.) See also 37 C.F.R. § 202.1 (1982), in which, under "Materials not subject to copyright," "words and short phrases such as names, titles and slogans" are included. A new "label" for a school of painting, for example, such as "minimalism" or "photo-realism" would not be entitled to copyright protection. But see, 1 Nimmer, § 2.01[B] at 2-15, for arguments that even a short phrase, if sufficiently creative, might be entitled to copyright protection.

59. Slogans can be protected under certain circumstances under the law of unfair competition. See generally, McCarthy, *Trademarks and the Law of Unfair Competition* (1973) at § 7.5.

60. See, e.g., *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950); and *McIntyre v. Double-A Music Corp.*, 179 F. Supp. 160 (S.D. Cal. 1959). But cf. *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956) (holding that composition based on folk song was copyrightable.)

61. See, e.g., *Donald v. Zack Meyers' T.V. Sales and Service*, 426 F.2d 1027, 1031 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971) (holding that the plaintiff's legal form was not entitled to protection, the court stated, "We reward creativity and originality with a copyright but we do not accord copyright protection to a mere copycat.")

62. See, e.g., *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 545 (2d Cir. 1957) (The pictures of the cakes used by plaintiff on its labels although possibly not achieving the quality of a Leonardo "Still Life" nevertheless have sufficient commercial artistry to entitle them to protection against obvious copying. . . .) But cf. *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) (holding that a standing cardboard star does not fall within the historical and ordinary conception of a work of art.)

63. See, e.g., *Prestige Floral v. California Artificial Flower Co.*, 201 F. Supp. 287 (S.D.N.Y. 1962). But cf. *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776 (S.D.N.Y. 1968) (holding that plaintiff's artificial corsages lacked the creativity and originality necessary for a work of art under the Copyright Act.)

64. Art reproductions are specifically included in the definition of "pictorial, graphic and sculptural works." See 17 U.S.C. § 101 (1982). Note that the registrability of a work of art is not affected by the number of copies reproduced, 37 CFR § 202.10(a) (1982).

dramatizations, and abridgments which either embody or recast these preexisting or underlying works in some way. This kind of work, known as a derivative work,⁶⁵ is a protectible work under copyright, but is protectible only as to the new authorship added to the preexisting work.⁶⁶ The creator of a derivative work cannot claim copyright in the underlying work, and if the underlying work is subject to copyright protection, the derivative work author must obtain consent to create the derivative work or copyright will be infringed.⁶⁷

Both the concepts of originality and derivative work authorship are important to the art museum, particularly for art reproductions such as may be used for posters, postcards, photographic slides, and sculpture.⁶⁸ These uses of copyrighted works constitute a major source of income for both the museum and the artist. One can only sell, rent or reproduce a work of art and it is this latter function which can earn steady income for the artist and the museum.

Who owns the copyright, if any, in reproduction of a work of art? Because a reproduction of a work of art is basically a derivative work, the museum as a reproducer must obtain the consent of the copyright owner to reproduce the work and create a non-infringing derivative work. As in any work, the museum as copyright claimant must add an original contribution not found in the preexisting work.

65.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101 (1982). See generally Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 *J. of Copyright Soc'y* 209 (1983).

66.

The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

17 U.S.C. § 103(a) (1982).

67.

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103(b) (1982).

68. For an interesting argument that restorations of works of art should qualify as derivative works for copyright protection, see Mandel, *Copyrighting Art Restorations*, 28 *J. of Copyright Soc'y*. 273 (1981).

The general *de minimis* standard of originality applies to an art reproduction as to any other work. The author need only add something irreducibly his own, but no more than a trivial variation on the preexisting work. For example, engravings of public domain paintings,⁶⁹ as well as three-dimensional scale-model reproductions have been held copyrightable.⁷⁰ Although there appears to be some discrepancy in how far the courts will go in conferring copyright on art reproductions,⁷¹ the historical tendency has been expansive. For this reason, the museum should always claim copyright in any reproduc-

69. See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) (holding that mezzotint engravings of "old master" paintings, for example, Gainsborough's "Blue Boy" were copyrightable as they were "versions" of the paintings, distinguishable from them, and the mezzotint process involved originality (*i.e.*, skill and judgment) on the part of the engraver. Lithographic reproductions of these mezzotints, therefore, constituted infringement of copyright).

70. See, *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (S.D.N.Y. 1959). The work involved was a small scale reproduction of Rodin's "Hand of God," (which was in the public domain), produced by Alva in arrangement with the Department of Fine Arts of The Carnegie Institute, owner of the Rodin sculpture. The court held that Alva's reproduction was copyrightable as its work "embodies and resulted from its skill and originality in producing an accurate scale of reproduction of the original." *Id.* at 267. The court emphasized the difference in size between the original sculpture and the Alva model, the different treatment of the base of the sculpture and the quality control exercised by the museum's curatorial staff.

71. See, *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976), a case involving plastic replicas of antique iron "Uncle Sam" banks. The court held that the copyright statute's requirement of originality was not met as the variations were merely trivial. It distinguished *Alva* as dealing with the reproduction involving complexity and exactitude not present in this case. The *Batlin* decision was relied upon by the court in *Gracen v. Bradford Exch.* 698 F.2d 300 (7th Cir. 1983), deciding *inter alia* the copyrightability of paintings and drawings made of Wizard of Oz characters and based on stills from the movie. The court held that the plaintiff's work was not an original derivative work. ". . . a derivative work must be substantially different from the underlying work to be copyrightable." 698 F.2d at 305. As the court pointed out, the concept of originality serves an important legal function to prevent overlapping claims.

Suppose Artist A produces a reproduction of the *Mona Lisa*, a painting in the public domain, which differs slightly from the original. B also make a reproduction of the *Mona Lisa*. A, who has copyrighted his derivative work, sues B for infringement. B's defense is that he was copying the original, not A's reproduction. But if the difference between the original and A's reproduction is slight, the difference between A's and B's reproductions will also be slight, so that if B had access to A's reproductions, the trier of fact will be hard-pressed to decide whether B was copying A or copying the *Mona Lisa* itself. 698 F.2d at 304.

Cf. Eden Toys v. Florelee Undergarment Co., 697 F.2d 27 (2d Cir. 1982), holding that gift wrap design based on sketches of Paddington Bear was copyrightable because the "cleaner look" of the gift wrap design satisfied the minimal requirements for originality under the Copyright Act.

The courts have clearly been inconsistent in their treatment of art reproductions. This inconsistency will continue into the foreseeable future because of the basic dilemma between protecting "sweat of the brow" but at the same time requiring *de minimis* level of creativity. The extent of the variations in *Alva* and *Batlin* was similar, but the expertise and the amount of effort expended by the reproducer was strikingly different. Once again, the court has smuggled in concepts of artistic quality despite the stated goals of *Bleistein* to the contrary.

tion that appears in a poster, postcard, advertisement, brochure, or three-dimensional model.⁷²

Museums make art reproductions of both public domain works and works which are protected by copyright. In each instance the museum has created a derivative work and can protect only what it has added either to the public domain work or to the copyrighted work. This can result in a rather thin copyright, depending upon how much the museum has added. As for the public domain work, anyone can make his own reproduction of it. For example, if the museum reproduces El Greco's "View of Toledo," a work in the public domain, anyone else could reproduce the same painting. What he could not do is copy the museum's reproduction of that work, because this would necessarily entail copying the original aspects of authorship contributed by the museum.⁷³ To quote Justice Holmes, "Others are free to copy the original. They are not free to copy the copy."⁷⁴

Suppose the museum has reproduced a work currently protected by copyright. The same principles of originality apply here, except that the museum can claim copyright only in those original aspects added by the reproduction. Of course, the museum, to avoid being an infringer, must obtain consent of the copyright owner to make the reproduction.⁷⁵ Note that even after the museum has created the reproduction, the artist could allow others to make their own reproductions, although no one could copy the museum's reproduction

72. This reproduction could take the form of a photograph. A close question, however, is whether a photograph of a painting displays sufficient originality to qualify for copyright. According to Nimmer, a photograph of a two-dimensional object, for example, a painting or drawing, may lack this quantum of originality; however, such a work may claim copyright as a reproduction of a work of art. 1 Nimmer, § 2.08[E] at 2-111. Alternatively, a photograph of a sculpture or other three-dimensional object, which involves the photographer's judgment in selecting camera angles and lighting, is a clearer case of sufficient original authorship. For cases involving originality in photographs, see *Gross v. Seligman*, 21 F. 930 (2d Cir. 1914) (where photographer, after sale of photograph and copyright, took later picture with same model and pose but with addition of a smile on her mouth and a cherry in her teeth, held an infringement); and the related case of *Franklin Mint Corp. v. Nat'l Wildlife Art Exch.*, 575 F.2d 62 (3d Cir. 1978) (holding that later painting by artist of same subject not infringement, as similarity reflected the common theme).

73. If, for example, the museum produced a postcard of one of its paintings which was in the public domain and copyrighted the card, a jigsaw puzzle manufacturer could not base a puzzle on the postcard, even if the original painting could be copied. See, e.g., *Habersham Plantation Corp. v. Country Concepts*, 209 U.S.P.Q. 711 (N.D. Ga. 1980), granting injunction for alleged copyright infringement of photographs of furniture in a catalogue. The furniture itself could be copied, the photographs could not. This case illustrates that copying in a different medium (Country Concepts' catalogue contained lined drawings based on Habersham's photographs) also constitutes infringement. See *infra* note 172 and accompanying text.

74. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. at 249.

75. See *infra* notes 171-73 and accompanying text.

without its consent. As a corollary, when the underlying work falls into the public domain, the whole world may copy it. The museum's copyright in its reproduction, however, will not be affected by the underlying work falling into the public domain, and its copyright in its derivative work will continue for the full duration.⁷⁶

4. PUBLICATION

4.1 *Importance of Publication*

For works created after January 1, 1978, federal copyright protection begins on creation, when an author fixes his work in a tangible medium of expression.⁷⁷ Works created before this critical date present a more complicated situation. For these works the duration of the copyright is still measured by the 1909 Act,⁷⁸ certain terms of which are essential for a thorough grasp of copyright law.

Unlike the current Act, the 1909 Act measured federal protection not on creation but on publication.⁷⁹ The event of publication constituted the dividing line between state common law protection and federal copyright. Publication also determined how long a particular work could endure. As long as the work was not published, it could theoretically endure forever under state common law copyright.⁸⁰

The 1976 Act has greatly reduced the fundamental importance of publication by extending federal protection from the moment of creation.⁸¹ But publication and the provisions of the 1909 Act continue to

76. See *supra* notes 64-76 and accompanying text.

77.

A work is "created when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

17 U.S.C. § 101 (1982).

78. Act of March 4, 1909, Ch. 320, 35 Stat. 1075.

79. 17 U.S.C. § 10 (1909) (Superseded 1976).

80. Under the theory of state common-law copyright, unpublished works, for example, the manuscript of a book, came under perpetual copyright protection. See generally Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. Rev. 1070 (1977).

81. Section 301 of the 1976 Copyright Act provided a major change from the earlier law.

Instead of a dual system of "common law copyright" for unpublished works and statutory copyright for published works . . . the bill adopts a single system of Federal statutory copyright from creation. . . . By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship.

H.R. Report at 129. For major arguments in favor of a single system, see H.R. Report at 129-30.

be important.⁸² This is because the new Act does not protect any work which has gone into the public domain before January 1, 1978.⁸³ Before the effective date of the new Act, an author had to affix proper notice to all copies of the work when published. Failure to affix proper notice would inject the work into the public domain.⁸⁴ This aspect of copyright has proven to be an insidious trap for the unwary, and many an author has dedicated his work to the public domain without wishing to do so.⁸⁵ For example, if an artist had distributed copies of his painting by photograph to the public without proper copyright notice before January 1, 1978, the work would enter the public domain forever and nothing could be done to revive the work to copyright status once it had entered the public domain. Thus, the museum, in acquiring the copyright to a work created before January 1, 1978, must be concerned about its publication history in order to determine if the copyright is valid. Alternatively, a museum may be interested in using a particular work, as for example, to reproduce it as a postcard or in a poster. If the artist has published his work without proper notice, the museum as well as the public can make use of the work any way it wishes.

What constitutes publication?⁸⁶ Paradoxically, this enormously important concept is not defined under the 1909 Act. Publication doctrine has developed rather inconsistently through case law.⁸⁷ The 1976 Act has attempted to codify this decisional law, defining publication as:

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership or rental, lease, or lending. The

82. For example, copyright notice must include the year of first publication (§ 402(b)(2)); the term of copyright for anonymous and pseudonymous works and works made for hire is measured from the year of first publication (§ 302(c)); registration in the Copyright Office must occur within five years of first publication in order for the registration certificate to constitute *prima facie* evidence of the validity of the copyright (§ 410(c)). For a comprehensive listing of the instances where publication continues to be important, see 1 Nimmer, § 4.01[A] and Latman at 143-44.

83.

This Act . . . does not provide copyright protection for any work that goes into the public domain before January 1, 1978

17 U.S.C. Note prec. § 101 (1982).

84. See, e.g., *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm'n of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970) (maquette of Picasso sculpture displayed to public without copyright notice affixed resulted in loss of protection for the sculpture.)

85. For example, the failure of the artist Robert Indiana to copyright his widely adapted "Love." *The Visual Artist and Law*, (Rev. Ed. 1974).

86. Note that the term "publication" in copyright law is a legal one, as distinct from the every day usage of the word.

87. See discussion in 1 Nimmer, § 4.04, and Strauss, *Protection of Unpublished Works*, in 1 *Studies on Copyright* 189 (Arthur Fisher Mem. Ed. 1963).

offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.⁸⁸

The above definition does not involve any question of subjective intent on the artist's part. Thus, publication may occur even if the copyright owner does not realize as matter of law that the acts he is committing or consenting to constitute publication. In sum, as long as the copyright owner voluntarily sells, leases, loans or gives away the original or tangible copies of the work to the general public, publication occurs. Further, even if a sale or other disposition of the work has not taken place, publication will occur if an authorized offer is made to dispose of the work in any manner.⁸⁹

4.2 *Publication in Commercial Art Galleries*

Questions of publication often occur in the art gallery context. Suppose the artist in our example placed the painting completed in 1970 in a gallery for sale that year. Typically, the artist may not have affixed proper copyright notice to the painting.⁹⁰ If the gallery reproduced the work for sale in an advertising brochure, publication would have occurred. Here, because neither the gallery nor the artist affixed proper notice, the work would forever be placed in the public domain. Nothing could revive its status as a copyrighted work.

But what of a sale of that painting to a member of the general public without its having been reproduced? This presents a difficult question in the law of publication, both under the 1909 and the 1976 Acts: whether a sale of a painting in its original form to a member of the general public is a copy for purposes of publication.⁹¹ This should

88. 17 U.S.C. § 101 (1982).

89. See 1 Nimmer, § 4.04 (4-19) and cases cited therein.

90. See *infra* note 122.

91. Arguably it is. Even though the 1976 Act defines publication as the "distribution of *copies* . . . of the work to the public by sale or other transfer of ownership . . .," in other words, uses the plural of "copy," implying more than one material embodiment, prior case law has found publication by the sale or distribution of a single copy. See, e.g., *Pierce & Business Mfg. Co. v. Werckmeister*, 72 Fed. 54 (1st Cir. 1896); *Burke v. Nat'l Broadcasting Co.*, 598 F.2d 688 (1st Cir. 1979).

The term "copy" is another instance of copyright language differing from everyday use. Most would infer from "copy" than an original work must preexist the creation of the copy. However, § 101 of the 1976 Copyright Act defines copies as including the material object in which the work is *first* fixed (emphasis added). Rep. Kastenmeir, who chaired the House Committee, which reported out the bill, noted the problem of the meaning of publication in the case of a work of art, such as a painting, which exists in only one copy. He stated on the floor of the House,

It is not the committee's intention that such a work would be regarded as "published" . . . when the single existing copy is sold or offered for sale in the traditional way—for

be compared with a sale of a painting by the artist out of his studio without offering the painting to the general public. Here, publication has clearly not occurred.

4.3 *Publication by Non-Commercial Display of Works of Art*

Another problem of publication under the 1909 Act concerns the display of a work of art without an accompanying offer to sell.⁹² Does such a display constitute a publication sufficient to divest common law copyright? The law is not entirely clear on this issue, but indicates that publication depends on the circumstances of the display. Generally, such a display or exhibit did not constitute a publication if the public were admitted to view the work of art with the understanding, express or implied, that no copying would take place and that these restrictions were enforced by the museum.⁹³

In sum, the above examples show how important it is for anyone acquiring a work of art to determine the circumstances relating to the publication of a work created before 1978. Often this is impossible to do without the proper records, particularly when a work has been resold several times. Nevertheless, the museum should take pains to unearth publication history before acquiring copyright to a work or it may be unpleasantly surprised to find that the work has been injected into the public domain. To repeat, the current Act will not revive a work that has gone into the public domain by acts committed before 1978.⁹⁴

example, through an art dealer, gallery, or auction house. On the other hand, where the work has been made for reproduction in multiple copies—as in the case of fine prints such as lithographs—or where multiple reproductions of the prototype work are offered for purchase by the public—as in the case of castings from a statue or reproductions made from a photograph of a painting—publication would take place at the point when reproduced copies are publicly distributed or when, even if only one copy exists at that point, reproductions are offered for purchase by multiple members of the public.

122 Cong. Rec. H.10, 874-75 (daily ed. Sept. 22, 1976).

92. See generally Jonakait, "Do Art Exhibitions Destroy Common-Law Copyright in Works of Art?" 19 Copyright L. Symp. (ASCAP) 81 (1971).

93. The leading case for the proposition that where circumstances of an exhibition indicated that care was taken to deter copying, publication did not take place is *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907). See also, *Carns v. Keefe Bros.*, 242 Fed. 745 (D. Mont. 1917) (holding that statue of elk was displayed in unrestricted circumstances which amounted to publication, in spite of putative copyright notice); *Morton v. Raphael*, 334 Ill. App. 399, 79 N.E.2d 522 (1948) (holding that murals on walls of hotel room were published when they could be seen by anyone who visited the hotel); and *Scherr v. Universal Match Corp.*, 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd* on other grounds, 417 F.2d 497 (2d Cir. 1969) (statute published when displayed without restriction as to either persons or on the copying or photographing of the statue).

94. See, e.g., *Lynn Goldsmith v. Peter Max*, 213 U.S.P.Q. 1008 (S.D.N.Y. 1981) (holding that photograph of Mick Jagger used in later collage by defendant artist had been injected into the public domain prior to 1978, and therefore not entitled to protection under the 1976 Act).

4.4 *Continuing Importance of Publication*

Although the current Copyright Act has greatly reduced the importance of publication, this event is still of great significance in the law of copyright for a number of reasons. First, the Copyright Act specifically requires notice on all published copies of the work and the notice confers certain procedural and substantive rights under the Copyright Act.⁹⁵ For example, the registration certificate can constitute *prima facie* evidence of the validity of the copyright if the work is registered within five years of the first publication.⁹⁶ In addition, statutory damages and attorney's fees are available for published works if registration is effected within three months after first publication.⁹⁷

Thus, publication and notice formalities continue to be of importance under the current Copyright Act. Even though it is much more difficult to inject a work into the public domain, the museum should ensure that notice is affixed to all works on which it owns a copyright interest, particularly on those published. In addition, the museum should promptly register all works in which it has an ownership interest.⁹⁸

4.5 *Forfeiture of Copyright Under the Current Act*

How then can copyright be forfeited under the current Act for works created after January 1, 1978? It is difficult, but possible, to forfeit copyright.⁹⁹ One can inject a work into the public domain if notice is omitted from a substantial number of copies¹⁰⁰ and if regis-

95.

Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

17 U.S.C. § 401(a) (1982).

96.

In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.

17 U.S.C. § 410(c) (1982).

97. 17 U.S.C. § 412 (1982).

98. See *infra* notes 103-15 and accompanying text.

99. See generally Levine & Squires, Notice, Deposit and Registration: The Importance of Being Formal, 24 U.C.L.A. L. Rev. 1232 (1977) [hereinafter cited as Levine & Squires].

100.

The omission of the copyright notice . . . from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

tration of the work is not made within five years of the publication. In addition to registration, a reasonable effort to add notice to the copies is required to save the copyright on a work.¹⁰¹

To illustrate the above principles, let us return to our introductory example. Suppose the museum decides to purchase the photo-realist painting finished in 1979 and its copyright. Assume that the artist consigned the painting to a gallery and gave the gallery the right to offer the painting for sale to the public as the gallery saw fit. In so doing, the gallery produced a brochure with a photograph of the painting and disseminated it to the public without placing notice of copyright anywhere on the brochure. Shortly thereafter, the museum acquired the painting with its copyright. Here to avoid injecting the work into the public domain, the museum should promptly (certainly no more than five years after the publication) register the claim to copyright and make a reasonable effort to affix notice to copies of the brochure that could yet be distributed to the public.

As the example illustrates, to avoid unnecessary difficulties the museum should affix notice to all works it owns and promptly register them. It should do so in a mechanical way and should establish a formal administrative procedure to accomplish this goal. It should register not only works of art, but any work that the museum pro-

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public;

17 U.S.C. § 405(a)(1) (1982).

101.

[R]egistration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered;

17 U.S.C. § 405(a)(2) (1982).

Thus, if notice is omitted from more than a "relatively small number" of copies . . . , copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within five years.

H.R. Report at 147.

See *Florists' Transworld Delivery Ass'n v. Reliable Glassware*, 213 U.S.P.Q. 808 (N.D. Ill. 1981) (denying defendant's motion for summary judgment and set for trial on question of reasonable effort where plaintiff, upon discovering that 1,200,000 vases packed for shipment lacked notice, mailed labels with notice to each flower shop with instructions to affix label to each vase).

It is open to debate whether deliberate omission of notice irrevocably injects the work into the public domain or may be rectified by later reasonable effort. See conflicting decisions in *O'Neill Developments v. Galen Kilbur, Inc.*, 524 F. Supp. 710 (N.D. Ga. 1981) (holding that deliberate omission may be cured); and *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305 (S.D.N.Y. 1982) (holding only unintentional omissions qualify under § 405(a)(2)). See also discussion in 2 *Nimmer*, § 7.13[B](3) and Patton and Hogan, *The Copyright Notice Requirement—Deliberate Omission of Notice*, 5 *Comm/Ent L. J.* 225 (1982-83).

duces, such as brochures, catalogues, or audio-visual programs. Unfortunately, it appears that not many museums have instituted clear administrative procedures for copyright matters.¹⁰²

5. FORMALITIES

5.1 *Registration*

Registration of a claim to copyright is permissive, confers no ownership right, and has no durational consequence.¹⁰³ But registration does confer valuable benefits,¹⁰⁴ is relatively inexpensive,¹⁰⁵ and is easy to execute. Accordingly, the museum should systematically and promptly register all significant works in which it has a copyright interest.¹⁰⁶ Moreover, the ease and simplicity of registration does not necessitate the use of an attorney; administrative personnel can handle registration formalities. The Copyright Office has issued short and self-explanatory registration forms specified for the type of work being registered.¹⁰⁷ One or two deposit copies must accompany the registra-

102. The lack of thorough copyright procedures is indicated in Weber-Karlitz, *Survey; Museums, Artists & Copyright*, 2 *Cardozo Arts & Eng. L.J.* 121 (1983), particularly the summary of museum responses.

103.

At anytime during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of section 405(a), such registration is not a condition of copyright protection.

17 U.S.C. § 408 (1982).

104. See, e.g., *supra* notes 111-15 and accompanying text.

105. A \$10 fee is charged for each registration. 37 C.F.R. § 202.3(c)(2) (1982). See Copyright Office Circular R4, *Copyright Fees Effective January 1, 1978*. For museums and others who might utilize registration frequently, the Copyright Office allows the maintenance of a Deposit Account, obviating the need to send a separate check with each registration. See Copyright Office Circular R5, *How to Open and Maintain a Deposit Account in The Copyright Office*.

106. According to the Copyright Office regulations, an application for copyright may be submitted by "any author or other copyright claimant of a work, or the owner of any exclusive right in a work . . ." 37 C.F.R. § 202.3(c)(1) (1982). Even if a museum owns only the right of reproduction to a work, rather than the entire copyright (see *infra* note 222 and accompanying text), the museum, if the author has not already done so, can register the copyright. If the museum is unclear whether or not a particular work was registered, it is possible to initiate a copyright investigation. For a fee, the Copyright Office will make a search of its records. See Copyright Office Circular R22, *How to Investigate The Copyright Status of a Work*. For the importance of recordation of assignments and licenses, see *infra* notes 230-39 and accompanying text.

107. Of particular interest to a museum would be: Form VA, for a work of the visual arts (for paintings, sculpture, prints, including derivative works such as postcards and photographic slides); Form TX, for non-dramatic literary works (for example, exhibitions, catalogue, quarterly bulletin); and Form SR for sound recordings (e.g., audio-visual sound track for gallery tour).

tion form¹⁰⁸ and copyright registration is effective once the application, fee and deposit copy are received.¹⁰⁹ The Office examines the application and deposit copies to see that they are in proper form; it neither evaluates the worth of the claim nor compares the claim with earlier works.¹¹⁰

What will the museum obtain in return for the ten dollar registration fee and the time spent on filling out the forms? The benefits are many. Registration is an essential step in preventing forfeiture of copyright for a work published without notice.¹¹¹ Second, registration is required before bringing an infringement suit.¹¹² Third, registration

108.

[T]he owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication—

- (1) two complete copies of the best edition; or
- (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords . . .

17 U.S.C. § 405(a) (1982).

Unlike the simplicity of sending two copies of an exhibition catalogue, it would clearly be impractical for an artist or a museum to send a copy of a work of art. By statutory authority (17 U.S.C. § 408 (1982)), the Copyright Office has provided that in the case of pictorial or graphic or sculptured works of art, identifying material may be deposited instead of a copy. 37 C.F.R. § 202.20(c)(2)(iv), (ix) (1982). See also Copyright Office Circular R40b, Deposit Requirements for Registration of Claims to Copyright in Visual Arts Material. Copyright Office Circular R40a, Specifications for Visual Arts Identifying Material, sets out the requirements for such material, e.g., photographic transparencies of a particular size, reproducing actual colors used, if the work is a pictorial or graphic work. Note that the Copyright Office regulations exempt picture postcards from deposit. 37 C.F.R. § 202.19(c)(2) (1982). The Copyright Office has published lists of criteria to be applied in determining the best edition of each of several types of material, e.g., for printed textual matter, hard cover rather than soft cover. See Copyright Office Circular R76, Best Edition of Published Copyrighted Works for The Collections of The Library of Congress.

109.

The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

17 U.S.C. § 410(d) (1982).

110. See Kaplan, *The Registration of Copyright*, in 17 *Studies on Copyright* 325 (Arthur Fisher Mem. Ed. 1963).

111.

The omission of the copyright notice . . . does not invalidate the copyright in a work if . . . (2) registration for the work has been made before or is made within five years after the publication without notice. . . ."

17 U.S.C. § 405(a) (1982).

112.

. . . no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. . . .

17 U.S.C. § 411(a) (1982).

within five years of publication establishes prima facie proof of copyright and validity.¹¹³ Fourth, registration within three months of publication may allow the copyright owner to recover certain monetary remedies in an action for infringement.¹¹⁴ Finally, registration confers constructive notice of the contents of certain filed documents.¹¹⁵ From the above, it is clear that prompt registration is well worth the small amount of time and expense required.

Applying these principles to our introductory example, there are many opportunities for filing claims for registration in the Copyright Office. The museum should consider filing for the 1970 and 1979 paintings, the photographs, the exhibition catalogue, the posters and the audio-visual program, to name a few. The museum may or may not wish to register all of these works, but if proper administrative procedures are in place, it could do so promptly and efficiently.

5.2 Notice and Methods of Affixation

To prevent the possibility of a work involuntarily entering the public domain, the museum should affix copyright notice to all published copies.¹¹⁶ If notice is defective or incomplete, it may constitute

113.

In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.

17 U.S.C. § 410(c) (1982).

114.

In any action under this title . . . no award of statutory damages or of attorney's fees . . . shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

17 U.S.C. § 412 (1982).

115.

Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if . . . (2) registration has been made for the work.

17 U.S.C. § 205(c) (1982).

116. Although recognizing the burden on copyright owners to place notice on their works, the drafters of the 1976 Act determined that notice serves several principal functions: (1) it places in the public domain, material no one has an interest in copyrighting, (2) it informs the public whether a particular work has been copyrighted, (3) it identifies the copyright owner, and (4) it gives the date of publication. H.R. Report at 143. See generally Roth, *Is Notice Necessary?: An Analysis of The Notice Provisions of The Copyright Law Revision*, 27 *Copyright L. Symp. (ASCAP)* 245 (1982); Levine & Squires, *supra* note 99, at 1236-1253; Note, *Copyright Notice Placement for The Visual Artist*, 7 *Colum. J. of Art and L.* 281 (1983); and Crawford, *The New Copyright Law: Help in Half-Measures*, 65 *Art in America* (Sept.-Oct. 1977) at 11, 12, 15 (criticizing requirement of notice).

no notice at all.¹¹⁷ In addition to proper notice, the other preventive measure to avoid forfeiture of copyright is prompt registration of the work.¹¹⁸ Consequently, museum personnel should understand the proper methods to affix notice and develop procedures for the systematic registration of works.

Notice of copyright consists of three elements: ©, or copyr., or copyright; the name of the owner of the copyright; and the date of first publication.¹¹⁹ A typical notice may look like this: © John Doe, 1983. As for position of notice, the current Act provides that notice shall be affixed in a manner and location to afford reasonable notice of the claim to copyright.¹²⁰ Of particular interest to the museum, the Register of Copyrights has issued a regulation indicating the position and manner of notice appropriate for various categories of works such as pictorial, graphic and sculptural works, audio-visual works and literary works.¹²¹ The museum should have a copy of this regulation on hand if any questions of proper notice should arise.

Museums and artists have traditionally omitted notice from works of art, perhaps because they were unaware of the requirement, or

117. Care should be taken by anyone affixing notice to see that it is in proper form. Certain errors in fixation of notice are considered by the Copyright Act to constitute a complete omission of notice and therefor subject the copyright owner to forfeiture. For example, § 406(b) "The year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice." Similarly, under § 406(c), omission of name or date from publicly distributed copies is also considered omission of notice with the same possible result of forfeiture.

The second variety of incorrect notice does not subject the copyright owner to forfeiture, but can be used as a defense to an infringement action if the alleged infringer shows that he was misled by the incorrect notice. See § 405(b), § 406(a) and § 406(b). For a discussion of infringement see *infra* notes 265-79 and accompanying text.

118. See *supra* note 111 and accompanying text.

119.

The notice appearing on the copies shall consist of the following three elements:

- (1) the symbol © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr.," and
- (2) the year of first publication of the work . . . ; and
- (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

17 U.S.C. § 401(b) (1982).

120. 17 U.S.C. § 401(c) (1982).

121. 37 C.F.R. § 201.20 (1982). It should be noted that these regulations are not to be interpreted in a limiting way:

A notice placed or affixed in accordance with the regulations would clearly meet the requirements, but, since the Register's specifications are not to "be considered exhaustive," a notice placed or affixed in some other way might also comply with the law if it were found to "give reasonable notice" of the copyright claim."

H.R. Report at 144.

perhaps they thought that copyright notice would deface the painting or sculpture.¹²² These beliefs are not justified; notice is easy to apply and need not affect the visual image of the work. For two-dimensional works, notice must be durably affixed, directly or by label, to the front or back of the work or to other material to which the copies are permanently housed.¹²³ The same applies to three-dimensional works except that notice must be placed on a visible portion of the work.¹²⁴ It is interesting to note that the year date may be omitted on pictorial and graphic works that are reproduced in useful articles such as postcards, stationery, jewelry, dolls and toys.¹²⁵

Of importance to the museum is the appropriate placement of notice on material with repetitive designs such as wrapping or writing paper. This issue was unclear under the 1909 Act.

For example, was one required to place notice on each design or could notice be placed on the margin or selvage of the fabric?¹²⁶ The current Act has clarified this problem, and consistent with the policy of flexibility,¹²⁷ the Register's regulations allow notice on the repro-

122. A 1973 survey revealed that of 206 artists questioned, 71.8% did not place copyright notice on their works. Many were simply unaware of possible copyright protection, as were the gallery owners to whom they looked for information concerning legal rights. Other factors impeding copyright use were fears that notice would deface the work of art or commercialize it, and that copyright would deter future buyers. Sheehan, *Why Don't Fine Artists Use Statutory Copyright*, 22 Bull. Copyright Soc'y 242 (1975). See also Note, *Statutory Copyright—A Valuable Right for The Visual Artist*, 7 Ga. L. Rev. 134 (1972).

123. 37 C.F.R. § 201.20(i)(1) (1982).

124. 37 C.F.R. § 201.20(i)(2), (3) (1982).

125.

The year date may be omitted where a pictorial, graphic, or sculptural work, with and accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles;

17 U.S.C. § 401(b)(2) (1982).

126. See, e.g., *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) (where copyright notice placed on selvage of fabric was removed from view by dress manufacturers, court held that in the case of a deliberate copyist, the absence of notice must be proven by the copyist who must show that the notice could have been embodied in the design without impairing its market value). Cf. *Dejonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33 (1914) (holding that where sheet of gift wrapping paper contained twelve squares of design, the copyright notice should have been affixed to each square).

127. Unlike the prior act, under which insufficient and/or unintended omission of notice could prove fatal for protection, the 1976 Act is much more flexible. The drafters recognized that there were other inducements for notice than outright forfeiture.

The provisions [effect of omission of copyright] make clear that the notice requirements . . . are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. . . . Thus, if notice is omitted from more than a "relatively small number" of copies . . . , copyright is not lost

duction itself, on the margin or selvage, on tags, or labels or containers housing the material.¹²⁸

6. DURATION

6.1 Works Created After 1978

The duration of a copyright is complicated because one must take into account both the 1909 Act and the current Act.¹²⁹ We shall first discuss duration under the current Act which bases the term of copyright on when the work was created, *i.e.*, fixed in a tangible medium of expression. For works created after 1978, the basic term of copyright begins on creation and lasts for the life of the author plus fifty years.¹³⁰ As a result, how long a copyright lasts will depend on the longevity of the author, rather than on an arbitrary amount of time.¹³¹ To illustrate, suppose that an artist finishes paintings in 1978,

immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within five years.

H.R. Report at 146-47. It is for court interpretation to determine what constitutes a "relatively small number of copies." See, e.g., *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.* 684 F.2d 821 (11th Cir. 1982) (holding that the sale of 400 out of 40,000 dolls without copyright notice constituted the "relatively few" indicated under § 405(a)(1) of the 1976 Act and that the inadvertent omission of the co-author's name did not render the registration invalid.) But cf. *James DeWitt King v. Winston A. Burnette*, Copyright L. Rep. (CCH), § 25,489 (D.C. 1982) (holding that artist's sculpture, though registered for copyright, entered the public domain because 300 to 500 of the 1,335 replicas which he had authorized to be sold and distributed were published without copyright notice and there was no showing that he had made a reasonable effort to add notice to the distributed copies.) Note in this case that the artist had registered the work prior to distribution. The Copyright Act is silent on this situation.

128. 37 C.F.R. § 201.20(i)(4) (1982).

129. See generally Cohen, *Duration*, 24 U.C.L.A. L. Rev. 1180 (1977); Rothenberg, *Old Copyrights, Old Copyright Lawyers and the New Copyright Act*, 29 J. of Copyright Soc'y 395 (1982).

130.

Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.

17 U.S.C. § 302(a) (1982).

131. There are many instances where the date of the author's death would be unknown. Section 302(d) provides that any person having an interest in a copyright may record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author was still alive on a particular date. The Register of Copyrights is then required to maintain current obituary records.

Section 302(e) provides a method of establishing a presumption as to an author's death. After a specified period of time, a person may obtain from the Copyright Office a certified statement that their records do not indicate that the author is living or died less than fifty years before. The person is then entitled to a presumption that the author has been dead more than fifty years and reliance in good faith on this presumption is a complete defense to an action for infringement of copyright.

1979 and 1980, dying in 1980. The duration of copyright for these works will last until 2030, fifty years after the death of the author. Thus, for individually created works, the Copyright Act establishes a basic term of life plus fifty years and this will account for all works which are not anonymous, pseudonymous, or works made for hire.¹³²

This latter category, works made for hire, is economically significant because many works are created in the course of one's employment.¹³³ For these works, along with anonymous and pseudonymous works, a different duration applies. Here, the term is seventy-five years after publication or one hundred years after creation, whichever is shorter.¹³⁴ For example, an exhibition catalogue prepared by a museum staff member as an employment duty in 1980 would have a term of copyright expiring in 2080; but if the work were published in 2000, the term would last until 2075. This would constitute the basic term of copyright no matter how long the life of the museum staff member.

Considering events which will take place fifty or more years in the future gives the question of duration of copyright under the current Act an air of unreality. But duration is of more immediate concern for works created before 1978.

6.2 *Works Created and Published Before 1978*

Under the 1909 Act, the term of copyright begins on the publication of a work. The 1909 Act set up a system of two copyright terms, a first

132.

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author . . .

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name . . .

A "work for hire" is

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations; maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instruction text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. § 101 (1982).

133. See *infra* notes 240-56 and accompanying text.

134. 17 U.S.C. § 302(c) (1982).

term of twenty-eight years and a renewal term of twenty-eight years, for a total of fifty-six years. The second or renewal term was not automatically granted, and a copyright owner was required to file a renewal claim in the Copyright Office. Failure to do so during the twenty-seventh and twenty-eighth years would cause the work to enter the public domain.¹³⁵ These renewal provisions still apply to all works copyrighted under the 1909 Act in their first term of copyright.¹³⁶ For example, the copyright of the photo-realist painting published in 1970 must be renewed in 1997. Although the current Act has extended the second or renewal term from twenty-eight to forty-seven years,¹³⁷ the second term must be timely and properly claimed.¹³⁸ Because of these renewal provisions, the museum administrator should take an inventory of all works whose first copyright term of twenty-eight years will soon expire.¹³⁹ Following this inventory, a renewal registration should be filed in the Copyright Office for the museum to benefit from another forty-seven years of copyright protection. Even if there is some doubt about ownership of the renewal term, the museum should file a renewal registration as a precaution for the copyright to continue to be protected.

The above discussion involves works in their first term of copyright when the new Act became effective. But what of works that were already in their second term as of 1978? Here, the current Copyright Act has extended the renewal term another nineteen years to comprise

135. 17 U.S.C. § 24 (1909) (superseded 1976).

136.

Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured. . . .

17 U.S.C. § 304(a) (1982).

137. 17 U.S.C. § 304(a) (1982).

138.

. . . in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

17 U.S.C. § 304(a) (1982).

139. The museum should take notice of a special situation which exists for works originally copyrighted between September 19, 1920, and renewed between September 19, 1934 and September 19, 1948. A series of interim bills were enacted by Congress to keep their renewal period alive, in the expectation that a copyright revision act would imminently be passed. The last such interim law maintained renewals through December 31, 1976. See Latman at 89 and H.R. Report at 139-40, for listing of relevant Public Law numbers. The 1976 Act, by § 304(b), increased the renewal term for seventy-five years from the date the copyright was originally secured. Therefore, these copyrights which were extended earlier, are extended again by lesser amounts, but in no case for longer than a total term of seventy-five years. The copyright on works published in 1906 went into the public domain in 1981.

a renewal term of forty-seven years.¹⁴⁰ Nothing need be done to acquire this additional duration. In effect, all works in their first or second term on the effective date of the current Act can now enjoy seventy-five years of copyright protection.

6.3 *Works Created But Not Published Before 1978*

The last durational problem concerns works which were created, but not published before 1978. These works typically include letters, diaries, manuscripts, and works of art in a museum collection which were never sold, exhibited, or reproduced for public distribution. The copyright for these works will endure for the life of the author plus fifty years, but protection will not terminate, regardless of the death date of the author, until 2002. If these unpublished works are published before 2002, protection under copyright will last an extra twenty-five years until 2027.¹⁴¹ Although 2002 seems many years off, the museum should consider systematically publishing such works to benefit from the additional duration. For example, black and white photographs of these works placed in a publicly distributed bulletin would serve this purpose.

7. RENEWAL AND TERMINATION OF TRANSFERS

7.1 *Renewal*

An enormous number of copyrighted works were published before 1978, many of which are now in their first or second term of copyright. For works in their first term, the acquisition of the renewal term is an important consideration and is a subject fraught with traps for the unwary.

One may erroneously believe that the formalities of renewal registration no longer apply after 1978. This misunderstanding may have

140.

The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal is registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

17 U.S.C. § 304(b) (1982).

141.

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

17 U.S.C. § 303 (1982).

the effect of inadvertently ejecting a work into the public domain. A renewal registration must be filed in the Copyright Office to claim the renewal term.¹⁴² If a renewal registration is not timely filed, copyright is permanently lost.¹⁴³ The registration for renewal must be filed within the year preceding the termination of the first term of copyright.¹⁴⁴

Who owns the second renewal term is an area of potential confusion. Unless specifically contracted for, the second renewal term reverts to the author.¹⁴⁵ Thus, if the museum is interested in the second renewal term, it should make this a matter of express written contract with the author.

If the author lives until the second renewal term begins, such contractual arrangements are honored by the courts.¹⁴⁶ But, what if the author dies before the second renewal term begins? Here, the Copyright Act sets forth the rights of ownership and despite all previous contractual arrangements, the renewal right automatically goes to the surviving spouse and children, or to as many of them as are living, or as a group, rather than to one who has bought the copyright

142. See Form RE and Copyright Office Circular 15, Renewal of Copyright.

143.

[I]n default of the registration of . . . application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

17 U.S.C. § 304(a) (1982).

The Copyright Office has no discretion to extend the renewal time limits.

37 C.F.R. § 202.17 (1982).

144. 17 U.S.C. § 304(a) (1982). Protection is extended to the end of the calendar year in which the twenty-eighth year ends.

All terms of copyright . . . run to the end of the calendar year in which they would otherwise expire.

17 U.S.C. § 305 (1982). Therefore, if the museum purchased a painting which was copyrighted in May, 1960, the renewal must be filed before December 31, 1988. This avoids the confusion engendered by the 1909 Act which ran the first term from "the date of first publication." 17 U.S.C. § 24 (1909, superceded 1978). The purpose of this change was to make the duration easier to compute. H.R. Report at 142.

145.

[T]he author of such work . . . shall be entitled to a renewal and extension of the copyright . . . for a further term of forty-seven years . . .

17 U.S.C. § 304(a) (1982).

146. See, e.g., *Fred Fisher Music Co. v. M. Witmkark & Sons*, 318 U.S. 643 (1943) (holding that an author (here the composer of "When Irish Eyes Are Smiling") can validly assign his right to renewal of his copyright by an agreement made prior to the expiration of the original copyright term). These are considered questions of contract and controlled by state law. See, e.g., *Dolch v. United California Bank*, 702 F.2d (9th Cir. 1983) (denying federal jurisdiction in case involving claim of invalidity of assignment of renewal rights for lack of consideration).

from the author.¹⁴⁷ The effect of this rule is that a transferee will be deprived of copyright ownership if the author of the work dies before the renewal begins. For example, if the artist of the photo-realist painting has published his work in 1970 and has sold it to the museum along with the copyright, renewal must be claimed in 1997-98. If the artist has transferred both terms of copyright and is still alive in 1998 when the renewal begins, the museum will accede to the second term. If, however, the artist dies before 1998, then the renewal term will revert to the widow or children, or to both.¹⁴⁸

The purpose of this provision is to allow the author's family to benefit from a work which may have become famous at a later time.¹⁴⁹ Thus, the two separate terms of copyright were designed to protect artists and their families who may have signed away valuable rights under economic duress or ignorance. To avoid the reversion of the renewal term, it became common practice for a transferee to seek out the author's wife and children to persuade them to sell their rights if the author died before the vesting of the renewal term.

7.2 *Termination of Transfer*

The renewal provisions only apply to works published before 1978 in their first term of copyright. For works created after 1978, renewal

147.

[T]he widow, widower, or children of the author, if the author be not living . . . shall be entitled to a renewal and extension of the copyright. . . .

17 U.S.C. § 304(a) (1982).

148. If there is only a surviving spouse and no children, she or he will receive the entire termination interest. If there are surviving children or grandchildren as well, then the spouse receives one-half of the artist's interest and the children and grandchildren take one-half interest per stirpes. For example, if the artist and his wife had three children, one child having died leaving two children, these two grandchildren of the artist would share a one-sixth interest in the termination interest. 17 U.S.C. § 304(c)(A), (B) and (C) (1982). In order for the termination to be effected, it must be carried out by persons who are entitled to exercise more than one-half of the author's interest. 17 U.S.C. § 304(c)(1) (1982). Therefore, if there are children and/or grandchildren, the widow must be joined with at least one other person before she can act. These provisions, dealing with renewal in the case of death of the author, are identical to the provisions of the statute relating to termination of transfer in works created after 1978. See 17 U.S.C. § 203 (1982) and *infra* notes 150-66 and accompanying text. See also H.R. Report at 125 and General Guide to the Copyright Act of 1976 (1977) at 6:2, 6:3. For some of the intricacies posed by the language of this section, see *DeSylva v. Ballentine*, 351 U.S. 570 (1956) (holding: (1) that widow and children succeed to the right of renewal as a class, each being entitled to share in the renewal term; and (2) in order to determine whether an illegitimate child came within the term "children," reference must be made to state law). If there is no surviving spouse, child or grandchild, then the right to renewal rests in the author's executors, or in the absence of a will, his or her next of kin. 17 U.S.C. § 304(a) (1982).

149. See generally, Ringer, *Renewal of Copyright*, in 1 *Studies on Copyright* 503 (Arthur Fisher Mem. Ed., 1963).

no longer applies. In its place, serving the same protective function, a termination of transfer is allowed by the current Act. A termination of transfer¹⁵⁰ may be exercised by the author or his heirs between the thirty-fifth and fortieth years after the date of the grant.¹⁵¹ Because this termination right is a special privilege given by the Copyright Act, it cannot be bargained away.¹⁵² The termination right extends to all works except works made for hire.¹⁵³ The other major limitation to termination is that it applies only to grants given by a living author made after December 31, 1977;¹⁵⁴ grants by will are not subject to termination.¹⁵⁵

The major affirmative obligation imposed on the artist and his heirs is that notice of termination must be given in writing, specifying the date of termination within the appropriate five-year period.¹⁵⁶ One must give notice at least two years, but not more than ten years,

150. A transfer is a sale of a copyright interest, for example, an exclusive license for the right of reproduction of a painting might be sold by the artist to a calendar manufacturer.

151.

Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant:
17 U.S.C. § 203(a)(3) (1982).

152.

The provisions of section 203 are based on the premise that . . . the proposed law should substitute for [revisionary provisions] a provision safeguarding authors against unreminerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.

H.R. Report at 124.

153.

In the case of any work other than a work made for hire, the . . . grant of a transfer . . . is subject to termination. . . .

17 U.S.C. § 203(a) (1982).

154.

In the case of any work, other than a work made for hire, the exclusive or non-exclusive grant . . . executed by the author on or after January 1, 1978. . . .

17 U.S.C. § 203(a) (1982).

155.

[T]he . . . grant of a transfer . . . executed by the author . . . otherwise than by will, is subject to termination

17 U.S.C. § 203(a) (1982).

156.

The termination shall be effected by serving an advance notice in writing

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period

17 U.S.C. § 203(a)(4) (1976).

before the termination date.¹⁵⁷ If, for example, the artist transferred copyright ownership for the painting created in 1979 to the museum in 1980, the artist or his heirs may terminate the transfer between 2016 and 2021 by filing the appropriate written notice no less than two, but not more than ten years, before the date of termination. Note that the responsibility for termination is placed upon the artist or his heirs; the museum is not obligated to alert the transferor of his right to terminate. Thus, if the artist or his heirs failed to exercise their termination rights in a timely manner, the museum will benefit from the entire duration of copyright. Involving all copyrighted works except for those made for hire, the termination right will eventually prove to be one of the most economically significant provisions of the current Act.¹⁵⁸

Inasmuch as this discussion refers to events taking place some decades in the future, it may seem like a purely theoretical exercise. Yet such is not the case. Termination of transfer is of immediate concern because it applies to the second renewal term of copyright which has been extended from twenty-eight to forty-seven years.¹⁵⁹ The additional nineteen years of protection are now subject to termination with several qualifications. The right to terminate applies only to transfers made before January 1, 1978.¹⁶⁰ It will not apply to works made for hire¹⁶¹ or grants made by will.¹⁶² It is thus now possible for an author's surviving spouse or children to terminate any transfer of a copyright interest, allowing them to reclaim all or part of the additional nineteen years of the second renewal term.¹⁶³

157.

. . . the notice shall be served not less than two or more than ten years before that date.

17 U.S.C. § 203(a)(4) (1976).

158. For discussions of this highly complex topic, see generally Curtis, *Caveat Emptor in Copyright: A Practical Guide to the Termination of Transfers Under the New Copyright Code*, 25 *Bull. Copyright Soc'y* 19 (1977); Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 *U. Pa. L. Rev.* 947 (1977); and Stein, *Termination of Transfers and Licenses Under the New Copyright Act: Theory Problems for the Copyright Bar*, 24 *U.C.L.A. L. Rev.* 1141 (1977). For focus on the problems arising for the derivative work if the proprietor of the underlying work terminates the transfer, see Ellingson, *The Copyright Exception for Derivative Works and The Scope Of Utilization*, 56 *Ind. L.J.* 1 (1980); Mimms, *Reversion and Derivative Works Under the Copyright Acts of 1909 and 1982*, 25 *N.Y.L. Sch. L. Rev.* 595 (1980).

159. 17 U.S.C. § 304(b) (1982).

160. 17 U.S.C. § 304(c) (1982).

161. *Id.*

162. *Id.*

163.

Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren. . . .

17 U.S.C. § 304(c)(2) (1982).

The mechanics of termination for these works are similar to termination for post-1978 works. Termination may take effect at any time during the five-year period beginning either fifty-six years from the date that copyright in the work was first secured, or January 1, 1978, whichever date is later.¹⁶⁴ The terminating party must give written notice not more than ten years, and not less than two years, before the date of termination is to take effect.¹⁶⁵ Notice procedures must comply with Copyright Office regulations.¹⁶⁶

Because the possibility of termination of copyright always exists, the museum must adjust to economic realities. It should inventory works whose second renewal term is to expire in the near future. For example, works renewed in 1958 in which the museum owns the copyright are subject to termination by the author or his heirs by giving the prescribed written notice in 1986. Such written notice will reclaim the extra nineteen years of protection and unless the museum renegotiates, it will no longer be able to make use of the work. As in the case of post-1978 terminations, there is no affirmative duty for the museum to notify the artist about the termination right. Similarly, the museum will not have to concern itself about termination of grants given by will or works made for hire, which are not subject to termination.

8. EXCLUSIVE RIGHTS

8.1 *In General*

Copyright springs into existence when a work of authorship is created and its ownership vests in an author. We now turn to what it means to own a copyright and what are the practical benefits of that ownership. Generally, a copyright consists of a bundle of rights, known as the exclusive rights. The Copyright Act enumerates five exclusive rights:¹⁶⁷ the reproduction right, the adaptation right, the

164. 17 U.S.C. § 304(c)(3) (1982).

165. 17 U.S.C. § 304(c)(4)(A) (1982).

166. 17 U.S.C. § 304(c)(4)(B) (1982). For regulations promulgated by the Copyright Office, see, 37 C.F.R. § 201.10 (1982).

167.

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

distribution right, the performance right and the display right.¹⁶⁸ Copyright ownership is therefore not absolute: every unauthorized use of copyrighted work is not an infringement of copyright. A use of a copyrighted work is an infringing use if, and only if, it falls within the scope of the enumerated rights.¹⁶⁹

- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1982).

168. The enumerated rights recognized under § 106 do not include the concept of moral rights. An extensive review of moral rights, or *droit moral*, that is, the continuing interest of the artist in his work after sale, is beyond the scope of this article. "Moral rights" is an umbrella term, and is generally said to include, *inter alia*, the right of paternity or authorship, the right of integrity or protection against distortion or mutilation, and the right of honor or reputation. Although widely recognized in civil law countries, moral rights have not been specifically recognized in this country with the exception of California, see *infra* discussion in text. See generally Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 *Harv. L. Rev.* 554 (1940); Merryman, *The Refrigerator of Bernard Buffet*, 27 *Hastings L. Rev.* 1023 (1976); 2 *Nimmer*, § 8.21. Over the years, several bills dealing with moral rights have been introduced in Congress. The most recent is H.R. 1521, *Visual Artists' Moral Rights Amendment* of 1983, introduced by Rep. Barney Frank. This bill would amend the copyright law so that the artist or the artist's representative, independent of the copyright, would have the right to protect his work from distortion, mutilation, or alteration done without his consent. This right would endure for the same period as the copyright, life of the author plus fifty years. Some commentators maintain that libel laws, the expanding concept of the right to privacy and restrictions on unfair competition provide adequate protections. See, e.g., Treece, *American Law Analogues of the Author's Moral Right*, 16 *Am. J. Comp. L.* 487 (1968); Note, *Protection of Artistic Integrity: Gilliam v. American Broadcasting Companies*, 90 *Harv. L. Rev.* 473 (1976); Comment, *Moral Rights for Artists Under the Lanham Act*, 18 *Wm. & Mary L. Rev.* 595 (1977); Comment, *The Morny Python Litigation of Moral Right and The Lanham Act*, 125 *U. Pa. L. Rev.* 611 (1977).

California recently passed the California Art Preservation Act, Cal. Civ. Code § 987 (West Supp. 1981), incorporating the moral rights doctrines of right of privacy and integrity. This act allows an artist who suffers a wrong to his work in California to bring a civil action and request injunctive relief and damages. For review of the act, see Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 *Geo. Wash. L. Rev.* 873 (1981); Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict*, 18 *Cal. W.L. Rev.* 189 (1982); Comment, *The California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.*, 14 *U.C.D. L. Rev.* 975 (1981); Note, *Artworks and American Law: The California Art Preservation Act*, 61 *B.U. L. Rev.* 1201 (1981).

169. For example, the Copyright Act gives a performance right to a literary or dramatic work, but not to a pictorial, graphic or sculptural work. If, for example, the program of modern dance presented during the photo-realist exhibition contained several "tableaux vivants" of copyrighted paintings, these would arguably be performances of the pictorial works and therefore there would be no infringement of the copyright owner's exclusive rights. However, the background projections of changing slide images would constitute a display of these pictorial works and permission of the copyright owner would be necessary.

The museum must accordingly take into account both exclusive rights and their limitations to avoid problems of infringement,¹⁷⁰ while making use of works to their fullest extent.

8.2 *The Reproduction Right*

The right to reproduce the copyrighted work is in some ways the most basic of the exclusive rights. The reproduction right is infringed when an author's work is placed without his consent in a tangible form in a material object.¹⁷¹ It makes no difference that the work is reproduced in a photograph; infringement may occur even though a different medium and dimension are involved.¹⁷² Similarly, one may infringe the reproduction right by making an unauthorized recording of a literary work in book form or a transcript of a musical work on sheet music from a tape recording. For infringement to occur, the copying does not have to be verbatim, as long as it is substantially similar to the copyrighted work.¹⁷³

8.3 *Limitations on the Reproduction Right: Library Photocopying*

The reproduction right is subject to important limitations which may apply to a museum which operates a library or archive open to

170.

Anyone who violates any of the exclusive right of the copyright owner as provided by sections 106 through 118, . . . is an infringer of the copyright.

17 U.S.C. § 501(a) (1982).

171.

[A] copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation.

H.R. Report at 61.

172. See, e.g., *King Features Syndicate v. Fleisher*, 299 Fed. 533 (2d Cir. 1924) (toys based on copyrighted cartoons); *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (sketches based on photograph); *Habersham Plantation Corp. v. Country Concepts*, 209 U.S.P.Q. 711 (N.D. Ga. 1980) (line drawings based on photographs). This same principle is true for infringement of derivative works. See, e.g., *Eden Toys v. Florelee Undergarment Co.*, 697 F.2d 27, 35 (2d Cir. 1982) ("No one may copy another's novel additions in a derivative work, even if the copier employs a medium different from that used by the holder of the derivative copyright." The unauthorized use of photographers' images in paintings has been the subject of some controversy. See Morris, *When Artists Use Photographs: Is It Fair Use, Legitimate Transformation or Rip-Off?*, 80 *Art News* 102 (Jan. 1981).

173.

Wide departures or variations from the copyrighted works would still be an infringement as long as the author's 'expression' rather than merely the author's 'ideas' are taken.

H.R. Report at 61.

For discussion of what constitutes "substantial similarity," see *infra* note 270 and accompanying text.

the general public or researcher in a specialized field of interest.¹⁷⁴ This exception to the reproduction right provides that under certain circumstances, a library open to the public may qualify for the privilege of reproducing and distributing one copy of a work without infringing copyright. The library must make the distribution without any purpose of direct or indirect commercial gain and the reproduction must bear copyright notice.¹⁷⁵ The library can make no more than one copy or phono-record of the work at a time, thus precluding systematic reproduction and distribution activities. Consequently, the museum library could send a photocopy of an article in a journal or a reprint to a researcher without infringing copyright if the above provisions were followed. Significantly, the library's right to reproduce does not extend to musical works, pictorial, graphic, or sculptural works except those appearing as illustrations, or to certain kinds of audio-visual works.¹⁷⁶

The provisions apply to library photocopying for a patron's use of a work. Other provisions relate to the library's own use of a work; the current Act allows the library to reproduce an unpublished work for archival preservation and to reproduce a published work for replacement which has been damaged, lost, stolen, or is deteriorating.¹⁷⁷ The

174. See generally Treece, *Library Photocopying*, 24 U.C.L.A. L. Rev. 1025 (1977); Young, *Copyright and the New Technologies—The Case of Library Photocopying*, 28 Copyright L. Symp. (ASCAP) 51 (1982). Written principally for librarians are: J. Miller, *Applying the New Copyright Law: A Guide for Educators and Librarians* (1979) and Copyright Office Circular R21, *Reproduction of Copyrighted Works by Educators and Librarians*.

175.

[I]t is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if—

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- (3) the reproduction or distribution of the work includes a notice of copyright.

17 U.S.C. § 108(a) (1982).

Section 108(e) requires that the library display warnings of copyright in accordance with the prescribed regulations. The text of the warning appears in 37 C.F.R. § 201.14(b) (1982). Section 108(i) requires that the Register of Copyrights report every five years to Congress concerning this library photocopy. The latest report, *Library Reproduction of Copyrighted Works*, was submitted to Congress in January, 1983. 25 Pat., Trademark & Copyright J. (BNA) 229 (1983).

176. 17 U.S.C. § 108(h) (1982). It would appear that a museum library would be prohibited under this section from copying a full-page reproduction, e.g., a drawing reproduced in a catalogue raisonnee, but it could photocopy a page in which an illustration accompanied explanatory text.

177. 17 U.S.C. § 108(c) (1982).

replacement privilege for published works applies only if the library cannot obtain the work at a fair price after making a reasonable effort.¹⁷⁸

8.4 *The Adaptation Right*

The adaptation right,¹⁷⁹ or the right to make derivative works, is related to the reproduction and performance rights. The adaptation right is infringed when one makes an unauthorized derivative work. Examples include art reproductions, translations, musical arrangements, dramatizations or any other mode by which a preexisting work is recast, transformed or adapted.¹⁸⁰ The standard for infringement, as in any copyright case, is one of substantial similarity.¹⁸¹ Thus, if one were to write a play based on a novel and the play substantially embodied the novel, the copyright owner could bring an action for the infringement of the adaptation and reproduction right. If the play were performed, the performance right, as well as the other two rights, would be infringed. The exclusive rights in many cases thus overlap and the infringement of the adaptation right almost invariably involves infringement of the reproduction right, performance right,¹⁸² or both.

There is one instance where the adaptation right alone is subject to infringement. This may occur when the copyright owner has licensed another to reproduce or perform the copyrighted work, but has not

178.

The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly known trade sources in the United States, and in the normal situation to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

H.R. Report at 75-76.

179. 17 U.S.C. § 106(2) (1982).

180. For discussion of copyrightability of derivative works, see *supra* notes 64-76 and accompanying text.

181. See *infra* note 270.

To be an infringement the 'derivative work' must be 'based upon the copyrighted work' Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form.

H.R. Report at 62.

182.

The exclusive right to prepare derivative works . . . overlaps the exclusive right of reproduction to some extent. It is broader than the right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

H.R. Report at 62.

specifically licensed the right to make derivative works.¹⁸³ For example, a museum may have acquired the right to reproduce a copyrighted painting; but what if the museum reproduces only part of the painting, including it as a full-page detail in an engagement calendar or cookbook?¹⁸⁴ Here, many courts would likely construe the contract narrowly and find the museum to have infringed the adaptation right because it was specifically granted the reproduction right only and no more. Thus, the museum should expressly acquire the adaptation right depending upon the uses it wishes to make of a copyrighted work.

8.5 *The Distribution Right*

The third exclusive right enumerated by the Copyright Act is the distribution right.¹⁸⁵ By the distribution right, the copyright owner has the right to control the first public distribution of the work either by sale, gift, loan, or rental. The distribution right is often infringed along with other exclusive rights, most often the reproduction right. Such would occur if one were to make and sell unauthorized prints of a work of art. Sometimes the infringement of the distribution right may occur alone. This type of infringement arises most commonly in the record and music industry when pirated records or video cassettes acquired from a third party are sold at retail. Although the retail seller may not know that the works were improperly made, they would still be infringing the distribution right by selling the pirated copies.¹⁸⁶ As in all cases of infringement, innocence is no defense.¹⁸⁷

183. The leading case is *Gilliam v. Am. Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976) (holding that American Broadcasting Company, which received a license to show Monty Python films, had infringed the copyright held by that group when they edited them for broadcast).

One who obtains permission to use a copyrighted script in the production of a derivative work, however, may not exceed the specific purpose for which permission was granted Whether intended to allow greater economic exploitation of the work . . . or to ensure that the copyright proprietor retains a veto power over revisions desired for the derivative work, the ability of the copyright holder to control his work remains paramount in our copyright law.

Id. at 20-21. See also *Nat'l Bank of Commerce v. Shaklee*, 503 F. Supp. 533 (W.D. Texas 1980) (holding that licensee infringed copyright of plaintiff, columnist Heloise, by inserting advertisements for their products in her books).

184. Many museums publish calendars from cookbooks, illustrated with works from their collections. See, e.g., *Grove, Museum Cookbooks: For Fun and Profit*, 53 *Museum News* 52 (June 1975). The illustrations are often appropriate details from paintings, to complement the theme of the book, e.g., flowers or food.

185. 17 U.S.C. § 106(3) (1982).

186.

[A]ny resale of an illegally "pirated" phonorecord would be an infringement
H.R. Report at 79.

187. Innocent intent, although relevant to questions of remedy, will not be a defense to actions for statutory copyright infringement. See, e.g., *Buck v. Jewell-LaSalle Realty Co.*, 283

Similarly, the museum could infringe the distribution right if it sold posters, postcards, or sculpture reproduced without authorization from the copyright owner. Infringement would occur even though the objects were bought from a third party and innocently sold without the museum knowing the circumstances of reproduction.¹⁸⁸

8.6 *Limitations on the Distribution Right: The First-Sale Doctrine*

A basic exception to the distribution right is known as the first-sale doctrine. This limitation on the distribution right authorizes the owner of a particular copy or phonorecord, which has been lawfully made, to sell or otherwise dispose of its possession.¹⁸⁹ Thus a museum which owns a work of art may resell it to another as long as it was bought from an individual who had lawful ownership. Of course ownership of the copy of the work does not include ownership of the copyright in the work itself. The first-sale doctrine therefore applies only to the right to resell the work and not to exploit it in any other

U.S. 191, 198 (1930) ("Intention to infringe is not essential under the Act"); *Platt & Munk Co. v. Playmore, Inc.*, 218 F. Supp. 267 (S.D.N.Y. 1962); and *Plymouth Music Co. v. Magnus Organ Corp.*, 456 F. Supp. 676 (S.D.N.Y. 1978).

"[A] plea of innocence in a copyright action may often be easy to claim and difficult to disprove. . . . Copyright would lose much of its value if third parties such as publishers and producers were insulated from liability because of their innocence as to the culpability of the persons who supplied them with the infringing material" (footnotes omitted). 3 Nimmer, § 13.08 at 13-110. Innocent intent is a defense to charges of criminal infringement, which, of course, requires culpable *mens rea*. See *infra* note 274.

188. For cost-sharing reasons primarily, many of the temporary exhibitions at museums today are traveling ones, organized by one or perhaps more institutions and shown at several. The organizing museum often prepares materials such as exhibition catalogues, posters, postcards, etc. to be sold at each participating museum. While museums often pay careful attention to copyright questions involved in loans of works of art, little regard is given to possible copyright infringements in the material sold during the traveling exhibition, perhaps in the mistaken belief that any infringement would be the problem of the organizing museum and not the "innocent third party."

189.

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

* * *

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

17 U.S.C. § 109(a), (c) (1982).

way, except perhaps to display the work under certain circumstances as will be later discussed.¹⁹⁰

The first-sale doctrine allows the copyright owner the privilege of making a profit on the first sale of his work, but not on a further resale or rental of the work. As it applies to artists, this doctrine reveals a particularly American notion about the ownership of tangible property. By comparison, countries such as France and Germany allow the artist to recover a portion of the profit from the resale of a work as it passes from owner to owner.¹⁹¹ Influenced by the European experience and responding to pressure from artists rights' groups, in 1976 California passed a Resale Royalties Act which allowed an artist to recover 5% of the total price payable for the sale of his pictorial, graphic, or sculptural work sold for more than \$1,000.¹⁹² For the Resale Royalties Act to apply, the resale must, however, occur in California. If the resale occurs elsewhere, the seller must be a resident of California at the time of sale.¹⁹³ Thus the museum may have to consider the California act when acquiring a work of art in California or from a California resident. Because of its narrow scope, the California Resale Royalties Act will have limited application,¹⁹⁴ but it may

190.

(b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

17 U.S.C. § 109(b) (1982). See *infra* notes 214-20 and accompanying text.

191. For discussion of resale royalties rights abroad, see, e.g., Sherman, Incorporation of the *Droit de Suite* Into United States Copyright Law, 18 Copyright L. Symp. (ASCAP) 50 (1970); Schulder, Art Proceeds Act: A Study of the *Droit de Suite* and a Proposed Enactment for the United States, 61 Nw. U.L. Rev. 19 (1966); Hauser, The French *Droit de Suite*: The Problem of Protection for the Underprivileged Artist under the Copyright Law, 11 Copyright L. Symp. (ASCAP) 1 (1962); and Price, Government Policy and Economic Security for Artists: The Case of The *Droit de Suite*, 77 Yale L.J. 1333 (1968).

192. Cal. Civ. Code § 986 (West Supp. 1980).

193. The Act has been widely criticized as benefitting only a few artists, those with a secondary market (not the great majority of artists); as being in reality a sales tax which will reduce the amount of money which museums and collectors would spend on art; as a psychological barrier to the purchase of art; and as the creator of uneconomic administrative burdens. See, Ashley, Critical Comment on California's *Droit de Suite*, Civil Code Section 986, 29 Hastings L.J. 249 (1977); Elsen, California Artist's Resale Law: Failure of Innocence, 65 Art In America 15 (Mar.-April 1977); and Bolch, Damon and Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689 (1978).

194. The Act has also been questioned regarding preemption by federal copyright law. See, e.g., 2 Nimmer, § 8.22[B] (1981); Katz, Copyright Preemption Under the Copyright Act of 1976: The Case of *Droit de Suite*, 47 Geo. Wash. L. Rev. 200 (1978). In 1980, applying the Copyright Act of 1909, the U.S. Court of Appeals for the Ninth Circuit upheld the constitutionality of the Act. *Morsburg v. Balyon*, 621 F.2d 972 (9th Cir. 1979), cert. denied, 449 U.S. 983

be representative of a general movement to depart from the strictures of the first-sale doctrine.

8.7 *The Performance Right*

The performance right is perhaps the most complex of the exclusive rights.¹⁹⁵ The three rights previously discussed, reproduction, adaptation, and distribution, apply to all varieties of copyrightable subject matter, whereas the performance right does not apply to pictorial, graphic or sculptural works or sound recordings. In addition, the performance right is further complicated by an elaborate set of limitations much more extensive than the other rights.¹⁹⁶

Even though the performance right does not apply to pictorial, graphic, or sculptural work, the museum as a center for general culture and education must concern itself with this right. The museum may have a concert series where music, dramatic, choreographic, or audiovisual works are performed, all of which are subject to the performance right.¹⁹⁷ Museum classrooms where art history and other subjects are taught also may involve the public performance of copyrighted works. Background music may be used to enhance the ambiance of an exhibition.

As a general proposition, all public performances, even those given by a non-profit museum, are subject to the performance right;¹⁹⁸ but this general proposition is qualified. The Copyright Act attempts to balance the needs of educators and other non-profit users of copy-

(1980). For an analysis of the 1976 Copyright Act as applied to the California Act, see Note, *The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law*, 81 *Colum. L. Rev.* 1315 (1981).

195. 17 U.S.C. § 106 (1976).

To perform or display a work "publicly" means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101 (1982).

196. 17 U.S.C. § 110 (1982). See also *infra* notes 200-13 and accompanying text.

197. See *supra* note 195.

198. A copyright owner's performance rights under the 1909 Act were limited to "for profit" performances. 17 U.S.C. § 1(e) (1909) (superseded 1976).

righted works by setting forth a complicated set of provisions limiting the performance right.¹⁹⁹

8.8 *The Face-to-Face Teaching Exemption*

One far-ranging limitation on the performance right exempts copyright liability for the performance and display of all types of copyrighted works by instructors or pupils in the course of the face-to-face teaching activities in a non-profit educational institution, in a classroom or similar place devoted to instruction.²⁰⁰ This exemption would apply, for example, to an instructor in a museum who teaches an art history class and shows an audio-visual work to his students or to students who act out a drama in front of the class.

This face-to-face teaching exemption is narrowly drawn. First, face-to-face teaching activities do not include broadcasts. Thus, if the audio-visual work accompanying the photo-realist exhibition were broadcast by closed circuit television from the museum to another location, the exemption would not apply.²⁰¹ Second, instructional activities do not include performances given for recreation or entertainment. Third, the museum school could bring in guest lecturers, but the exemption does not apply to performances by paid actors brought in from the outside.²⁰² Fourth, the teaching activities must

199.

The line between commercial and "non-profit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow.

H.R. Report at 62-63.

200.

The following are not infringements of copyright:

- (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audio-visual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made; . . .

17 U.S.C. § 110(1) (1982). See also H.R. Report, at 81-82.

201.

The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit.

H.R. Report at 81.

202. H.R. Report at 82.

take place in a classroom or similar place devoted to instruction, including a large auditorium. The teaching in that place must, however, actually be used as a classroom for systematic instructional activities and the audience must be comprised of the members of the class. This appears to exclude a museum lecture series open to the public and not directed to members enrolled in a specific course.²⁰³

8.9 *The Broadcast Teaching Exemption*

The previous exemption covered performances in a face-to-face teaching situation. The Copyright Act also exempts certain teaching activities of a transmission or broadcast, but in much more narrow circumstances.²⁰⁴ This exemption to the performance right would allow an educational broadcast of a non-dramatic literary or musical work if the broadcast is a regular part of a systematic non-profit instructional activity.²⁰⁵ The broadcast must be directed to classrooms or similar places normally devoted to instruction.²⁰⁶ Here the museum could broadcast over educational television a reading from a literary text, but could not perform a play or show a motion picture without the copyright owner's permission.²⁰⁷

8.10 *Face-to-Face Non-Instructional Performances by Non-Profit Institutions*

The above exceptions to the performance right concern teaching and instructional activities. But what of a performance given to the public who are not attending as students? As, for example, the program of modern dance presented during the photo-realist exhibition? The Copyright Act exempts an unauthorized non-broadcasted performance of a non-dramatic literary or musical work in a narrow and complex set of circumstances.²⁰⁸ The performance must truly be a

203. For example, beginning in 1982, the National Endowment for the Humanities has awarded grants for "Learning Museums Programs" aimed at adult audiences and consisting of sequential series of lectures integrating several humanities disciplines. Parks, NEH Learning Museum Programs, Museums, Adults and The Humanities at 203 (1981).

The use of audio-visual materials in such a series, which the lecturer knew or had reason to know were made without the authorization of the copyright owner, would appear not to come under the exemptions of § 101.

204. 17 U.S.C. § 110(2) (1982).

205. 17 U.S.C. § 110(2)(A) (1982).

206. 17 U.S.C. § 110(2)(C) (1982).

207. H.R. Report at 83.

208. 17 U.S.C. § 110(4) (1982).

non-profit performance. There can be no admission charge,²⁰⁹ or if there is, all profits must go to educational, religious or charitable purposes.²¹⁰ Moreover, no compensation can be paid to a performer, producer or promotor. Thus, even a free concert will constitute copyright infringement if the performer receives any payment other than reimbursement for expenses.

The privilege for performing certain works face-to-face in a non-profit setting is subject to an interesting variation: this occurs if an admission is charged. Here it is possible for the copyright owner to stop the performance by "notice of objection" to the performance at least one week before the performance is to take place.²¹¹ The institution, however, has no duty to inform the copyright owner that the performance will take place. The copyright owner must somehow find out about the performance and follow the prescribed procedures within the required time limits. Despite the possibility of notice of objection, it is unlikely that many copyright owners will take these necessary steps except in cases of the most highly publicized performances.

8.11 *Public Receptions of Performance*

The final exception to the performance right concerns a narrow privilege to receive a transmission on a radio or television for retransmission.²¹² The Copyright Act allows small commercial establishments to use on their premises standard radio or television equipment for the enjoyment of their customers, such as the ubiquitous television in the neighborhood bar. This exception to the performance right does not apply to commercial sound systems more elaborate than those used by private persons. The drafters of the Copyright Act considered such performances *de minimis*, but when the apparatus becomes larger, then the performance is more extensively disseminated and the performance right is placed in jeopardy.²¹³ Thus the museum should not adopt the practice of receiving music over a sound system and simultaneously transmitting it to several rooms. Such could constitute infringement of the performance right.

209. 17 U.S.C. § 110(4)(A) (1982). The statute specifies that there must be no direct or indirect admission charge.

210. 17 U.S.C. § 110(4)(B) (1982).

211. 17 U.S.C. § 110(4)(B)(i), (ii) (1982).

212. 17 U.S.C. § 110(5) (1982).

213.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further

8.12 *The Display Right*

The right to display²¹⁴ the copyrighted work has obvious importance to anyone involved in the visual arts. As in the performance right, the display right only involves public display of the work and is subject to some of the same educational limitations as the performance right discussed in the previous section.²¹⁵ To display a work is to show a copy of it directly or by a device. A motion picture, for example, is displayed when frames are shown non-sequentially; when shown in sequence, however, the motion picture is considered performed.²¹⁶

8.13 *Limitations on the Display Right*

One limitation to the display right, apart from the face-to-face teaching exemption, is closely related to the first-sale doctrine.²¹⁷ This allows the owner of a lawfully made copy of a work to display it directly or by projection of no more than one image at a time to viewers present at the place where the copy is located.²¹⁸ Thus if the museum owns a painting, even if it does not own the copyright on the painting, it may show the painting to the public directly or by projection, as long as the display takes place on museum grounds and is not further projected to distant locations.

The privilege to display or to authorize others to display the copy applies only to those who own the work. Therefore the museum which is lent a painting may only display it at the museum and cannot

liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. This clause has nothing to do with cable television systems and the exemptions would be denied in any case where the audience is charged directly to see or hear the transmission.

H.R. Report at 86. The discussion of cable television, because of its technical legal complexity, is beyond the scope of this article. See generally, M. Hamburg, *All About Cable* (1981); Rosenthal, *Copyright Owners vs. Cable Television: The Evolution of a Copyright Liability Conflict*, 33 *Syr. L. Rev.* 693 (1982).

214. 17 U.S.C. § 106 (1982). The right to display is codified for the first time in the 1976 Act. H.R. Report at 63.

215. See *supra* notes 195-213 and accompanying text.

17 U.S.C. § 101 (1982).

216. According to § 101 of the Act:

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audio-visual work, to show individual images nonsequentially.

According to the House Report:

Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them.

H.R. Report at 64.

217. See *supra* notes 189-94 and accompanying text.

218. 17 U.S.C. § 109(b) (1982).

authorize others to display it. Of course the right to display does not include any other use of the painting, such as reproduction in an exhibition catalogue.²¹⁹ Here the museum must acquire permission from the copyright owner if it wishes to reproduce a work given to it on loan from another person or museum, even though the third party may own the copy of the work.²²⁰ Of course if the lender owns the copyright as well as the copy, no such complications will arise.

9. OWNERSHIP

Copyright ownership initially vests in the author of the work, who is given as copyright owner a bundle of rights known as the exclusive rights.²²¹ The exclusive rights of reproduction, adaptation, distribution, performance and display set forth the boundaries of copyright ownership, specifying what constitutes infringement on the one hand and how the copyright owner can economically exploit his property on the other.

9.1 *Divisibility of Ownership*

The current Copyright Act recognizes the principle of divisibility which allows the copyright owner to split up his ownership in an infinite number of ways by sale, gift or lease.²²² For example, the

219. The House Report, in its discussion of § 109(b), raises the question of the right of an artist, who has sold a painting, but not the copyright, to restrain the new owner from displaying the work of art publicly for example in galleries. The drafters answer the question by stating that § 109(b) adopts the general principle that the lawful owner should be able to put his copy on public display without the consent of the copyright owner. If, however, they would contract to the contrary, this would appear to be enforceable. H.R. Report at 79.

This limitation on the right of display is limited to viewers "present at the place where the copy is located." Nimmer, pointing out some ambiguities in the language of the exception, asks: "If viewers observe a painting projected on a screen in one room of a large museum, while the 'copy' being projected is in another room at the opposite end of the museum, are the viewers 'present at the place where the copy is located'?" Referring to this House Report discussion of the place located as "a situation in which viewers are present in the same physical surrounding as the copy, even though they cannot see the copy directly" (H.R. Report at 80), Nimmer concludes that this museum display would fall within the exception. 2 Nimmer § 8.20[B] at 8-244.

220. This is true whether the museum is the owner of the work but does not own the copyright, is lent the work by an owner who does not own the copyright, or is lent the work by an owner who does own the copyright, but is authorizing nothing more than display. The drafters of the act were concerned that the exception to the right of display not affect the copyright owner's market for reproduction and distribution of copies. H.R. Report at 80.

221. 217 U.S.C. § 201(a) (1982).

222.

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of

copyright owner of a sculpture may sell the right of reproduction and distribution to a publishing company while retaining the right of adaptation for himself and, at the same time, give an exclusive license for the display of his work to a museum for one year. Each of these transferees now becomes owner of a copyright interest along with the original author and, unless there is a limitation placed on the transfer, the new owner of the copyright interest can further sell or lease his interest in the work. In addition, he may also bring copyright infringement actions in his own name against those who are improperly using his property right.²²³

Although desirable, it may not always be possible for the museum to acquire the full copyright along with the work of art. If not, the museum at the least should negotiate an assignment or license authorizing the specific use it wishes to make of the work, *e.g.*, reproduction for purposes of publicity and education. We now turn to the manner in which copyright interests are transferred.

9.2 *Assignments and Licenses*

One must distinguish among the several ways in which the copyright owner may exploit his copyright interest. The entire copyright interest might be assigned to another who now becomes the copyright owner. Similarly, the copyright owner can also assign his interest in one or more of the exclusive rights, such as the reproduction and performance rights, while either retaining some rights for himself or selling or leasing them to others. The copyright owner can also convey less than a complete ownership interest in a work. Such a transfer is called a license which is either an exclusive license, if the licensor

any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. § 201(d) (1982). This is the first statutory recognition of the principle of divisibility of copyright. "This provision means that any of the exclusive rights that go to make up a copyright . . . can be transferred and owned separately." H.R. Report at 123. See generally Kaminstein, *Divisibility of Copyrights*, Study No. 11 in 1 *Studies in Copyright* at 623 (Arthur Fisher Mem. Ed. 1963). See also Note, *Divisibility of Copyright: Its Application and Effect*, 19 *Santa Clara L. Rev.* 171 (1979); Note, *Divisibility of Copyright: A Bill of Rights for Authors*, 14 *Cal. W.L. Rev.* 590 (1979).

223.

It is thus clear, for example, that a local broadcasting station holding an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, someone who infringed that particular exclusive right.

H.R. Report at 123.

agrees not to give the same right to someone else, or a nonexclusive license, if the licensor retains the right to license the same rights to others.²²⁴ For example, a museum as the copyright owner may license a publisher the right to reproduce the work in a poster to be sold in certain retail outlets only during a five-year period. By an exclusive license, the museum would agree not to give another the same right.²²⁵

The distinction between assignments and exclusive licenses on the one hand and non-exclusive licenses on the other is important. Assignments and exclusive licenses are considered transfers of copyright²²⁶ and under the Copyright Act, to be effective, must be manifested in a signed writing.²²⁷ Alternatively, non-exclusive licenses can be conveyed orally as informally as an agreement over the telephone. Nevertheless, it is highly recommended that one effect a written document for all assignments or licenses.²²⁸

What form should the writing take? Just about any format will suffice, such as a letter stating the terms of the assignment or license. The written agreement should explicitly set forth the royalty provisions, the length of the time of the conveyance, the circumstances of termination, if any, the name to be carried on the notice of copyright, and the responsibilities for maintaining an infringement suit against third parties.²²⁹

224. See generally 3 Nimmer, §§ 10.01-10.15 (Assignments, Licenses, and Other Transfers of Rights).

225. Museum licensing arrangements with manufacturers for the production of goods based on works of art in the collection and to be carried in its own and other stores, as well as by mail-order catalogues, can be a lucrative source of revenue for the museum. These products can range from traditional items such as greeting cards and posters, to tee-shirts, bed linens and needle-point canvasses. See generally Hodes & Gross, *Museums in the Commercial Marketplace: The Need for Licensing Agreements*, 10 Conn. L. Rev. 620 (1978), [hereinafter cited as Hodes & Gross]; and Faul, *Licensing Programs—A Second Life for Museum Collections*, 54 *Museum News* 26 (Nov.-Dec., 1975).

226.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license.

17 U.S.C. § 204(a) (1982).

227. 17 U.S.C. § 204(a) (1982).

228. One reason for this recommendation is that it may not be clear whether a particular agreement is an exclusive or non-exclusive license. See, e.g., *Library Publications v. Medical Economics*, 548 F. Supp. 1231 (E.D. Pa. 1982), where plaintiff had alleged breach of non-exclusive license to distribute a book published by the defendant, the court held the license was exclusive and as such, invalid as it was not in writing.)

229. Strong, *The Copyright Book: A Practical Guide* (1981) at 41-42. For a sample licensing agreement drafted specifically for museums, see "Model Museum Licensing Agreement," Appendix A in Hodes & Gross, *supra* note 225, at 631. This agreement includes sections on manner of

9.3 *Recordation and Ownership Priorities*

For a nominal fee the Copyright Act permits recordation of all documents pertaining to copyright ownership no matter what their form.²³⁰ The museum should make use of this privilege for all important transfer documents, whether assignments, exclusive licenses, or non-exclusive licenses. Recordation, specifically identifying the work, will give notice to the world of the facts set forth in the recorded documents. This means that even if a third party did not have actual notice of the document, he is presumed to have had that information.²³¹ This important constructive notice aspect of recordation applies only if the underlying work is registered.²³² For optimum effectiveness, recordation should accompany registration.

Perhaps the most important aspect of recordation is that it establishes priority of ownership.²³³ Suppose, for example, that the artist conveyed to the museum the copyright on the photo-realist painting in December, 1983, and then conveyed the copyright on the same painting to a third party in January, 1984. The museum, as first transferee, under the terms of the Copyright Act, is allowed a grace period of one month (two months if the agreement was executed outside the county) to record the work in the Copyright Office.²³⁴ When the one-month grace period terminates, it then becomes a race between the two

reproduction and quality control directed to particular museum concerns with the safety of their valuable works of art and with the quality of resulting products. The objects produced by license reflect the quality of the original work and also reflect the museum's aesthetic reputation.

230.

Any transfer of copyright ownership or other document pertaining to copyright may be recorded in the Copyright Office

17 U.S.C. § 205(a) (1982).

See, 37 C.F.R. § 201.4 (1982) for regulation of the Copyright Office pertaining to the recordation of transfers.

231.

Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document

17 U.S.C. § 205(c) (1982).

232. 17 U.S.C. § 205(c) (1982).

233.

As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution, in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

17 U.S.C. § 205(e) (1982).

234. *Id.*

transferees to record, and if the museum is last to record, it will be deprived of its ownership right. The museum may still possibly obtain damages against the artist on the contract, but it has lost its chance to own the copyright in the painting. Note that these priority provisions apply only if the work, in this case the painting, was registered in addition to the recordation of the document. If no one has registered the work, these statutory priority provisions will not apply and the court will decide priority on proof submitted by the parties.

There are two exceptions to the above priority rules. First, priority will not be given to one who has received a transfer in bad faith,²³⁵ as for example, to someone who actually knows about the prior transfer. The second major exception concerns a transfer not involving valuable consideration such as a gift or bequest.²³⁶ In these two situations the later transferee will not prevail over the first, even if he records in the proper manner. Later transferees, even if they are first to record, who receive an ownership right either in bad faith or for nothing cannot therefore prevail over a prior transferee.

Prompt registration and recordation is also important in ownership rights between a first transferee, assignee or exclusive licensee and later a non-exclusive licensee. For example, suppose the artist transferred the entire copyright to the photo-realist painting to a museum, but then gave a third party a non-exclusive license for reproduction and distribution. Here, the non-exclusive license would continue to be effective despite the transfer to the museum if it is evidenced by a written agreement signed by the artist and if the license were taken in good faith before recordation of the transfer.²³⁷ Thus, the museum which neglected to record the transfer would own the copyright, but could do nothing to prevent the non-exclusive licensee from continuing to reproduce and distribute the work.

9.4 *Recordation as a Prerequisite to Infringement Suit*

Both registration and recordation are prerequisites to infringement suits. To prevent another from using the copyrighted work, a copy-

235. *Id.*

236. *Id.*

237.

A non-exclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if—

- (1) the license was taken before execution of the transfer; or
- (2) the license was taken in good faith before recordation of the transfer and without notice of it.

17 U.S.C. § 205(f) (1982).

right owner must first register the work and record the transfer.²³⁸ Sometimes the work will already have been registered and all that need be done is to record the transfer. Just as often, particularly in the art world, many copyright owners have failed to take advantage of registration. Thus if the museum enters into an agreement to transfer copyright, it should check the records in the Copyright Office for evidence of registration and recordation of other grants covering the copyrighted work.²³⁹

The museum should therefore, no more than one month after execution of the transfer document, make certain that the document is recorded in the Copyright Office. Because registration is a prerequisite to effective recordation, the museum may have to file simultaneously for registration as well. Again, there is a need for procedures within the museum to administer these simple ownership formalities which play such an important role in establishing one's effective rights in a copyrighted work.

9.5 *Works Made for Hire*

Having discussed the ways in which an owner of copyright can exploit his ownership in a work, we now turn to the question of who is an author. In general, the source of ownership is the author of the work, its maker or originator. Many works, however, are not created by an individual privately, but are motivated by an employer pursuant to employment duties or created on commission. In our opening example the curator of contemporary art has written a contribution to the photo-realist exhibition catalogue. Other staff have developed an audio-visual program to accompany the exhibition. Works like these, created in the course of one's employment, are called works made for hire.²⁴⁰ Here, unless the parties have expressly agreed otherwise, ownership vests in the employer who is considered the author.²⁴¹

238.

No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

17 U.S.C. § 205(d) (1982).

239. See *supra* note 106 relating to search of records at the Copyright Office.

240. For definition, see *supra* note 132 and accompanying text. See generally O'Meara, *Works Made "For Hire" Under The Copyright Act of 1976—Two Interpretations*, 15 *Creighton L. Rev.* 523 (1981-82); Angel & Tannenbaum, *Works Made For Hire Under S.22*, 22 *N.Y. L. Rev.* 209 (1976). See also Simon, *Faculty Writings: Are They 'Works Made for Hire' Under the 1976 Copyright Act*, 9 *J. of Coll. and U.L.* 485 (1982-83).

241. 17 U.S.C. § 201(b) (1982). For legislative history of this section, see H.R. Report at 121.

Other works, such as the critical essays written by outside scholars and the special dance program, were created on commission. As will be discussed, only certain categories of commissioned works qualify as "works made for hire." A work made for hire differs from other works in several important ways. First, the employer need do nothing to secure ownership of the work; the employer should simply register the work in its own name.²⁴² Second, the duration for a work made for hire differs from other works.²⁴³ Instead of the life of the author plus fifty years, the term for a work made for hire is seventy-five years from publication or 100 years from creation, whichever is shorter.²⁴⁴ Third, a work made for hire is not subject to termination rights as are other works.²⁴⁵

How does one decide whether a work has been created in the scope of employment? For example, what of a curator who works at home on a catalogue covering an aspect of the museum's collection or on an article for a journal?²⁴⁶ This question is often more difficult to answer in practical situations, that is, the standard is more easily stated than applied. A work created within the employment relationship is one created at the insistence and expense of the employer. Close factual questions arise in construing this standard and actual cases turn on such elements as whether the employee was creating something related to his employment duties,²⁴⁷ whether the employer had the right to direct and supervise his work,²⁴⁸ and whether the employer was the

242. 17 U.S.C. § 408 (1982). Moreover, a statement to the effect that the work is a work made for hire must be included in the application for copyright registration. 17 U.S.C. § 409(4) (1982).

243. 17 U.S.C. § 302(c) (1982).

244. *Id.*

245. See 17 U.S.C. § 203(a) (1982), regarding termination of transfer. It states, "In the case of any work other than a work made for hire"

246. The benefits of publication for museum personnel are many: enhanced professional reputation, dissemination of scholarly ideas, even fees or royalties. As long as the practices of museums in this area are varied, and the law is unclear, it is advisable for a museum to promulgate written guidelines concerning staff writings. This is recommended by the Code of Ethics of the American Association of Museums (1978). For a review of the questions to be considered in such a policy and an articulate argument that it would ultimately aid museums in attracting and retaining highly qualified staff to allow them to keep proprietary and copyright interests in their writings, see Knoll & Drapiewski, "Knowing Your Copyrights," 55 *Museum News* 49 (Mar.-April 1977).

247. See, e.g., *Public Affairs Assoc. v. Rickover*, 268 F. Supp. 444 (D.C. 1967) (speeches delivered by Admiral Rickover held to be his private property for which he might obtain the copyright. The court emphasized that the invasions were delivered to him directly, were prepared on his own time and concerned a subject removed from this official duties.), on remand from the U.S. Supreme Court, 369 U.S. 111 (1961).

248. See, e.g., *Donaldson Publishing Co. v. Bregman, Vocco and Conn., Inc.* 375 F.2d 639 (2d Cir. 1967); *Olympia Press v. Lancer Books, Inc.*, 267 F. Supp. 920 (S.D.N.Y. 1967); and *Aitken v. Empire Construction Co.*, 542 F. Supp. 252 (D. Neb. 1982) (holding for architect as

motivating factor in the creation of the work.²⁴⁹ If the above factors are present the law establishes a presumption that the work is a work made for hire, with initial ownership vesting in the employer.²⁵⁰ To reverse the presumption, the employer and employee may, by written contract, agree otherwise.²⁵¹ But note that the contrary is not true; if a work is not created in the scope of employment, the parties cannot agree to characterize the work as one for hire. In such cases the museum would have to seek a formal written assignment of the work to obtain copyright ownership.²⁵²

Works created in one's employment are clearly works made for hire, but what of specially commissioned works? For example, the museum may hire a public relations firm to develop certain promotional materials for its various activities. These specially commissioned works look like works made for hire, and under the 1909 Act, it was generally presumed that they were.²⁵³ The current Act, however, has

owner of copyright for plans, rather than contractor, court said that although contractor could direct the result that the architect was to accomplish, it could not direct the means, which the architect as a trained professional, was required to use). The work for hire doctrine has been held applicable to a volunteer, who prepared a manual for a town and then tried to claim the copyright. The court held that the crucial factor for purpose of the copyright laws was whether the town had the right to direct and supervise the manner in which the employee [volunteer] did his work. *Town of Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).

249. See, e.g., *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir. 1972), cert. denied, 409 U.S. 997 (1972) (where copyright in song, "Who's Afraid of the Big Bad Wolf," claimed by adaptor, the court found that the composition was motivated by Walt Disney (who had control of the original work) and adaptor's supervisor, Irving Berlin, and therefore was a work done for hire); *Siegel v. Nat'l Periodical Publisher*, 508 F.2d 909 (2d Cir. 1967) (work made for hire not applicable to Superman, as it was developed before the employment relationship began); *Excel Promotions Corp. v. Babylon Beacon, Inc.*, 207 U.S.P.Q. 616 (E.D.N.Y. 1979) (copyright in advertisements prepared by employees of a newspaper for a firm advertising in the paper held to be owned by the firm as it was at their insistence and expense that the work was done).

250.

The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law

H.R. Report at 121.

251. 17 U.S.C. § 201(b) (1982).

252. See, e.g., *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir. 1955) (where lyrics were written on a special job assignment and writer later assigned his copyright to the company which hired him).

253. See, e.g., *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir. 1972), cert. denied, 409 U.S. 997 (1972); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966); *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939). Some problems may be raised regarding commissioned works created after the enactment of the 1967 Act but prior to its effective date of January 1, 1978. Which act should apply: the 1909 Act under which the employer is deemed the author, or the 1976 Act which would award copyright to the artist if the work does not fall within the specified categories or the requirement of writing is not met? See Beckett, *The Copyright Act of 1976: When Is It Effective*, 24 Bull. Copyright Soc'y 391, 398 (1977).

now reversed the presumption and has explicitly set forth nine circumstances where a commissioned work becomes a work made for hire, but only if the parties expressly agree in writing to create a work made for hire.²⁵⁴ These nine circumstances are: as a contribution to a collective work, as part of a motion picture or other audio-visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.²⁵⁵ Thus, if the museum commissions a work which does not fall into one of these categories, it is not a work made for hire even if the parties expressly agree in writing that it is. For example, the scholarly essays would likely be regarded as works made for hire because they fit into one of the nine enumerated categories as contributions to a collective work. Alternatively, the commissioned dance program does not fall within any of the nine categories and cannot be made a work made for hire. The museum, to become owner of the copyright, must obtain an assignment by written agreement. The rules relating to works made for hire illustrate how the current Copyright Act makes it difficult for the author to be dispossessed of ownership rights in his copyright.²⁵⁶ As a result, the museum, when commissioning a work, should obtain an assignment of the copyright if there is any doubt about the status of the piece as a work made for hire.

254.

[A] work specially ordered or commissioned for use . . . , if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (1982). As stated in the House Report,

The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.

at 121. For works denied classification as "works made for hire" because they fell outside one of the nine specified categories, see, e.g., *Aitken v. Empire Constr. Co.*, 542 F. Supp. 252 (D. Neb. 1982) (architectural plans); *Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981) (fabric design); *May v. Morganelli-Heumann and Assoc.*, 618 F.2d 1363 (9th Cir. 1980) (architectural drawings).

For denial of commissioned photographs of status as "work made for hire" because of lack of written instrument, see *Childers v. High Society Magazine*, 557 F. Supp. 978 (S.D.N.Y. 1983).

255. 17 U.S.C. § 101 (1982).

256. At least, the right to terminate transfer at the appropriate time. There is evidence, however, that publishers still use "work made for hire" contracts with free lance artists by means of the categories "contributions to collective works" and "supplementary works." See Comment, *Free Lance Artists, Works for Hire, and the Copyright Act of 1976*, 15 U.C.D. L. Rev. 703, 714 (1982).

9.6 *Collective Works*

From time to time a museum may solicit contributions from a number of sources and assemble them into a collective whole, such as an anthology, periodical issue, or exhibition catalogue. These works, known as collective works,²⁵⁷ are a form of derivative work. The ownership of the copyright on the individual contributions to a collective work remains with the individual author and is not a work made for hire unless the parties expressly agree in writing.²⁵⁸

What if a contributor to the photo-realist catalogue refuses to confer a work made for hire status on his individual contribution? The museum still remains the creator of a collective work and, as a collective work owner, has the right to reproduce and distribute the individual contribution as part of the current collective work, a revised edition, or in another collective work in the same series. But the museum cannot reproduce and distribute reprints of the individual contribution without the consent of the author.²⁵⁹ The museum should resolve ownership rights at the outset when forming a collective work by either creating a work made for hire, obtaining copyright ownership, or obtaining an exclusive or non-exclusive license to make reprints of the individual contribution.

9.7 *The Pushman Doctrine*

We have already emphasized the fundamental principle in copyright law of the distinction between ownership of the material object and ownership of the copyright.²⁶⁰ An outright sale of the material object such as a book, canvas, or master tape-recording of a musical work does not transfer copyright. One possible exception to the above principle that applies to certain works transferred before 1978 is a

257.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

17 U.S.C. § 101 (1982).

258.

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c) (1982). For legislative history of this section, see H.R. Report at 122.

259. 17 U.S.C. § 201(c) (1982).

260. 17 U.S.C. § 202 (1982).

situation which involves the transfer of an unpublished work of art, one which has not yet acquired federal statutory copyright. Under the Pushman Doctrine, named after a case arising in New York State,²⁶¹ an artist was presumed to have transferred common law copyright at the time the original work of art was sold unless the artist specifically reserved copyright ownership.²⁶² The new law has clearly overruled the Pushman Doctrine,²⁶³ and even before the current Act became effective, two important states in the art world, California and New York, enacted statutes reversing the presumption that an unconditional sale of an unpublished work of art transferred copyright along with the material object.²⁶⁴

10. COPYRIGHT INFRINGEMENT

Having discussed various aspects of copyrightable subject matter and ownership, we now turn directly to what constitutes the illegal use of a copyrighted work. Infringement of copyright is defined as the violation of any one of the exclusive rights.²⁶⁵ Other than the distribution right, the rights of reproduction, adaptation, performance and display involve, in different ways, the copyright owner's authority to prevent others from copying his work without consent. In essence, to prove copyright infringement one must show that another has actually copied from the work²⁶⁶ and that he has copied a material amount of

261. *Pushman v. New York Graphic Soc'y*, 287 N.Y. 302, 39 N.E. 2d 249 (1942).

262.

[A]n artist must, if he wishes to retain or protect the reproduction right, make some reservation of that right when he sells the painting.

Id. at 308, 39 N.E. 2d at 251.

263. See H.R. Report at 124, stating that the presumption of transfer is reversed under the new Act.

264. N.Y. Gen. Bus. Law §§ 223-24 (McKinney 1968); Cal. Civ. Code § 982(c) (West Supp. 1976).

265. 17 U.S.C. § 501(a) (1982).

266. In the absence of direct proof of copying, which is extremely difficult to obtain, infringement may be proved by showing that the defendant had access to the copyrighted work and that there is substantial similarity between them. *Sid and Marty Krofft Television Prods. Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977) ("Access is proven when the plaintiff shows that the defendant had an opportunity to view or copy the plaintiff's work"); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977) (defendant's designers actually viewed the upholstery fabric design of the plaintiff); *Universal City Studios v. Kamar Industries*, 217 U.S.P.Q. 1162 (S.D. Tex. 1982) (defendant's products were based on character, E.T., movie had been released prior to manufacture of products and defendant held to have access); *Jack Lenor Larsen v. Dakotah, Inc.*, 452 F. Supp. 99 (S.D.N.Y. 1978) (defendant saw photographs of plaintiff's fabric designs in a department store); *Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982) (bare possibility of access is insufficient to create a genuine issue of material fact where plaintiff alleged that the movie "Coming Home," had been based on her privately printed

the work.²⁶⁷ Alternatively, copyright infringement does not occur when a third party has independently duplicated the work.²⁶⁸ The classic example of this principle involves a photographer who has taken a picture of the same scene and from the same point of view as in a prior copyrighted photograph. His independent, although identical creation, is not copyright infringement.

Although the principle of independent creation limits the scope of copyright protection, other principles broaden its scope. In this regard, innocent or unintentional copying is no defense to copyright infringement.²⁶⁹ For example, if someone on the museum staff copied from a book thought to be in the public domain, infringement will have occurred. The intent of the infringer might carry some weight as to the scope of recovery and the extent of damages, but not in establishing infringement.

Also broadening the scope of infringement is the principle that infringement of copyright encompasses acts other than verbatim or literal copying. To constitute infringement, the amount copied must be substantial²⁷⁰ and material when compared to the copyrighted work as a whole, but copyright infringement will include such acts

book which was sold in Southern California.) The copying may be done subconsciously and not deliberately, and still be infringement. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (George Harrison's "My Sweet Lord" held an infringement of "He's So Fine.")

267. The more striking the similarity is, the less likely that the work was independently duplicated. *Boorstvn*, *supra* note 23 at 290.

268. "Absent copying there can be no infringement of copyright." *Mazer v. Stein*, 347 U.S. 201 (1954) at 218 (footnote omitted). See also *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971) (In this case both plaintiff and defendant made jeweled bees. Court stated that there was evidence that defendant, who had designed other jeweled pins in the form of living creatures, had independently created his bee); *Franklin Mint Corp. v. Nat'l Wildlife Art Exch.* 575 F.2d 62, 65 (3d Cir. 1978) ("Since copyrights do not protect thematic concepts, the fact that the same subject matter may be present in two paintings does not prove copying or infringement"). Moreover, in this case, the artist, who had painted both works which were the subject of controversy, painted a third picture on the same theme "while in the courtroom and without referring to either of his earlier paintings" *Id.* at 66. The court held that each painting was a separate artistic effort.

269. See *supra* note 187. One may also be held liable on the theory of contributory infringement when "one who, with the knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Gershwin Publishing Corp. v. Columbia Artist Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). See also *Original Appalachian Artworks v. Cradle Creations*, 684 F.2d 821 (11th Cir. 1982) (pattern book for making dolls that were substantially similar to plaintiff's copyrighted dolls held to constitute contributor infringement).

270. *Nimmer* has devised two basic forms of "substantial similarity," comprehensive nonliteral similarity, where the essence or structure of one work is copied by another, and fragmented

transcending verbatim similarity such as paraphrasing,²⁷¹ or taking the general pattern of a work.²⁷² Regardless of what kind of copying has occurred, the question to be decided in every case of copyright infringement is whether the copy comes so near the original as to give the impression created by the original. As long as the ordinary observer²⁷³ would recognize the copy as having been taken from the original, it does not matter whether the copying is verbatim, a paraphrase, or the taking of the general pattern of the work.

Copyright infringement actions,²⁷⁴ which can involve great time and expense, should not be brought unless the matter is a serious instance of infringement and the parties cannot work out a settlement. For the copyright owner who has won an infringement action, the damages can be substantial. A prevailing plaintiff in an infringement

literal similarity where there has been verbatim copying of a small amount of the original work. These two forms present very different problems for the courts: for the first, to determine when the line between idea and expression has been crossed and for the latter, to determine at which point the amount copied becomes substantial. 3 Nimmer § 13.03[A].

271. See, e.g., *Meredith Corp. v. Harper & Row, Publishers*, 378 F. Supp. 686 (S.D.N.Y. 1974), *aff'd*, 500 F.2d 1221 (2d Cir. 1974) (infringing psychology textbook was in large portion a recognizable paraphrase of an earlier work).

272. The principle that the "pattern" of a work is protected was first expressed by Z. Chaffee in *Reflections on Copyright Law*, 45 Colum. L. Rev. 503 (1945).

I like to say that the protection covers the "pattern" of the work . . . For example, the idea of Irish-Jewish Ingh-Jewish marriage in a play may be borrowed. With this theme, some resemblance in characters and situations is inevitable, but the line of infringement may not yet be crossed. On the other hand, the pattern of the play—the sequence of events and the development of the interplay of the characters—must not be followed scene by scene. Such a correspondence of pattern would be an infringement although every word of the spoken dialogue was changed.

Id. at 511 (footnote omitted).

273. The determination of substantial similarity is thus to be made by the impression upon the ordinary observer or audience.

[T]he ordinary observer, unless he set out to detect the disparities [in the two fabric designs in question] would be disposed to overlook them, and regard their aesthetic appeal as the same.

Peter Pan Fabrics Corp. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960). See cases cited in 3 Nimmer § 13.03[E] at 13-40, note 92 and subsequent criticism. One result of this test is that expert testimony on the question of similarity has been held irrelevant. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 230 U.S. 851 (1947).

274. A discussion of criminal prosecution for copyright infringement, as provided for in § 506 of the Act, is beyond the scope of this article. See generally *Lindenberg-Woods, The Smoking Revolver: Criminal Copyright Infringement*, 27 Bull. Copyright Soc'y 63 (1979); and, *Comment, Criminal Copyright Infringement and Step Beyond*: 17 U.S.C. § 506 (1976), 60 Neb. L. Rev. 114 (1981).

action can obtain both actual damages as a result of the infringement and the defendant's profits.²⁷⁵ In lieu of these remedies, the Copyright Act provides for statutory damages which are based on set amounts per infringement at the court's discretion.²⁷⁶ In addition, the prevailing plaintiff can obtain injunctive relief²⁷⁷ and in appropriate circumstances can have the infringing articles impounded or destroyed.²⁷⁸

275.

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504(b) (1982).

276.

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$250 or more than \$10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$100

17 U.S.C. § 504(c) (1982).

277.

Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. § 502(a) (1982).

See, e.g., *Brennan v. Hearst Corp.*, Copyright L. Rep. (CCH) ¶ 25,295 (1981) (defendant enjoined from distributing book which contained picture substantially similar to plaintiff's copyrighted drawing of grapes and leaves).

278.

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matri-

Finally, costs and attorney's fees can be given to the prevailing party at the court's discretion.²⁷⁹

11. FAIR USE

The major defense²⁸⁰ to an action of copyright infringement is the defense of fair use.²⁸¹ This equitable doctrine creates a privilege to use another's work in a reasonable manner even though the use might technically constitute an infringement. Fair use is not easily defined, but the current Act has set forth basic guidelines or factors to be considered in determining fair use. These are the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;²⁸² the nature of the copyrighted work;²⁸³ the amount and substantiality of the portion used in relation to the work as a whole;²⁸⁴ and the effect of the use on the potential

ces, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

17 U.S.C. § 503 (1976). For a description of the historical development of these provisions and their interpretation by the courts, see Alexander, *Discretionary Power to Impound and Destroy Infringing Articles: An Historical Perspective*, 29 J. Copyright Soc'y 479 (1982).

279. 17 U.S.C. § 505 (1976).

280. Other defenses include forfeiture of copyright, nonoriginality, lack of copyrightable subject matter, abandonment of copyright, *de minimis* use and the first amendment. See generally Leavens, *In Defense of Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 Law & Contemp. Probs. 3 (1981).

281. 17 U.S.C. § 107 (1976). This is the first statutory recognition of a judicially created doctrine, "one of the most important and well-established limitations on the exclusive right of copyright owners . . ." H.R. Report at 65.

See generally Latman, *Fair Use of Copyrighted Works*, Study No. 14, 2 Studies in Copyright (Arthur Fisher Mem. Ed. 1963); Seltzer, *Exemptions and Fair Use in Copyright: The 'Exclusive Rights' Tensions in The New Copyright Act*, 24 Bull. Copyright Soc'y 215 (1977); and Schulman, *Fair Use and the Revision of the Copyright Act*, 53 Iowa L. Rev. 832 (1968); Perlman and Rhinelander, *Williams Wilkins Co. v. United States: Photocopying, Copyright and the Judicial Process*, The Sup. Ct. Rev. 355 (1975).

282. See, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980) (holding that "any commercial use tends to cut against a fair use defense,").

283.

[I]t seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals.

H.R. Report at 73.

284. See, e.g., *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) (defendants claimed that their parody of Disney characters was protected by fair use; the court held that by copying the images in their entirety, the defendants' excessive copying precluded fair use); *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554, 560 (D.C.D.C. 1981) ("The admitted reprinting of approximately 92% of plaintiff's story precludes the fair use defense . . .").

market for the work.²⁸⁵ The Copyright Act does not indicate what particular weight is to be given to these factors, nor does it indicate how the factors interrelate.²⁸⁶ But perhaps the most important of the factors is the last,²⁸⁷ that is, does the new work compete with and supplant the need for the original? If so, chances are that fair use has not occurred.

In general, fair use occurs when one is using another's work in the context of a new work, usually for purposes of criticism, comment, news reporting, teaching, scholarship or research.²⁸⁸ Examples are a photograph of a painting in the review of a museum exhibition; a quotation in a scholarly work or for purposes of review and criticism;²⁸⁹ incidental reproduction in a newscast;²⁹⁰ summary or quota-

285. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978); (in case brought by sons of Julius and Ethel Rosenberg against Louis Nizer, author of book on the trial of the Rosenbergs, Nizer claimed his incorporation of copyrighted letters in the book constituted fair use. The court held that the effect of the use of the letters on their future market was a matter for trial); *Roy Export Co. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137 (S.D.N.Y. 1980) (applying concept of effect on the market to a derivative work; *Iowa State Univ. Research Found. v. Am. Broadcasting Co.*, 621 F.2d 57, 61 (2d Cir. 1980) ("The fair use doctrine is not a 'license for corporate theft'").

286. According to the drafters of the Act, these are not exact rules, but guidelines, and the courts must be free to make decisions on a case-by-case basis. H.R. Report at 66. However, in the area of classroom use, more specific provisions were incorporated in the House Report. These are Guidelines for Classroom Copying in Not-For-Profit Educational Institutions and Guidelines for Educational Uses of Music. They were agreed to by interested organizations and were included in the House Report as "reasonable interpretations of the minimum standards of fair use." H.R. Report at 72. See Hayes, *Classroom Fair Use: A Reevaluation*, 26 Bull. Copyright Soc'y 101 (1978). The controversy over classroom photocopying was recently publicized when a group of publishers sued New York University, several individual faculty members and a private photocopying facility used by them for copyright infringement. (*Addison-Wesley Publishing Co. v. New York University*). Although the matter reached a settlement, the president of the Association of American Publishers stated:

. . . we wish to make clear that the publishing community does not consider the overall issue of college and university photocopying has been fully resolved.

We and our members will actively pursue further arrangements [such as those agreed to in the settlement] at other campuses and related copying facilities.

26 Pat., Trademark & Copyright J. (BNA) 145 (1983).

287. See 3 Nimmer, § 13.05[A](4) and § 13.05[B] for an analysis of this factor in terms of the function of each work.

288. 17 U.S.C. § 107 (1982).

289. In this situation, the functional differences are distinctive. One would not read quotations in a review rather than see a play, or look at a photograph of a painting rather than viewing the original in the museum.

290. See, e.g., *Italian Book Corp. v. Am. Broadcasting Co.*, 458 F. Supp. 65 (S.D.N.Y. 1978); *Pac. and S. Co. v. Carol Duncan*, Copyright L. Rep. (CCH) ¶ 25,421 (N.D. Ga. 1982).

tions in an address or news article;²⁹¹ use in parody or burlesque.²⁹² Other typical examples where fair use might arise in the museum context are reproduction of works of art for documentary files, to accompany a notice that a work has been removed from its usual location in the museum, or as small illustrations on gallery guides. What is usually precluded from fair use is wholesale and systematic copying.²⁹³

Because of its inherent vagueness, the doctrine of fair use should not be abused by the museum trying to justify a wide variety of copying. A more solid justification is to be found under the exceptions to the exclusive rights, which are much more concrete than fair use and will form a more predictable basis in determining the allowable use of a copyrighted work.

291. See, e.g., *Suid v. Newsweek Magazine*, 503 F. Supp. 146 (D.C. 1980) (16-word quotation not infringing). But cf. *Harper & Row v. Nation Enterprises*, 557 F. Supp. 1067 (S.D.N.Y. 1983) (extensive quotations of material from soon-to-be published Gerald Ford memoirs not protected by fair use).

292. The defense of fair use as applied to works of parody and satire has been raised in many infringement actions, e.g., *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd* by an equally divided court, 356 U.S. 43 (1958) (holding that comedian Jack Benny's parody "Autolight" of the movie "Gaslight" was not entitled to fair use defense); *Walt Disney Prods. v. Air Pirates*, 591 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (limiting holding in *Gaslight* case); *Elsmere Music, Inc. v. Nat'l Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (holding that *Saturday Night Live's* "I Love Sodom" a fair use of "I Love New York"). Issues raised by parody fair use include the benefits of parody (e.g., social criticism), the weight to be given to the amount taken from the original work and the effect of marketability on the original. See, *Light, Parody, Burlesque and the Economic Rationale for Copyright*, 11 Conn. L. Rev. 615 (1979); *Comment, Piracy or Parody: Never the Twain*, 38 U. Colo. L. Rev. 550 (1966); *Comment, Parody and Fair Use: The Critical Question*, 57 Wash. L. Rev. 163 (1981). While pictorial works may be less susceptible to parody than literary or musical ones, paintings such as Grant Wood's "American Gothic" have formed the basis of many a cartoon.

293. It is important to emphasize that this is the case even if these is for a non-profit, educational purpose. Museums should not be indifferent to infringing practices on the grounds that they are non-profit institutions acting for the public good. See, e.g., *Whitl v. Crow*, 309 F.2d 777 (8th Cir. 1962) (church choir director who made musical arrangement of copyrighted hymn held infringer); *Encyclopaedia Britannica Education Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978) (taping of plaintiff's entire copyrighted films for showing in schools too excessive for fair use defense); *Marcus v. Rowley*, 217 U.S.P.Q. 691 (9th Cir. 1983) (booklet on cake decorating prepared for public classroom use held to infringe similar booklet when majority of pages were copied verbatim and no attempt made to obtain copyright permission or credit plaintiff for the use of her material. The court refused to apply the defense of fair use because of the wholesale copying, in spite of the fact that the plaintiff suffered no monetary loss and the defendant showed no profit). But cf. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975).

12. CONCLUSION

Copyright law, by its nature sets up a tension between creators and disseminators of works of art. The art museum embodies this conflict. As disseminator, the art museum is the best vehicle by which the public has access to, and may learn about works of art. As creator, it has monetary and aesthetic interests in protecting its own copyrightable works.

The administrator and his counsel should be conscious of the museum's delicate position as creator and user. Awareness of copyright law and its underlying policies will allow them to obtain the information necessary to employ staff time efficiently, to avoid legal complications, and to make the economic decisions most beneficial to the museum.