

Cleveland State University
EngagedScholarship@CSU



Cleveland-Marshall
College of Law Library

Cleveland State Law Review

Law Journals

1977

The 1976 Copyright Act: Advances for the Creator

I. Fred Koenigsberg

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

I. Fred Koenigsberg, *The 1976 Copyright Act: Advances for the Creator*, 26 Clev. St. L. Rev. 515 (1977)
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol26/iss4/5>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

THE 1976 COPYRIGHT ACT: ADVANCES FOR THE CREATOR

I. FRED KOENIGSBERG*

ON OCTOBER 19, 1976, PRESIDENT GERALD R. FORD signed the Copyright Act of 1976,¹ the first complete revision of United States copyright law since the Copyright Act of 1909.² The 1909 Act, passed during the final days of Theodore Roosevelt's administration,³ was written before the technological explosion of the 20th century. It became outdated almost immediately after its enactment, and efforts at a complete revision began as early as 1924.⁴

Revision efforts during the 1920s and 1930s were unsuccessful, and were stalled entirely during the Second World War. After the war, the United States copyright community focused its attention upon the achievement of an international copyright treaty to which the United States would be a party. When the Universal Copyright Convention came into force in 1955, the effort to revise the outmoded 1909 Copyright Act began anew.⁵ It took twenty-one years of studies, draftsmanship, hearings, and debates to achieve this revision.

The 1976 Copyright Act represents a major advance for the creator. This is not to say that every provision is favorable to the creator. The new law is extremely complex, and the effects of many of its provisions are even now the subject of debate. The improvements of the new law over the 1909 Copyright Act are of such significance, however, as to justify its characterization by the Register of Copyrights as "an author's bill."⁶ This paper, based upon a panel discussion of the new law held at the Volunteer Lawyers for the Arts National Art Law Conference on December 3, 1976, in which the author participated, will outline some of the major advances for the creator in the 1976 Copyright Act.

I. THE TWO MOST SIGNIFICANT ADVANCES

Unquestionably, the two most significant advances for the creator will be found in the new law under the heading of "Duration of Copyright."⁷ The first, federal preemption of copyright law, concerns a subject that touches not

* B.A., Cornell Univ.; M.A.C., Annenberg School of Communications, Univ. of Pennsylvania; J.D., Columbia Univ.; Attorney, Office of General Counsel, American Society of Composers, Authors and Publishers, New York, New York.

¹ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C.A. §§ 101-810 (West Supp. 1977)).

² Act of March 4, 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. §§ 1-216 (1970)) (repealed 1976).

³ The 1909 Act was signed into law on March 4, 1909, the last day of Theodore Roosevelt's term in office and the date of William Howard Taft's inauguration.

⁴ H.R. 8177, 68th Cong., 1st Sess., (1924) 65 CONG. REC. 4912; H.R. 9137, 68th Cong., 1st Sess., (1924) (65 CONG. REC. 8552).

⁵ H. R. REP. NO. 1476, 94th Cong., 2d Sess. 47, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5660 [hereinafter cited as 1976 HOUSE REPORT].

⁶ Remarks by Hon. Barbara Ringer, Register of Copyrights, at "Program on the 1976 Copyright Act," in New York City (May 7, 1977).

only on duration, but on many other matters as well. The subject of the second advance, the copyright term, deals with the actual duration of copyright protection.

A. Federal Preemption of Copyright

Since the enactment of the first federal copyright law in 1790,⁸ the United States has had a unique and confusing dual system of copyright. After "creation" but prior to "publication"⁹ of a work, as the terms are used in the copyright sense, protection was a matter of state statutory or common law. Once "publication" took place, state common law protection ceased, and the only protection available was under the federal copyright statute. If the author did not comply with the federal copyright requirements at the time of "publication," the work lost all protection and passed into the public domain.¹⁰ To complicate matters further, certain types of works could be registered for federal copyright protection prior to publication, while such protection was not available to other types of unpublished works.¹¹ The result was a confusing system of copyright protection like no other in the world.

This bifurcation of protection and the attendant confusion has been remedied by the new law, which abolishes the dual system of copyright and substitutes a single unified system of federal copyright protection.¹² Initially, it might appear that federal preemption works to the detriment of the creator. State common law had extended protection in perpetuity, while federal protection, by constitutional mandate, is limited in duration.¹³ For many reasons, however, federal preemption is a major advance for the creator.¹⁴

First, it is widely recognized that federal copyright offers far better protection than state common law. For example, in any infringement action the prima facie evidentiary weight granted to a federal copyright certificate shifts the burden of proof regarding the validity of the copyright and the facts

⁸ Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

⁹ Publication, in the copyright sense, is generally taken to occur when:

by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur.

M. NIMMER, NIMMER ON COPYRIGHT § 49 (1976).

¹⁰ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

¹¹ 17 U.S.C. § 12 (1970) (repealed 1976). Types of unpublished works which could be registered include lectures, dramatic, musical, or dramatico-musical compositions, motion picture photoplays or other motion pictures, photographs, works of art, plastic works, and drawings.

¹² Copyright Act of 1976, 17 U.S.C.A. 301(a) (West Supp. 1977).

¹³ "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . ." U.S. CONST., art. I, § 8, cl. 8 (emphasis added).

¹⁴ S. REP. NO. 94-473, 94th Cong., 1st Sess. 112-116 (1975) [hereinafter cited as 1975 SENATE REPORT]; 1976 HOUSE REPORT, *supra* note 5, at 129-133. However, preemption does not prevent states from protecting "[t]he evolving common law rights of 'privacy,' 'publicity,' 'trade secrets, and the general laws of defamation and fraud, as long as the causes of action contain elements, such as an invasion of personal rights or breach of trust or confidentiality, that are different in kind from copyright infringement.'" *Id.* at 132.

contained in the certificate.¹⁵ The ability to press claims in federal courts which are familiar with copyright litigation, rather than in state courts which do not have equal sophistication, also works to the creator's advantage. A single, national, and uniform system of copyright frees the creator and his counsel from concern over differences in the common law of the various states.

Further, given the abolition of state common law protection, federal copyright need no longer be based on the concept of "publication."¹⁶ Accordingly, the new law allows registration of all types of unpublished works,¹⁷ and all authors, not only those whose works attain sufficient commercial success to be published, may benefit fully from federal copyright protection.

It should be noted that to a small extent some state common law protection has not been preempted by the new copyright law.¹⁸ Works which are not fixed in a tangible medium of expression are not "created" as the word is used in the new law, and thus are not subject to federal copyright protection.¹⁹

B. Copyright Term

Federal preemption of copyright protection may be the most important theoretical improvement in the new law, but in purely practical terms the most important advance is the extension of the copyright term for works copyrighted both before and after the effective date of the new law, January 1, 1978.²⁰

¹⁵ Copyright Act of 1976, 17 U.S.C.A. § 410(c) (West Supp. 1977) states that: "[T]he 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." The certificate of registration is issued by the Register of Copyrights under seal of the Copyright Office after it is determined that all materials deposited constitute copyrightable subject matter, and that all other legal and formal requirements of the Copyright Act have been met. *Id.* § 410(a).

¹⁶ The courts have long struggled with the definition of "publication." When is "publication" a general publication disseminating among or making the work available to the general public? *Gustave v. Zuppiger*, 24 Ariz. App. 557, 540 P.2d 176 (1975); *Jewelers' Mercantile Agency Ltd. v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898). When is publication special and limited so as not to constitute publication? *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973); *White v. Kimmel*, 94 F. Supp. 502 (S.D. Cal. 1950). When has the work been dedicated to the public? *Vic Alexander & Assoc. v. Cheyenne Neon Sign Co.*, 417 P.2d 921 (Wyo. 1966).

The United States Supreme Court refused to apply the term to categories of writings which Congress had not brought within the scope of federal statute. *Goldstein v. California*, 412 U.S. 546 (1973).

¹⁷ Copyright Act of 1976, 17 U.S.C.A. § 408(a) (West Supp. 1977).

¹⁸ Compare 17 U.S.C. § 12 (1970) (repealed 1976) with Copyright Act of 1976, 17 U.S.C.A. § 102(a) (West Supp. 1977).

¹⁹ Copyright Act of 1976, 17 U.S.C.A. § 301(a) (West Supp. 1977). Protection extends only to works which are fixed in a tangible medium of expression and come within the subject matter of copyright. These works include: literary works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures, and audiovisual works; sound recordings; including compilations and derivative works. *Id.* § 102(a). Section 102(b) specifically excludes from copyright protection 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. *Id.* § 102(b).

The 1909 law granted an initial copyright term of twenty-eight years.²¹ If the work was properly renewed in its twenty-eighth year, a renewal term of twenty-eight years was granted. Proper renewal, then, resulted in a total term of fifty-six years.²² The new law extends the total term to seventy-five years for works protected by federal copyright as of the new law's effective date by adding an additional nineteen years to the renewal term.²³ Thus, a work copyrighted before January 1, 1978 will have the same initial term of twenty-eight years, but will be entitled to a longer renewal term of forty-seven years. The nineteen-year addition to the renewal term is automatic for works already in their renewal term on January 1, 1978.²⁴ It is important to note, however, that works in their initial term on January 1, 1978 must still be renewed at the proper time²⁵ to enjoy the extended term of the new law.²⁶ Failure to renew properly will cause the work to pass into the public domain at the end of the initial term.

While the extension of term for already-existing copyrights is significant, the major advance in the term of copyright protection applies to works created or copyrighted on or after January 1, 1978. The basic term of copyright protection for such works is not a constant term of years, but is based on the life of the author; copyright will exist for the author's life and for fifty years after his or her death.²⁷

A term based on the life of the author is especially appropriate for three reasons. First, a life plus fifty-year provision comports with constitutional doctrine seeking the promotion of science and art and the limited protection of authors and inventors.²⁸ A fifty-six year term is too short a period in which

²¹ 17 U.S.C. § 24 (1970) (repealed 1976).

²² *Id.*

²³ Copyright Act of 1976, 17 U.S.C.A. § 304(a) (West Supp. 1977).

²⁴ *Id.* § 304(b). This increase in renewal term duration took effect immediately upon the 1976 Copyright Act's enactment, October 19, 1976, rather than upon the general effective date, January 1, 1978. Copyright Act of 1976, Transitional and Supplementary Provisions § 102.

²⁵ Timely application for renewal of a copyright in its first term on January 1, 1978 requires the applicant to submit an application to the Copyright Office to register the application within one year before the copyright is scheduled to expire. *Id.* § 304(a).

²⁶ *Id.* Further, an additional extension of copyright term has been effected by a provision of the new law which carries copyright protection through the end of the calendar year in which it would otherwise expire, rather than permitting expiration on the anniversary date of the copyright. *Id.* § 305.

²⁷ *Id.* § 302. This term also applies to works created but not copyrighted or published before January 1, 1978. Thus, certain works formerly protected by state common law because "unpublished" under the 1909 Act now receive federal copyright protection. See notes 9-10 *supra* and accompanying text. In no case will such protection last for less than 25 additional years, until December 31, 2002. If the work is published before December 21, 2002, it will be protected for at least another 25 years, until December 21, 2027. *Id.* § 303.

²⁸ The congressional reports note that "by far their most important legislative goal" in sponsoring this copyright revision was the adoption of copyright protection for the author's life plus 50 years. This provision was considered by the Register of Copyrights to be the "foundation of the entire bill." 1975 SENATE REPORT, *supra* note 14, at 117; 1976 HOUSE REPORT, *supra* note 5, at 133.

An argument against the life plus fifty year term, voiced by Irwin Goldbloom, Deputy Assistant Attorney General in the Civil Division of the Justice Department, was that an extension of copyright protection for a term of the author's life plus 50 years was contrary to the intent of the founding fathers of the Constitution in providing for limited protection of an author's works. See <https://www.copyright.gov/records/1976-01-01-1976-01-01> and <https://www.copyright.gov/records/1976-01-01-1976-01-01> (cited in the Justice Department records) extending copyright protection to a term

to insure an author and his dependents the fair economic benefits of his work, or to provide an incentive for creation and dissemination of that work given the increase in life expectancy since the 1909 Act. Indeed, under the 1909 copyright law many creators saw their work go into the public domain during their lifetimes. In addition, too short a term harms an author without providing any substantial benefit to the public, since the price of public domain works is rarely lower than the price charged for copyrighted works. With the growth of the communications media, the commercial life of many works has been substantially lengthened. A longer term is necessary to offer copyright protection for those works whose value is not recognized until many years after their initial promotion.

Secondly, a term based on the life of the author makes possible the elimination of the renewal requirement of the 1909 copyright law, thereby removing the substantial burden renewal placed upon authors.

Lastly, almost every country in the world has adopted a copyright term of the life of the author plus fifty years or more. The sore point in international copyright relations caused by foreign countries giving longer copyright protection to American works than the United States gives to foreign works is cured by the new law.

A term based on the life of the author presents special problems for computation of the term when a work is the result of multiple authorship. The new law resolves this simply and fairly by basing the life plus fifty-year provision on the death of the last survivor of a group of joint authors.²⁹

Finally, a new right, the right of termination relating both to term and transfers of copyright, is contained in the 1976 Copyright Act. Under the 1909 Act, authors had an opportunity to reclaim the rights in their works from assignees at the time of renewal.³⁰ Authors usually assigned renewal rights with the original assignment of copyright. However, if an author died before the initial term expired, the renewal right vested in the author's surviving spouse and children, notwithstanding any assignment of the renewal rights by the author.³¹ Thus, to some degree authors and their heirs were protected

of 56 years or the author's life, whichever was longer, feeling such a term of copyright protection more compatible with the constitutional mandate of "limited" protection. *Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 141-43 (1975) (statement of Irwin Goldbloom).

This contention, however, was sufficiently rebutted in the congressional reports to lead Congress to conclude that, "[t]he need for a longer term of copyright [had] been conclusively demonstrated." 1975 SENATE REPORT, *supra* note 14, at 118; 1976 HOUSE REPORT, *supra* note 5, at 135.

²⁹ Copyright Act of 1976, 17 U.S.C.A. § 302(b) (West Supp. 1977). Another case in which a term based on the life of the author presents special problems occurs when "authorship" is vested in a corporation or when the author's identity is unknown. In cases of works made for hire, anonymous works, or pseudonymous works, the new law grants a term of 75 years from publication or 100 years from creation, whichever expires first. *Id.* § 302(c).

³⁰ 17 U.S.C. § 24 (1970) (repealed 1976).

³¹ 17 U.S.C. § 24 (1970) (repealed 1976).

The proposition of renewal right vestment in the author's heirs notwithstanding any assignment of renewal rights made by the author is now a firmly established rule of copyright law. *See, e.g., Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975); *Rose v. Bourne, Inc.*, 279 F.2d 79 (2d Cir. 1960); *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F. Supp. 420 (M.D. Tenn. 1975).

against unremunerative initial transfers of copyright by recapture at renewal. In practice, recapture of the copyrights at the time of renewal did not often occur because assignees would obtain grants of contingent future interests in the renewal copyright from the author's spouse and children while the author was still living, which insured continued possession of the copyright during the renewal period.

Given a single term based on the life of the author and the elimination of the renewal procedure, the possibility of recapture has been lost under the new law. Congress has therefore created the right of termination,³² under which the author or his heirs may in certain circumstances recapture copyrights previously assigned, notwithstanding a contractual agreement. Two such termination rights were created. One allows recapture of works assigned before January 1, 1978, for the additional nineteen years added to the renewal term, which would otherwise be a "windfall" period for the assignee.³³ The other allows recapture of works assigned after January 1, 1978, generally thirty-five years after the assignment is made.³⁴

II. IMPROVEMENT IN SUBSTANTIVE RIGHTS

The 1976 Copyright Act contains significant advances in the substantive rights protected by copyright. While an exhaustive list of these improvements is beyond the scope of this Article, some of the major advances for visual and performing artists may be noted.

First, protection has been explicitly extended to a new category — pantomime and choreographic works.³⁵ The 1909 Act did not expressly include choreographic works, but protection could be obtained for those choreographic works which fit into the category of "dramatic" works, that is, which had a definite plot line or conveyed definite emotions which could be

³² Copyright Act of 1976, 17 U.S.C.A. §§ 203, 304(c) (West Supp. 1977).

³³ *Id.* § 304(c). This termination right may be exercised by the author of a singly authored work, by an author or authors of a jointly authored work (to the extent of their interest in the work), or by the heirs of such authors as their interests are explained in section 304(c)(1) and (2). The right may not be exercised if the copyright was granted by the author's will. An eligible individual wishing to exercise this right may do so anytime within 5 years after January 1, 1978, or 5 years after the original 56 year copyright term expired, whichever is later. *Id.* § 304(c)(3).

In order to make such a termination effective, notice must be served upon the grantee or assignee at least 2 and not less than 10 years before the date chosen for termination by the author or his heirs. The notice must also include a statement of the effective date of termination, must be signed by everyone exercising their right of termination (authors, joint authors, heirs or their authorized agents), and must comply with any further regulations prescribed by the Register of Copyrights. *Id.* § 304(c)(4)(A) and (B).

³⁴ Copyright Act of 1976, 17 U.S.C.A. § 203 (West Supp. 1977). The right to terminate a copyright granted after January 1, 1978, is established in an author, authors, or particular heirs of authors according to a specific grant of such a right explained in section 203(a)(1) and (2). These specific grants are quite similar to those established in section 304(c)(1) and (2). See note 33 *supra*. Termination under this section is also subject to the same notice requirements as termination of assignments made prior to January 1, 1978. Copyright Act of 1976, 17 U.S.C.A. § 203(a)(4)(A), (B) (West Supp. 1977). See note 37 *supra*.

An eligible individual terminating under this section may do so within 5 years after the expiration of a 35 year period commencing with the date of the grant. However, if the grant of the copyright extends over the right of publication of the work, the individual choosing to terminate has until 35 years from the date of work's publication or 40 years after the date of the grant, whichever is shorter. Copyright Act of 1976, 17 U.S.C.A. § 203(a)(3) (West Supp. 1977).

³⁵ Copyright Act of 1976, 17 U.S.C.A. § 102(a)(4) (West Supp. 1977).

reduced to writing. Protection was not granted for choreographic works which were not "dramatic," creating difficulty for choreographers.³⁶ The new law's addition of all forms of choreographic works as a distinct category subject to copyright eliminates the classification problem in favor of the creator.

The new law also contains a significant clarification of the rights protected by copyright. The 1909 law contained a long list of the exclusive rights of the copyright proprietor. For various types of works, these included the rights to: "print, reprint, publish, copy and vend";³⁷ "translate . . . or make any other version . . . dramatize . . . convert . . . arrange or adapt . . . complete, execute and finish";³⁸ "deliver, authorize the delivery of, read, or present . . . play or perform . . . exhibit, represent, produce, or reproduce";³⁹ and so on. This long and confusing list of exclusive rights has been simplified to five basic rights under the new law:⁴⁰

1. The right to reproduce the copyrighted work in copies or phonorecords;⁴¹
2. The right to prepare derivative works;⁴²
3. The right to distribute copies or phonorecords to the public by sale or other transfer of ownership or by rental, lease or lending;⁴³
4. The right to perform the copyrighted work publicly;⁴⁴
5. The right to display the copyrighted work publicly.⁴⁵

³⁶ Guidelines established by the courts for determining when an artistic work such as choreography was "dramatic" and when it was not were, by their very nature, vague. This was one definition of a "dramatic" work extracted from *Fuller v. Bemis*, 50 F. 926 (S.D.N.Y. 1892): "It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary." *Id.* at 929.

The detailed stage instructions involved in *Fuller*, which directed explicitly the movements of a single female dancer, as well as the lighting and scenery involved in a three act presentation were held to be nondramatic and to constitute only an attractive woman "illustrating the poetry of motion in a singularly graceful fashion." *Id.*

³⁷ 17 U.S.C. § 1(a) (1970) (repealed 1976).

³⁸ *Id.* § 1(b).

³⁹ *Id.* § 1(c).

⁴⁰ Copyright Act of 1976, 17 U.S.C.A. § 106 (West Supp. 1977).

⁴¹ *Id.* § 106(1). A reproduction differs from a display (§ 106(5)) in that the tangible form of a reproduction must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5)." 1976 HOUSE REPORT, *supra* note, 5, at 62.

⁴² Copyright Act of 1976, 17 U.S.C.A. § 106(2) (West Supp. 1977). The right to prepare derivative works is overlapped by, but broader in scope than the right to reproduce the work, in that the derivative work may infringe upon the copyright owner's right even though nothing is ever fixed in tangible form.

⁴³ Copyright Act of 1976, 17 U.S.C.A. § 106(3) (West Supp. 1977).

⁴⁴ Copyright Act of 1976, 17 U.S.C.A. § 106(4) (West Supp. 1977). This right is limited to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. *Id.*

⁴⁵ *Id.* § 106(5). This right is limited to 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. *Id.* The right to display under the 1909 Act was uncertain and subject to varied interpretations. Thus, the statutory recognition given to this right is the first such recognition in American copyright law. 1976 HOUSE REPORT, *supra* note 5, at 63.

It is clear from both the relevant definitions in the new law⁴⁶ and the language of the congressional reports⁴⁷ that a very broad reading of these rights in favor of the copyright owner was intended.

Other changes in the new law relating to specific visual or performing arts are noteworthy. In the field of music, one significant change is the elimination of the "for profit" limitation on the exclusive right to perform nondramatic musical compositions publicly.⁴⁸ Very limited and specific exemptions for performances with certain educational and religious purposes were substituted for the general non-profit limitation. Generally, performances in the course of face-to-face teaching activities⁴⁹ or religious services at a place of worship⁵⁰

⁴⁶ Copyright Act of 1976, 17 U.S.C.A. § 101 (West Supp. 1977). Not only are all the exclusive rights of the copyright owner under the old Act contained in the new Act, but the new Act includes much more, as illuminated by the definitions under the new Act. For example, in reference to section 106(2), the right to prepare derivative works, section 101 defines a derivative work as:

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* [or] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship. . . .

Id. (emphasis added).

⁴⁷ 1976 HOUSE REPORT, *supra* note 5, 61-65. "Each of the five enumerated rights may be subdivided indefinitely and . . . each subdivision of an exclusive right may be owned and enforced separately." *Id.* at 61.

⁴⁸ Under the old act, [a]ny person entitled thereto, . . . shall have the exclusive right: . . . [t]o perform the copyrighted work publicly for profit . . ." 17 U.S.C. § 1(e) (1970) (repealed 1976).

The approach under the new law is similar to many foreign laws. It protects the copyright proprietor by prescribing an initial broad statement of a public performance right followed by specific well-defined exemptions. The deletion of the "for profit" limitation is a more reasonable approach because of the fading distinction between commercial and "nonprofit" organizations. The modern "nonprofit" organization is apt to be highly subsidized and therefore as able to pay royalties as any commercial organization. "In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad 'not for profit' exemption could not only hurt authors but could dry up their incentive to write." 1975 SENATE REPORT, *supra* note 14, at 59.

⁴⁹ The following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of a face-to-face teaching activities of a nonprofit educational institution, . . . unless, in the case of a motion picture or other audiovisual work, the performance, or the display . . . is given by means of a copy that was not lawfully made . . . and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or display of a work . . . if (A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and . . . (C) the transmission is made primarily for (i) reception in . . . places normally devoted to instruction, or (ii) reception by persons . . . [whose] disabilities or other special circumstances prevent their attendance in . . . places normally devoted to instruction, or (iii) reception by officers or employees of governmental bodies as part of their official duties or employment

Copyright Act of 1976, 17 U.S.C.A. § 110(1), (2) (West Supp. 1977). These two clauses are intended to encompass any performance or display which is used in systematic instruction. The phrase "face-to-face" is used to distinguish performances or displays which are transmitted, either by broadcasting or any other form of transmission into a classroom or similar place devoted to instruction. Another requirement of section 110, clause 1 is that the work must be performed or displayed by instructors or pupils, not by outside artists brought into the instructional environment specifically for the purpose. 1976 HOUSE REPORT, *supra* note 5, at 81-82.

⁵⁰ "[T]he following are not infringements of copyright: . . . (3) performance of non-

are exempt and will not require a license from the copyright owner. Performances without any purpose of direct or indirect commercial advantage, and in which no performer, promoter, or organizer is paid, are also exempt in limited circumstances.⁵¹ Except for these very limited exemptions, all public performances of nondramatic musical works whether "for profit" or not must be licensed by the copyright owner or his representative. The elimination of the "for profit" limitation together with a broadened definition of a "public" performance will enable authors, composers, and publishers of copyrighted music to license performances which were not licensed under the 1909 law, and to receive income from such performances.

Another advance in the field of music, related to the income which the creator will earn from his work, concerns the compulsory license fee for sound recordings. Under the 1909 law, the compulsory license fee was set at two cents per record manufactured.⁵² Under the new law, the compulsory license fee is increased to two and three-quarter cents or one half-cent per minute, whichever is greater, for each record distributed.⁵³

dramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly. . . ." Copyright Act of 1976, 17 U.S.C.A. § 110(3). This exemption is similar to the exemption in the 1909 Act that "nothing in this title shall be so construed as to prevent the performance of religious or secular works . . . provided the performance is given for charitable or educational purposes and not for profit." 17 U.S.C. § 104 (1970) (repealed 1976).

The purpose [in the 1976 Act] is to exempt certain performances of sacred music that might be regarded as 'dramatic' in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme and take place 'in the course of [religious] services.'

1976 HOUSE REPORT, *supra* note 5, at 84. This exemption excludes any kind of social, educational, or fund-raising activities at a place of worship by requiring the performance or display to be "in the course of services."

⁵¹ COPYRIGHT ACT OF 1976, 17 U.S.C.A. § 110(4) (West Supp. 1977). This exemption is only applicable to public performances given directly in the presence of an audience, and, though the performance may be live or mechanical (e.g., playing phonorecords or a television), it does not include a "transmission to the public." Also, despite the limitation, the exemption would not be lost if the performers, promoters, or organizers are paid a salary for duties encompassing the performance and not for the performance directly. Lastly, the commercial advantage provision expressly adopts the court established principle that public performances given or sponsored in connection with a commercial or profit-making enterprise are not exempt even though the public is not charged for seeing or hearing the performance. 1975 SENATE REPORT, *supra* note 14, at 76-7; 1976 HOUSE REPORT, *supra* note 5, at 85.

For examples of cases under the 1909 Act that found this commercial advantage concept, see *Herbert v. Shanley Co.*, 242 U.S. 591 (1917) (music played as an incident to other entertainment for which the public had paid was a "for profit" performance); *Chappel & Co. v. Middletown Farmer's Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964) (playing recorded music in a store for the entertainment and amusement of the patrons and to make the place of business more attractive was a "for profit" performance); *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*, 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd*, 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944) (broadcast of copyrighted material on a sustaining program of a non-profit radio station was "for profit" since it was a part of the general business of the station though it brought in no revenue directly); *Remick Music Corp. v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523 (D. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809, *rehearing denied*, 330 U.S. 854 (1947) (public performance of a musical composition in a dining room of a hotel, a skating rink, or a dance hall is a "for profit" performance).

⁵² 17 U.S.C. § 1(e) (1970) (repealed 1976).

⁵³ Copyright Act of 1976, 17 U.S.C.A. § 115 (West Supp. 1977). This section provides, *inter alia*, that a record should be considered to be "distributed" when the party exercising the,

Certain user industries, which had been exempt or had not paid license fees under the old law, will now be required to pay for the copyrighted works they use. In the musical field, jukebox operators will pay an annual compulsory license fee of eight dollars per jukebox, to be divided among copyright proprietors through performing rights organizations such as ASCAP.⁵⁴ Cable television, previously exempt from royalty payments for use of copyrighted works when simultaneously retransmitting broadcast signals,⁵⁵ will now be subject to compulsory licensing for such secondary transmissions under a complicated statutory formula.⁵⁶ The royalties will be divided among copyright proprietors.

Of interest to both musical and visual artists, public broadcasting will finally pay license fees for the use of nondramatic musical, pictorial, graphic, and sculptural works in its broadcasts.⁵⁷ Again, such uses are subject to compulsory licensing, but no statutory license fee is set. Rather, voluntary agreements are encouraged, but if none can be worked out, the license fees will be set by a new agency in the legislative branch, the Copyright Royalty Tribunal.⁵⁸

The compulsory license for public broadcasting should be of special interest to visual artists whose pictorial, graphic, and sculptural works are displayed on public broadcasting's programs. It is safe to assume, as has been the case in the past, that public broadcasting will attempt to pay as little as possible for the creative works it uses. Authors and composers of musical compositions have long had national organizations such as ASCAP to license the nondramatic performance of their works and to protect their interests in negotiations with large industries like public broadcasting. Visual artists, however, had no such national organization, and the compulsory license of pictorial, graphic, and sculptural works to public broadcasting may provide the impetus for establishment of such an organization.

Other improvements in the law concerning the visual arts should also be noted. The new law expressly provides that ownership of copyright is distinct from ownership of the material object embodying the copyrighted work.⁵⁹ Coupled with federal preemption of state common law copyright,⁶⁰

compulsory license voluntarily and permanently parts with possession of the record. *Id.* § 115(c)(2).

⁵⁴ *Id.* § 116(b).

⁵⁵ *Teleprompter Corp. v. Columbia Broadcasting Sys.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). Both of these decisions urged Congress to consider and determine the scope and extent of liability upon revision of the 1909 Act.

⁵⁶ Copyright Act of 1976, 17 U.S.C.A. § 111 (West Supp. 1977). Part of the complication is the result of taking into account the rules adopted by the FCC to govern the cable TV industry. The statutory formula adopted here is meant to avoid interfering with FCC rules or affecting "communications policy," while recognizing the liability of cable operators to the creators of the copyrighted program material that they carry. 1975 SENATE REPORT, *supra* note 14, at 79; 1976 HOUSE REPORT, *supra* note 5, at 89.

⁵⁷ Copyright Act of 1976, 17 U.S.C.A. § 118 (West Supp. 1977).

⁵⁸ *Id.* § 118(b). The Copyright Royalty Tribunal will also periodically review and adjust all other statutory compulsory license fees.

In early 1978, the Tribunal held the first public broadcasting proceedings, and issued its determination of reasonable fees and terms on June 8, 1978, 43 Fed. Reg. 25068 (1978). For regulations embodying that decision, see 37 C.F.R. §§ 304.1 *et. seq.*

⁵⁹ Copyright Act of 1976, 17 U.S.C.A. § 202 (West Supp. 1977).

⁶⁰ *Id.* § 301.

the new law has the effect of overruling the common law doctrine that the sale of an unpublished material object, especially a work of visual art, carries with it the sale of the copyright in the work.⁶¹

In addition, the new law clarifies the copyright owner's right to place a work of visual art on exhibition without fear of losing his copyright. There had been some difficulty with the new law's definition of "publication" as applied to exhibitions of works of visual art. While the "public . . . display of a work does not of itself constitute publication . . . [t]he offering to distribute copies . . . to a group of persons for purposes of further distribution . . . or public display, [does constitute] publication."⁶² It had been feared that the offering of a work for sale by an art gallery would thus constitute publication, and would threaten loss of the work's copyright if proper notice is not affixed. Both the Senate and House reports on the new law, however, expressly state that such is not the case.⁶³

III. COPYRIGHT FORMALITIES

Creators, and especially visual artists, have been troubled by the copyright formalities of notice, deposit, and registration. Certainly, from the creator's point of view the best copyright system would be one with no formalities whatsoever. Indeed, such copyright systems exist throughout Europe, perhaps reflecting a long-standing European cultural presumption in favor of authorship.

A significant drawback of the 1909 Copyright Act and preceding copyright acts was the requirement of rigid adherence to copyright formalities. Improper placement or omission of the copyright notice almost always worked to deprive the copyright owner of his property. While the 1976 Copyright Act makes significant progress in easing the requirements for compliance with copyright formalities, the total elimination of copyright formalities is a task for the next copyright revision, and it is important to note that in many ways compliance with formalities becomes even more important under the new law.

A. Copyright Notice

The requirements concerning copyright notice⁶⁴ are eased in two substantial ways. First, the technical requirements regarding the notice are relaxed. No longer must the notice appear in a specific location to be effective.

⁶¹ 1975 SENATE REPORT, *supra* note 14, at 108; 1976 HOUSE REPORT, *supra* note 5, at 124. A specific written conveyance of rights would be required in order for a sale of any material object to carry with it a transfer of copyright. See *Pushman v. New York Graphic Society, Inc.*, 287 N. Y. 302, 39 N. E.2d 249 (1942) (common law doctrine that authors and artists were presumed to have transferred property rights when they sold their work).

⁶² Copyright Act of 1976, 17 U.S.C.A. § 101 (West Supp. 1977).

⁶³ 1975 SENATE REPORT, *supra* note 14, at 126-127, 1976 HOUSE REPORT, *supra* note 5, at 143-144. This is meant to include public display "of a copy by any means, including projectors, television or cathode ray tubes connected with information storage and retrieval systems, or in connection with the public performance of a work by means of copies or phonorecords, whether in the presence of an audience or through television, radio, computer transmissions, or any other process." *Id.*

Rather, the new law provides that it shall be placed "in such manner and location as to give reasonable notice of the claim of copyright."⁶⁵ The Register of Copyrights is given the responsibility of prescribing by regulation specific methods of affixation and positions on various types of works, although the regulations will not be considered exhaustive.⁶⁶

This change in the law is especially significant for visual artists, who for many years have objected to the old law's notice requirement on the grounds that a copyright notice marred the work's artistic character. The new law clearly intends that this shall not be the case in the future. For example, in the case of paintings the Register of Copyrights has said that she believes a notice affixed to the back of a painting, rather than the front, would satisfy the new law's notice requirement.⁶⁷

Copyright notice has included the use of three elements: the word "Copyright," the abbreviation "Copr.," or the symbol "©"; the year of first publication; and the name of the copyright proprietor.⁶⁸ The new law, like the old law, does not require the year date on pictorial, graphic, or sculptural works with accompanying text reproduced in greeting cards, postcards, stationery, jewelry, dolls, toys, or other useful articles.⁶⁹ For all types of works, an abbreviation by which the copyright owner can be recognized, or a known alternative designation, may be substituted for the name of the copyright owner.⁷⁰ Further, contributions, except advertisements, to collective works such as newspapers or periodicals need not bear separate notices of copyright in addition to the notice applicable to the work as a whole.⁷¹

The second easing of the notice formality concerns an error in or omission of the notice. Under the 1909 Copyright Act, a substantial error in the copyright notice or the omission of the notice from published copies could cause loss of the copyright. The 1976 Copyright Act contains saving provisions in such cases. If the copyright owner's notice is omitted from copies of the work, and corrective steps are taken within five years of publication, the work will not be lost to the public domain.⁷² In case of error in the copyright notice, the new law permits corrective registration. While innocent infrin-

⁶⁵ *Id.* § 401(c).

⁶⁶ *Id.*

⁶⁷ Remarks by Hon. Barbara Ringer, Register of Copyrights at "Program on the 1976 Copyright Act," in New York City (May 7, 1977). The Copyright Office's regulations have embodied this view, 37 C.F.R. § 201.20.

⁶⁸ 17 U.S.C. § 19 (1970) (repealed 1976); Copyright Act of 1976, 17 U.S.C.A. § 501(b) (West Supp. 1977).

⁶⁹ See note 68 *supra*.

⁷⁰ Copyright Act of 1976, 17 U.S.C.A. § 401(b)(3) (West Supp. 1977). The 1909 Copyright Act required that in "the case . . . of copies of works specified [maps; works of art; models or designs for works of art; reproductions of a work of art; drawings or plastic works of a scientific or technical character; photographs] notice may consist of the letter c enclosed within a circle, thus ©, accompanied by the initials, monogram, mark or symbol of the copyright proprietor: Provided that on some accessible portion of such copies . . . his name shall appear." 17 U.S.C. § 19 (1970) (repealed 1976).

⁷¹ Copyright Act of 1976, 17 U.S.C.A. § 404 (West Supp. 1977).

⁷² Copyright Act of 1976, 17 U.S.C.A. § 405 (West Supp. 1977). Cf. 17 U.S.C. § 21 (1970) (repealed 1976) for the 1909 Copyright Act's provision for treatment of accidental omission of notice.

gers may not be liable in cases of erroneous notice, in no event will the copyright be lost.⁷³

B. Deposit of Copies

As under the 1909 Copyright Act, the deposit of one or more copies of the work is required by the 1976 Copyright Act upon publication.⁷⁴ Registration of the work must be accompanied by deposit if no deposit has previously been made.⁷⁵ In the past, the deposit requirements have been a severe burden on those working in the fine arts. For example, when only fifty copies of a work of fine art are produced, the requirement that one or two of the best copies be deposited is obviously a great artistic and financial hardship on the creator. To correct this inequity, the new law provides that in such circumstances the work shall be exempt from the deposit requirements.⁷⁶

C. Copyright Registration

Registration is entirely permissive under the 1976 Copyright Act.⁷⁷ A single registration for a group of related works is now allowed.⁷⁸ Further, the Register of Copyrights is directed to establish regulations permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals within a twelve-month period.⁷⁹ Single renewal registration in similar circumstances is also allowed.⁸⁰ These provisions will be of especial help to visual artists such as cartoonists, whose works are published in periodicals.

In some ways, however, the registration requirements are harsher under the new law than the old. As under the 1909 Act,⁸¹ if registration is not made the copyright owner may not sue for copyright infringement.⁸² But the 1909 Act allowed infringement suits once registration was made, with the full availability of all remedies. Under the new law, even if registration is made subsequent to infringement, the copyright owner may lose the right to recover statutory damages and attorney's fees depending on the dates of infringement, publication, and registration.⁸³ Thus, copyright registration is of

⁷³ Copyright Act of 1976, 17 U.S.C.A. § 406 (West Supp. 1977).

⁷⁴ *Id.* § 407. Cf. 17 U.S.C. § 13 (1970) (repealed 1976). Compliance with section 13 of the 1909 Copyright Act was a requirement for copyright protection, although the late deposit of copies did not bar a suit for copyright infringement for acts occurring prior to deposit. *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939).

⁷⁵ Copyright Act of 1976, 17 U.S.C.A. § 408(b) (West Supp. 1977). Cf. 17 U.S.C. § 11 (1970) (repealed 1976).

⁷⁶ Copyright Act of 1976, 17 U.S.C.A. § 407(c) (West Supp. 1977). See note 61 *supra*.

⁷⁷ Copyright Act of 1976, 17 U.S.C.A. § 408(a) (West Supp. 1977). Cf. 17 U.S.C. § 11 (1970) (repealed 1976).

⁷⁸ Copyright Act of 1976, 17 U.S.C.A. § 408(b)(4) (West Supp. 1977).

⁷⁹ *Id.* § 408(c)(2). Such registration is contingent upon compliance with the requirements of section 408(c)(2).

⁸⁰ *Id.* § 408(c)(3). Single registration is contingent upon compliance with the requirements of section 408(c)(3).

⁸¹ 17 U.S.C. § 13 (1970) (repealed 1976).

⁸² Copyright Act of 1976, 17 U.S.C.A. § 411 (West Supp. 1977).

extreme importance, and the best advice to a creator is to register his work with the Copyright Office as soon as possible — certainly immediately upon publication.

It should also be noted that transfers of copyright are not valid unless they are embodied in a written instrument,⁸⁴ and that no action for infringement by the transferee may be brought until the transfer is recorded in the Copyright Office.⁸⁵

IV. CONCLUSION

In the past, artists in different fields, especially in the visual arts, were either unaware of the benefits of copyright or simply did not bother to take advantage of the law. The 1976 Copyright Act marks a quantum leap forward for authors and composers of musical compositions, for creators of choreographic works, for artists working in the pictorial, graphic, and sculptural arts, and indeed for all authors in the protection of their creations. It is now up to the creators to make full use of the protection which the new law affords.

⁸⁴ *Id.* § 204(a). See also 17 U.S.C. § 28 (1970) (repealed 1976), which also required a writing for valid assignment of a copyright.

⁸⁵ Copyright Act of 1976, 17 U.S.C.A. § 205(d) (West Supp. 1977).