

PUBLICATION AND THE COPYRIGHT LAW REVISION*

I

INTRODUCTION

There has been no major revision of the copyright law since 1909. In many ways, its provisions have not given satisfactory answers to the legal problems arising in the field of communications—a field that has been in the van of the great advance in technology that has become the trademark of the twentieth century. For this reason, the United States Senate authorized the Copyright Office of the Library of Congress to undertake a complete investigation of the problem areas of the law of copyright preparatory to a proposed general revision of title 17 of the United States Code, the Copyright Act.¹ Studies of thirty-four separate topics were solicited and received from members of the Copyright Office staff and legal scholars independent of that Office; each study included recommendations of the author for specific revisions to the existing copyright law.² The Copyright Office then solicited comments on each of the studies from persons interested in the particular fields; the studies, with comments appended, were transmitted by the Office to the Senate Judiciary Committee, Subcommittee on Patents, Trademarks, and Copyrights, which published them in a series of twelve committee prints.³ On the basis of these studies and comments, the Copyright Office prepared a report on its ideas of the important issues to be considered and made tentative recommendations for their solution in a general revision of the copyright law.⁴ It is the purpose of this comment to examine the problems relating to *publication* in the law of copyright and to evaluate the Copyright Office's proposed solutions in light of both the present law and the suggestions made in the studies referred to above.

II

THE PROBLEMS

The term "publication" arises in several different contexts in the law of copyright, and its legal meaning varies with the context. Indeed, one of the greatest problems in the area of publication is that the same term has been used to describe dissimilar situations; cases dealing with one type of publication have been carelessly cited as authority in cases concerning another variety.⁵ A recent statement by Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit illustrates the several ways in which the courts use the term:

A finding that a work has been published may have various effects. It may serve to destroy a common-law copyright . . . or a statutory copyright secured under § 12, as

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¹ S. Res. 53, 86th Cong., 1st Sess. (1959); S. Res. 240, 86th Cong., 2d Sess. (1960).

² See Studies No. 1-34, prepared for the subcommittee under the authority of S. Res. 53 and 240, *supra* note 1. Throughout this comment, the studies will be cited by author, title, study number, and date, without further reference to the authorizing legislation.

³ Copies of the prints are available from the Superintendent of Documents, U.S. Government Printing Office, Washington 25, D.C.

⁴ U.S. REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (July 1961) [hereinafter cited as COPYRIGHT REPORT].

⁵ See Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185 (1956); Roberts, *Publication in the Law of Copyright*, in ASCAP COPYRIGHT LAW SYMPOSIUM No. NINE 111 (1958).

is here contended. On the other hand, it may serve to validate a statutory copyright secured under § 10, where publication is a necessary precondition. Or it may invalidate a § 10 copyright where the alleged publication bears a defective notice of copyright.⁶

Each use of the term will be considered separately.

A. Publication That Divests Common Law Rights

1. Common Law Rights

The common law recognizes a property right in literary and related works, giving the author the right to prevent anyone from making a disclosure to the public of the contents of his work before he chooses to do so himself.⁷ This right is assignable, the assignee receiving the same protection from the courts as would the author.⁸ As long as the contents of the work are kept private, there can be little argument with the conclusion of the courts that the property right is still intact.⁹ And, if the author makes many copies of his work and sells them to any willing buyer, it would be hard to dispute the policy determination that the common law right of first disclosure has come to an end.¹⁰ The difficulty arises when the author or proprietor of the common law right in the work makes some public disclosure of its contents short of a renunciation of his common law rights or short of a general sale of copies of his work but nevertheless seeks the aid of the court to prevent anyone other than his assigns from making use of it. The question the court must answer is whether the public's interest in preserving a private property right is greater than its interest in having the contents of the work freely available.¹¹ When this right of the public to know is held to be paramount, the work is said to have fallen into the public domain,¹² and the author or proprietor is held to have been divested of all of his common law right in the work. The question is how much public disclosure is allowable before this divestiture occurs.¹³

⁶ *Hirshon v. United Artists Corp.*, 243 F.2d 640, 644 (D.C. Cir. 1957). See also *American Visuals Corp. v. Holland*, 239 F.2d 740, 742 (2d Cir. 1956); *Nimmer*, *supra* note 5, at 185 (1956). It seems that the last example cited by Judge Bazelon is spurious, inasmuch as there is no § 10 copyright to invalidate until there has been publication with adequate notice.

⁷ For a summary of common law rights in literary property before publication, see *Harper & Bros. v. Donahue & Co.*, 144 Fed. 491, 492 (C.C.N.D. Ill. 1905).

⁸ *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907). However, since the sale of even a single copy of a work has been held to divest the author of his common law rights, see note 13 *infra*, only a gratuitous assignment would seem to be effective in transferring the author's rights.

⁹ *Roberts*, *supra* note 5, at 119.

¹⁰ *Id.* at 120.

¹¹ Recognition of the latter interest is an acknowledgment of the important role the free circulation of ideas has played in the intellectual and scientific development of our civilization.

¹² This assumes, of course, that statutory copyright has not been secured.

¹³ Some situations clearly constitute divestitive publication, and it is worthwhile to list them at this point: (1) Making and selling copies. See *Nimmer*, *supra* note 5, at 187. See also *Fashion Originators Guild of America v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941); *Wagner v. Conried*, 125 Fed. 798 (C.C.S.D.N.Y. 1903); *Grandma Moses Properties, Inc. v. This Week Magazine*, 117 F. Supp. 348 (S.D.N.Y. 1953); *William A. Meier Glass Co. v. Anchor Hocking Glass Co.*, 95 F. Supp. 264 (W.D. Pa. 1951). The same rule applies if the copies are leased rather than sold. *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898). (2) Unconditional public disclosure of an idea. *Irizarry y Puente v. President and Fellows of Harvard College*, 248 F.2d 799 (1st Cir.), *cert. denied*, 356 U.S. 947 (1957). (3) Conditional disclosure, where no steps are taken to enforce the condition. *White v. Kimmell*, 193 F.2d 744 (9th Cir. 1952), *reversing on the facts*, 94 F. Supp. 502 (S.D. Cal. 1950). *Accord*, *Public Affairs Associates v. Rickover*, 284 F.2d 262, 271 (D.C. Cir. 1960), *vacated and remanded due to inadequate record*, 360 U.S. 111 (1962).

2. *Limited Publication*

Because the courts do not like to declare forfeitures of property rights, they have developed a device that enables them to find that a work, though disclosed to some degree, is not divestitively published. This device is the doctrine of "limited publication." The Second Circuit has defined limited publication as follows:

Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a "general publication." There may be also a "limited publication." The use of the word "publication" in these two senses is unfortunate and has led to much confusion. A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. . . . The test is whether there is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject-matter by the public or the members thereof to whom it may be committed.¹⁴

Under this statement of the rule, a court wishing to hold that the author or proprietor of a work that has been made public has not dedicated or abandoned it to the public domain (or, more properly, has not forfeited his common law rights in it)¹⁵ may do so by finding either that the work was made available to only a limited class of people or that the people who were granted access to the work, although not limited in number, were restricted in the scope of permissive use. It is easy to see how the courts can justify a holding that common law rights survive where the work is made available to only a limited number of people. Also, it is understandable that the courts would be reluctant to find a publication where the author or proprietor of the work *expressly* informed all those to whom he showed the work that they were not allowed to copy or make any other beneficial use of it without express permission to do so.¹⁶ The hard cases have been those in which the courts have *implied* a restriction on use where the work was shown to an unlimited number of people.

a. *Performance*

In *Ferris v. Frohman*,¹⁷ the producers of an American "adaptation" of an English play that had previously been produced in England were sued for an accounting and an order enjoining them from further violations of the plaintiffs'

¹⁴ Werckmeister v. American Lithographic Co., 134 Fed. 321, 324-25 (2d Cir. 1904). (The court's application of its analysis to the facts of that case is found in 134 Fed. at 330.) This discussion was specifically approved by the Supreme Court when it affirmed the Second Circuit's decision *sub nom.* American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907).

¹⁵ The distinction between abandonment and dedication (a term often used in the same context as abandonment), on the one hand, and forfeiture, on the other, is forcefully pointed out by Judge Learned Hand in *National Comics Publications, Inc. v. Fawcett Publications*, 191 F.2d 594, 597-98 (2d Cir. 1951). Judge Hand was not looking to the *intent* of the proprietor (in this case, of a comic strip, *viz.*, "Superman") to establish whether there had been a dedication or abandonment. Rather, he was looking at the *acts* of the proprietor *objectively* to determine whether the court should grant it relief. If these acts indicated that a publication had taken place, then, regardless of the intent of the proprietor, it had to be held that it had *forfeited* its common law rights.

¹⁶ But such express limitations were held not to have the effect of preventing general publication in *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898).

¹⁷ 223 U.S. 424 (1912).

common law rights in the English version of the play. There was no denial that the works were substantially identical, the defense being that the stage production in England served to divest the plaintiffs of their common law rights in the play. The Supreme Court held that because the common law rule that the public presentation of an *unpublished* dramatic composition does not deprive the owner of his common law rights had not been changed by the American copyright laws, the complainants were the owners of the play and exclusively entitled to produce it.¹⁸ When it stated that the dramatic composition had not been *published*, the Court used the term in its narrow, printing sense, rather than in the sense of communicating to the public.¹⁹ In other words, performance was not considered to be the equivalent of selling or offering for sale printed copies.²⁰

The *Ferris* case has been severely criticized on several grounds. First, it has been argued that the cases relied upon by the Court as declarative of a common law rule that performance of a play did not constitute publication do not clearly stand for any such rule.²¹ Most of them were based upon an implied understanding that no one in the audience was to copy the play,²² a basis that has been demonstrated to be analytically unsound.²³ Second, neither the Court nor the briefs of counsel²⁴ considered whether a holding of no publication would be contrary to the policy of granting monopoly protection to the author for only a limited time that is expressed in the copyright clause of the Constitution.²⁵ At the time the facts of the *Ferris* case arose,²⁶ there was no statutory protection available to the author of a play who had not yet printed copies of it for sale. Thus, the Court was faced with the choice of holding either that common law rights in a play, despite performance, persisted until copies were printed for sale, or that the author must publish and register the work under the Copyright Act if he does not wish a performance of his play to divest him of his rights in it. Had the policy expressed in the Constitution been urged upon the Court, it might have decided against granting plaintiffs such a perpetual monopoly. Finally, the writers argue that even if the *Ferris* holding was proper in that particular case, the enactment in 1909 of (then) section 11²⁷ of the Copyright Act, allowing prepublication registration of dramatic works, should have indicated to later courts that Congress did *not* intend that a work could be economically exploited by performance forever

¹⁸ *Id.* at 434, 435-36, 437. The fact that *English* statutes would require forfeiture of common law rights in this situation was held irrelevant.

¹⁹ *But cf.* *Marx v. United States*, 96 F.2d 204, 206 (9th Cir. 1938), stating that a published work is one that is communicated to the public.

²⁰ Strictly speaking, the Court did not find a "limited publication" here; rather, it found *no* publication of any variety. It will be seen, however, that the quantum of making public in this case is at least as great as in those cases in which the courts find a "limited publication."

²¹ Selvin, *Should Performance Dedicate?*, 42 CALIF. L. REV. 40, 47-50 (1954).

²² Roberts, *Publication in the Law of Copyright*, in ASCAP COPYRIGHT LAW SYMPOSIUM No. NINE 111, 125 (1958).

²³ *Id.* at 127:

If the dramatist does not publish because there is a fictitious implicit understanding between himself and the audience that it will not copy, why is there not an implicit understanding that the reader of an unregistered novel will not copy?

²⁴ The briefs of counsel are summarized in 223 U.S. at 425-29.

²⁵ U.S. CONST. art. I, § 8(8). See also 17 U.S.C. §§ 24-26 (1958).

²⁶ Although the case was decided in 1912, the first English performance of the play in question was in 1894. *Frohman v. Ferris*, 238 Ill. 430, 431, 87 N.E. 327 (1909).

²⁷ Now 17 U.S.C. § 12 (1958).

or for limited times only, *depending on the decision of the author*.²⁸ Instead, the result has been exactly the opposite, with the *Ferris* doctrine being extended "into every new medium of mass communication."²⁹ Thus, today a radio performer can speak to millions of persons at one time and yet retain, unscathed, his common law rights in his script.³⁰ He can also make a recording of his performance—on disc, tape, wire, or motion picture soundtrack—and replay that recording to an unlimited audience without jeopardizing his common law rights in the material so recorded and played.³¹ Similarly, the showing of a filmed enactment of a play or photoplay no more constitutes a divestitive publication of the play or photoplay than does the performance itself.³² With respect to works that are primarily exploited by performance, there is no practical limitation upon the author or proprietor as to the number of people to whom he may disclose his work, or as to the time during which he may continue to do so, so long as he does not issue copies of the work for sale.

b. Public Exhibition

The doctrine of limited publication has also been applied to preserve common law rights in cases other than those involving performance of the work in question.³³ In fact, the leading statement of the doctrine was made in a case involving the public exhibition of a painting.³⁴ The court there held that the artist did not dedicate his painting to the public when he allowed it to be exhibited to the public at a gallery, especially since the gallery, in accordance with the apparent wishes of the exhibiting artists, refused to permit copying by the viewers.³⁵ On

²⁸ It is argued that by making § 12 registration optional, authors who register are, in effect, penalized for doing so, because their rights are limited in time while their nonregistering counterparts' rights are not. Selvin, *supra* note 21, at 46. See also Roberts, *supra* note 22, at 126.

²⁹ Roberts, *supra* note 22, at 124. It is there stated that counsel for major broadcasting companies advise against copyrighting works that are to be performed.

³⁰ See *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934). *But cf.* *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949) (musical composition).

³¹ Analytically, performance by way of recording is still a performance and does not dedicate any more than does a live performance of the same material. Note that nothing is being said at this time about the sale of recorded performances.

³² See *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577 (2d Cir. 1914). The same should be true of a magnetic tape recording of a television performance. However, this area of technology is too new for any case law to have developed on it. *But see* note 96 *infra*, with respect to registration of such a tape under the copyright statute. Another case involving the effect of showing of motion pictures was *Patterson v. Century Prods., Inc.*, 93 F.2d 489 (2d Cir. 1937), where the court held actionable the pirating of the film itself, not just the script enacted for the film. Of course, the film in this case was a photographic record of a big game hunting safari in Africa and did not involve a script or scenario.

Some doubt has been cast upon the notion that performance of a filmed copy does not constitute publication by *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949), which held that the creator of the famous "Woody Woodpecker" musical laugh lost his common law rights in the laugh by continued use of it in the sound tracks of commercial cartoon films. Some writers have argued that since this case involves a sound track, it is more of a precedent in record cases than in film cases. See, e.g., Nimmer, *Copyright Publication*, 56 *COLUM. L. REV.* 185, 192 (1956). It would seem that this case is, at best, only slight authority for any proposition that performance of a film is a publication of its contents.

³³ *But see* note 20 *supra*.

³⁴ *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 324-25 (2d Cir. 1904), *aff'd sub nom.* *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907).

³⁵ *Werckmeister v. American Lithographic Co.*, *supra* note 34. *Contra*, *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 Fed. 54 (1st Cir. 1896). Since, however, the Supreme Court affirmed the former case, the latter holding seems to have been overruled.

the other hand, the public showing of a line of glassware, decorated with a design that could be the subject of statutory copyright, for the purpose of securing orders for the product was held to be a general publication.³⁶ It is difficult to say where the line is to be drawn between exhibitions that will and those that will not result in forfeiture of common law rights. The glassware case relied on the fact that the embodiment of the design was being offered to the general public for sale through the wholesalers attending the showing. It is probable, however, that the artist who permitted exhibition of his painting did so with the idea of soliciting the sale of his work. One author has attempted to justify these seemingly inconsistent results by saying that since a painting is normally financially exploited by sale of printed copies, rather than by the sale of the original itself, the offering for sale of the original should not be considered a general publication.³⁷ However, his characterization of a painting as a work primarily exploited economically by the sale of copies seems to beg the question. A substantial number of paintings sold are probably never exploited in any manner other than the original sale; only the most successful artists can sell the rights to make and sell copies separate from the property in the original.³⁸ From the artist's point of view, the work has been offered for sale to the general public and, unless he reserved some rights when he completed the sale, the work belongs to the public.³⁹ It is submitted that whether or not a work falls into the public domain at the time of offering for sale to the general public should not depend on whether the artist is then, or later, in a position to sell only part of his rights in his work. If this analysis is correct, the glassware and painting exhibition cases are inconsistent. True, such inconsistency could be resolved by distinguishing between works of art, such as paintings and sculpture, and designs embodied in commercial wares, such as drinking glasses. This distinction would, however, be self-defeating in that designs for commercial wares often originate in works of art. Moreover, such a treatment would be inconsistent with the Copyright Act, which makes no distinction between copyrightable designs that are to be embodied in commercial wares and those that are to be found only in works of art.⁴⁰

c. Lectures

Still another example of the law allowing one to make his work public without risking loss of his common law rights in the work is the treatment of lectures. In

³⁶ *William A. Meier Glass Co. v. Anchor Hocking Glass Co.*, 95 F. Supp. 264 (W.D. Pa. 1951). See also, *Fashion Originators' Guild of America v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd on other grounds*, 312 U.S. 457 (1941), where the court said: "To embody a design in a dress or fabric, and to offer the dress for general sale was such a [general] 'publication'; nothing more could be done to bring it into the public demesne." 114 F.2d at 84.

³⁷ Roberts, *Publication in the Law of Copyright*, in *ASCAP COPYRIGHT LAW SYMPOSIUM NO. NINE* 111, 119-20 (1958).

³⁸ Thus, in the *Werckmeister* case, *supra* note 34, the artist could have assigned the common law copyrights to a print-maker and sold the painting minus these rights to another party. There is authority, however, that even though he has assigned away his common law rights, the artist can, by a general publication, destroy those rights. See *WEIL, COPYRIGHT LAW* 115-16 (1917), and case cited n.79 therein.

³⁹ This argument is especially meaningful when it is recalled that it has been held that the unrestricted sale of a single copy of a work constituted a general publication sufficient to divest common law copyright. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Grandma Moses Properties, Inc. v. This Week Magazine*, 117 F. Supp. 348 (S.D.N.Y. 1953). *Accord*, as to investitive publication, *Atlantic Monthly Co. v. Post Pub. Co.*, 27 F.2d 556 (D. Mass. 1928).

⁴⁰ *Mazer v. Stein*, 347 U.S. 201 (1954).

the leading case of *Nutt v. National Institute*,⁴¹ one of the plaintiff's former instructors embarked on a lecturing career of his own, using the plaintiff's copyrighted materials as his program. The defendant claimed that the copyright was invalid because the lectures were in the public domain, having been published by delivery prior to application for copyright. In reply the court said that "common-law rights are not lost by a limited publication, as distinguished from [the] . . . general publication, and the delivery of these lectures before audiences prior to copyrighting was limited publication."⁴² The court seemed to treat this as just another performance case, although it appears that the distinguishing factor between lectures and performances—as the term is used in *Ferris*—is the lecturer's granting of permission to the audience to make copies. The court here found that there was an implied limitation on the use that the members of the audience could make of their copies in that they could not sell them; thus the holding that the delivery of the lectures constituted only a limited publication. The Ninth Circuit took a different tack in *White v. Kimmell*,⁴³ holding that the lecturer's failure to enforce his stated restrictions resulted in a general, divestitive publication.⁴⁴ Although this seems a better view than the mechanical approach of the Second Circuit in *Nutt*, the matter has not been further settled.

d. Limited Circulation of Manuscripts

A final example of limited publication is perhaps the only situation in which all writers agree that no divestitive publication should be held to have taken place, namely, where an author distributes his manuscript to a limited number of people seeking criticism prior to attempted sale.⁴⁵ It may be seen that such a distribution satisfies *both* the limited audience and the restricted use alternatives contained in the above-quoted definition of limited publication.⁴⁶ But as Weil has shown, in such a situation the doctrine of limited publication is unneeded because there would be *no publication* by any standard.⁴⁷

3. Uncertain Areas

Two areas of the law of divestitive publication of works protected by common law copyright are sufficiently uncertain to merit discussion at this point. The first problem has to do with what effect the sale of phonograph records has on the common law rights in the underlying work. The second concerns the filing of copies of a work in a public office, whether in compliance with the copyright statute or otherwise.

a. Sale of Records

The battle over the status of records in the law of copyright has been raging

⁴¹ 31 F.2d 236 (2d Cir. 1929).

⁴² *Id.* at 238.

⁴³ 193 F.2d 744 (9th Cir. 1952).

⁴⁴ The trial court had reached the opposite conclusion on the facts. *White v. Kimmell*, 94 F. Supp. 54 (S.D. Cal. 1950) (Yankwich, J.). See Yankwich, *Some Observations on "Publication" in the Law of Copyright*, 5 BULL. COPYRIGHT Soc'y 329, 338-39 (1958).

⁴⁵ See, e.g., BALL, COPYRIGHT AND LITERARY PROPERTY 134 (1944); Roberts, *Publication in the Law of Copyright*, in ASCAP COPYRIGHT LAW SYMPOSIUM No. NINE 111, 119 (1958); Weil, *op. cit. supra* note 38, at 124. See also, *Dieckhaus v. Twentieth Century-Fox Film Corp.*, 54 F. Supp. 425 (E.D. Mo. 1944), *rev'd on other grounds*, 153 F.2d 893 (8th Cir. 1946); *Allen v. Walt Disney Productions*, 41 F. Supp. 134 (S.D.N.Y. 1941) (*semble*).

⁴⁶ See text accompanying notes 14 and 15 *supra*.

⁴⁷ WEIL, *op. cit. supra* note 38, at 125.

for some time, due probably to the very large financial interests that are involved.⁴⁸ Although little is known about the legal activity of such interests, on the basis of economic benefit it should be possible to predict how they would align themselves. In favor of finding the sale of records to be publications of the underlying work would be the record companies, radio stations, and motion picture producers. These industries pay out significant amounts in royalties but own little musical property.⁴⁹ On the other side we would expect to find the large groups of royalty-receivers, such as ASCAP and BMI, which hold a considerable amount of musical property that has not been copyrighted.⁵⁰ A ruling that sale equals publication would divest the royalty-receivers of whatever common law rights they had in all music previously recorded and free the royalty-payers of any obligations that might otherwise arise from future sales of such recorded music.⁵¹ True, the royalty-receivers could thenceforth register all new works under statutory copyright provisions, but that would not save the rights in the old works, records of which had been previously offered for sale.⁵² If this speculation is correct, it would not be surprising to find the cases inconclusive and a distinct lack of legislative response to the cry of the scholars to solve this important question.

The trouble in the record cases may be traced to *White-Smith Music Publishing Co. v. Apollo Co.*⁵³ The Court there held that musical rolls constituting part of the mechanism of player pianos were not "copies" within the meaning of the copyright law as it then read. Thus, the maker of the rolls was not an infringer of the copyrights in the music. In the 1909 revision of the Copyright Act, some protec-

⁴⁸ Blaisdell reports that the record industry pays recording artists, composers, lyricists, etc., a total of about \$28.2 million annually. Presumably, a good percentage of that amount consists of royalties to the owners of the common law or statutory copyrights in the recorded works. Even less is known about the amounts that such industries as radio and television stations, motion picture producers, and bands, orchestras, and entertainers may pay out in royalties each year; in any event this expense would seem to bear a significant ratio to the income of these industries. Blaisdell estimates the national income generated by the copyright aspects of each of these industries as follows: radio and television broadcasting, \$533 million; motion pictures, \$917 million; bands, orchestras, and entertainers, \$58 million. Blaisdell, *Size of the Copyright Industries*, U.S. COPYRIGHT OFFICE, COPYRIGHT REVISION, STUDY No. 2, at 28 (1959).

⁴⁹ See note 48 *supra*.

⁵⁰ Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 191 (1956), states that counsel for the various interests within the phonograph record industry have advised that statutory copyright not be obtained on musical compositions that are to be recorded, based on the theory "that sale of a phonograph record will not constitute a surrender of common law rights in the work." It is worth noting the similarity of this legal advice to that given the broadcasting companies with respect to works that are to be performed. See note 29 *supra*.

⁵¹ Nimmer, *supra* note 50, at 191, states:

Despite the logical and conceptual reasons requiring that the sale of a phonograph record constitute a publication and surrender of common law rights, a final determination to this effect by a court of last resort will, if indiscriminately applied, serve to discharge a tremendous body of previously recorded musical material into the public domain.

⁵² Nimmer suggests that such a harsh result might be ameliorated by applying the ruling prospectively only, by adopting a good faith reliance test, or by holding that the sale of records would accomplish only a publication of the records themselves, but not of the underlying music. Nimmer, *supra* note 50, at 191-92. The final proposal, however, would seem to invite acts that would now be considered record piracy, or "disclegging," that is, making copies of records directly from the other party's records. But even if he were free to pirate the performances thus released to the public domain, he would still have to pay royalties preserved for the owner of the musical property by this solution.

⁵³ 209 U.S. 1 (1908).

tion from this kind of appropriation was given to the composer who registered his work under the act.⁵⁴ The language of the act, while clearly applicable to musical rolls such as were involved in the *White-Smith* case, is also broad enough to include phonograph records. But nowhere in the act is there an authorization for the composer to meet the publication requirement of section 10⁵⁵ by issuing records with notice attached; nor is there a provision for the registering of the record itself under the act as a work of art or "writing."⁵⁶ Thus, the composer who desires statutory protection for recorded versions of his work must make up some written or printed copies of his musical score, "publish" them with the proper notice affixed, and register the works with the Copyright Office by depositing two copies.⁵⁷ Once he has done this, he may produce for sale copies of the score for the full statutory term to the exclusion of all others. Or, he may make or permit to be made records of his music, but once he has done so, he must allow any other party to make records as well, if the party pays a compulsory license of two cents per record made.⁵⁸ What if the composer does not choose to register his work under the act? It appears that prior to publication he may prevent the unauthorized performance or the making of printed copies or recordings of the work by asking the courts to enforce his common law rights in it. The question then arises, what is publication of a musical composition? Certainly the sale or other general distribution of printed copies of the music, as with any other written work, constitutes a publication. What if he makes and sells records of the work; are they "copies"? The *White-Smith* reasoning would lead to a negative answer. Moreover, the interrelation of parts (a) and (e) of section 1 of the act indicate that mechanical reproductions of the work are not copies.⁵⁹ All this does not mean, however, that "copy" must mean the same thing for the purpose of section 1 as for divestment of common law rights. Neither must it preclude a finding of publication even if it is conceded that a record is not a copy. All that is necessary to effect divestitive publication is some act inconsistent with the composer's retention of all rights in the work, and that is the ultimate question that the courts have been asked to decide. The fact that the Copyright Act does not permit registration of the record, as such, militates against a holding that the sale of records results in publication either of the record itself (to the extent any common law rights existed therein) or of the underlying musical work.⁶⁰ On the other hand, to permit record making and selling without holding that a publication has taken place would be to encourage composers to

⁵⁴ 17 U.S.C. § 1(e) (1958).

⁵⁵ See text accompanying note 82 *infra*.

⁵⁶ The Copyright Office regulations state that neither phonograph records nor other sound recordings are acceptable for copyright registration. 37 C.F.R. § 202.8(b) (1961). See also, *Jerome v. Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736 (S.D.N.Y. 1946), *aff'd*, 165 F.2d 784 (2d Cir. 1948).

⁵⁷ 17 U.S.C. § 13 (1958). The statute requires deposit, but, strictly speaking, valid copyright depends only upon publication and notice. See note 83 *infra* and accompanying text.

⁵⁸ 17 U.S.C. § 1(e) (1958).

⁵⁹ See Nimmer, *supra* note 50, at 188 n.34.

⁶⁰ If the act were changed to permit registration of records as such, there would have to be some provision added to determine whether such registration and ensuing sale would or would not constitute publication of the work of which the record was the embodiment. Otherwise, there would be a new conflict whereby the composer would be forced to take his chances that failure to register the underlying work as well as the record would cost him his common law rights in the work. The safe course would be to register everything in sight. Requiring such behavior would seem to accord with the policy of the "limited times" feature of the copyright clause of the Constitution. U.S. Consr. art. I, § 8(8).

refrain from registering their works under the act. Such a result would give them a perpetual monopoly not subject to the compulsory license provision of section 1(e). This perpetual permit to exploit their works exclusively is consistent with that granted authors whose works are exploited by performance.⁶¹ The scholars argue that such perpetual monopolies are against public policy and that the law must be changed.⁶² Congress has, however, done nothing,⁶³ and the courts have been unable to work out a clear or fair solution to the problem.⁶⁴

⁶¹ See text accompanying notes 24-32 *supra*.

⁶² See, e.g., Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 479, 488-90 (1955); Nimmer, *supra* note 50, at 190-91; Roberts, *supra* note 45, at 148; Selvin, *Should Performance Be Dedicated?*, 42 CALIF. L. REV. 40, 51 (1954); Strauss, *Protection of Unpublished Works*, U.S. COPYRIGHT OFFICE, COPYRIGHT REVISION, STUDY No. 29, at 14-15, 26-27 (1957).

⁶³ Between 1924 and 1940 a number of bills for the general revision of the copyright law were introduced in Congress but none of them was enacted into law. All these bills contained some provision for the protection of unpublished works; some of them preserved the dual system of common law protection and statutory copyright, others abolished common law rights in favor of statutory copyright. On several of these bills extensive hearings were held but the record is singularly devoid of any discussion of the merits of the varying proposals for protecting unpublished works. Strauss, *supra* note 62, at 19-20.

⁶⁴ The only case holding that sale of records did not divest the composer of his common law rights in his composition is *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955). The persuasiveness of this decision is somewhat shaken by the fact that the Second Circuit deemed itself bound by New York law on what constituted divestitive publication of common law rights, and based its finding of New York law on a debatable inference from a New York case where the question was presented but not directly decided. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd per curiam*, 108 N.Y.S.2d 977 (App. Div. 1951). *Yacoubian v. Carroll*, 74 U.S.P.Q. 257 (S.D. Cal. 1947), held that sale of records of a musical composition registered under the present § 12 as an unpublished work did not terminate its copyright protection under the act. The authority in favor of publication is not very satisfactory either, although it is mentioned in more opinions. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), is but tangential authority, for it held only that sale of records divested the performing artist of whatever common law rights he might have in the performance that was the subject matter of the recording. Next came the decision in *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949), which held (alternatively) that the general sale and distribution of motion picture cartoons, with integral soundtracks, "made public" the contents of both the film and the soundtrack within the meaning of the (then) wording of CAL. CIV. CODE § 983. This divested plaintiff, originator of a "musical laugh" that was recorded on the soundtracks in question, of his common law rights in the musical laugh. In *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950), the court held that the plaintiff had failed to establish that he was the author of the work in question; therefore, his copyright was invalid. But in a dictum the court said that common law property in the musical composition did not survive the sale of records of the composition to the public. *Biltmore Music Corp. v. Kittinger*, 29 Copyright Dec. 32 (S.D. Cal. 1954), was a decision without a written opinion, and it is impossible to tell the basis of the court's decision. But there is a statement in the court's order that the sale of records was a publication of the recorded song. This statement, at most, could be an alternative holding of the case. In *Mills Music, Inc. v. Cronwell Music, Inc.*, 126 F. Supp. 54 (S.D.N.Y. 1954) (the famous "Tzena Tzena" case), the court repeated the dictum of the *Shapiro, Bernstein & Co.* case that the sale of records would divest the composer of common law rights in the work, but held that any sale of records was without the composer's knowledge or permission; therefore, he still had his common law rights. The final case in this line is *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681 (S.D. Cal. 1958), where the court held (alternatively) that the sale of records of a new arrangement of a previously copyrighted song divested the arranger of his common law rights in the arrangement. (The other alternative holding was that there was nothing original in the "new" arrangement and the owner of the renewal rights in the original copyright did not infringe this arrangement by printing new sheet music of it.)

b. Deposit of Copies in Public Offices

When the original or a copy of a work is deposited in a public office, the issue of whether the proprietor's common law rights survive the act of deposit becomes pertinent. At this point, attention will be focused on the effect of filing or placement in public offices other than the Copyright Office. Deposit in the Copyright Office will be the subject of a later discussion.⁶⁵

It sometimes happens that one who creates a work that is within the area of protection granted by the courts to literary property submits the original or one or more copies of that work to a public agency, where it may or may not be subject to examination by any member of the general public. The courts disagree whether such an act should constitute divestitive publication. For example, one court decided that the submission of a copy of a play to the local censors by the theater manager, in order to obtain a license for its performance, did not constitute publication.⁶⁶ The court stated that no one was allowed to make a copy of the submitted play,⁶⁷ but it is not at all certain whether this factor was necessary to its holding. Similarly, in *Press Publishing Co. v. Monroe*,⁶⁸ the plaintiff was invited to write and submit a poem to the committee in charge of the 1892 Chicago World's Fair to be delivered at the dedicatory exercises. In a suit against a newspaper that had, without permission, printed the poem before it was delivered at the fair, the court held, *inter alia*, that the submission of the poem to the committee for approval before payment did not, of itself, constitute publication. However, this does not seem to be a case of filing with a public office; rather, it involves a negotiated sale of a work to a public body.⁶⁹ On the other hand, in *Callaghan v. Myers*⁷⁰ it was held that the filing of copies of state reports by the court reporter with the Illinois secretary of state, in accordance with the terms of his appointment, was sufficient publication to satisfy the requirement of the Copyright Act as it then read.⁷¹ It should be noted, however, that this case only involved investitive publication; the Court did not consider divestment of common law rights. In one intermediate appellate decision there is a square holding that the filing of plans by an architect with the local building department, preliminary to the granting of a building permit, does constitute such a publication as would divest him of his common law

⁶⁵ See text accompanying notes 98-113 *infra*.

⁶⁶ *O'Neill v. General Film Co.*, 152 N.Y. Supp. 599 (Sup. Ct. 1915), *aff'd*, 157 N.Y. Supp. 1028 (App. Div. 1916).

⁶⁷ 152 N.Y. Supp. at 604.

⁶⁸ 73 Fed. 196 (2d Cir. 1896).

⁶⁹ Plaintiff sold to the committee the right to "furnish copies for publication to the newspaper press of the world, and copies for free disposition, if desired, and also [to] publish same in the official history of the dedicatory ceremonies; and, subject to the concession herein made, the author expressly reserves her copyright therein." Contract Between the Plaintiff and the Committee, quoted in 73 Fed. at 198. The case is usually cited for the proposition that the owner of literary property may sell only part of his rights in that property; that is, he has a divisible common law copyright.

⁷⁰ 128 U.S. 617 (1888).

⁷¹ However, the plaintiff was held not to have valid statutory copyright because of failure to comply with other required formalities. If *Dieckhaus v. Twentieth Century-Fox Film Corp.*, 54 F. Supp. 425 (E.D. Mo. 1944), *rev'd on other grounds*, 153 F.2d 893 (8th Cir. 1946), is correct in holding that common law rights are not divested until valid statutory copyright is achieved, then the filing of the copies with the secretary of state in *Callaghan* was not necessarily a divestitive publication—because it was part of the procedure for procuring statutory copyright—but would have to be judged by the normal standards of access of the general public to the work and control over its use by those who were granted access.

rights in the plans.⁷² The case has been strongly criticized⁷³ and a recent California case with almost identical facts rejected its doctrine.⁷⁴ One of the cases cited for the proposition that the filing of maps and plats with the local board of public works constitutes divestitive publication in reality involved only the sale of such maps to that board, which, of course, was divestitive.⁷⁵

The argument over the matter of filing is not as academic as the cases discussed above might indicate. Today the librarians are waging a campaign to bring all unpublished works within the copyright law in order that scholars might be afforded unhampered access to documents deposited in libraries, but which remain unpublished. Because there is a strong possibility that the deposit with a library of unpublished documents and other works will serve to divest the owner of his common law rights in them, libraries have had a hard time procuring these papers from their owners. If the owners of the works could be assured that they would not lose their property rights in them by placing them in libraries and thereby making them available to scholars, it would seem that the entire nation would profit from the information thus made available.⁷⁶

4. State or Federal Law?

One problem pervades the entire area of divestitive publication, namely, what law, state or federal, should be applied to determine whether there has or has not been publication? In *Capitol Records, Inc. v. Mercury Records Corp.*,⁷⁷ the Second

⁷² *Wright v. Eisle*, 83 N.Y. Supp. 887 (App. Div. 1903), followed in *Tunney v. Little*, 186 N.Y.S.2d 94 (Sup. Ct. 1959). The same decision could have been reached on two other, and sounder, grounds. First, since the suit for misappropriation of plaintiff's plans was not originated until after defendant had completed the building alleged to have been constructed to plaintiff's plans and specifications, and since there was no evidence that defendant actually had access to the plans plaintiff had filed with the building department, it could have been held that the publication took place at the moment of completion of the building plaintiff originally designed. That being the case, defendant would be free to copy from the structure itself. There is authority for such a holding. *Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W.2d 282 (1938); *Gendell v. Orr*, 13 Phil. 191 (City Ct. 1879). It should be noted, however, that one author attacks these cases as strongly as he does the *Wright* case, on the grounds that they unfairly deprive the architect of one of his chief sources of income by effectively denying him the power to sell copies of successful designs. See Katz, *Copyright Protection of Architectural Plans, Drawings, and Designs*, 19 LAW & CONTEMP. PROB. 224, 233-37 (1954).

Second, the court stated, but did not base its holding on the point, that since the architect had been fully paid for his services, any rights to sell copies of the plans should be held to belong to the party who engaged him to design the building and who paid him for it. It can be argued against this point that it assumes that plaintiff-architect did sell all his rights in the plans and that he was fully compensated for his services. It may well be that the architect should be held to give up his rights to sell the same design to another client only when such a term is clearly part of the agreement.

⁷³ See Katz, *supra* note 72, at 233-37; Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 199-200 (1956); Roberts, *Publication in the Law of Copyright*, ASCAP COPYRIGHT LAW SYMPOSIUM NO. NINE 111, 135 (1958).

⁷⁴ *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P.2d 546 (1959).

⁷⁵ *Rees v. Peltzer*, 75 Ill. 475 (1874), cited for the stated proposition in Nimmer, *supra* note 73, at 199; WEIL, COPYRIGHT LAW 128 (1917).

⁷⁶ See generally Price, *Photocopying by Libraries of Copyrighted Material*, 5 BULL. COPYRIGHT SOC'Y 345, 348-50 (1958); Varmer, *Photoduplication of Copyrighted Material by Libraries*, U.S. COPYRIGHT OFFICE, COPYRIGHT REVISION, STUDY NO. 15, at 53 (1959); COPYRIGHT REPORT 42-43.

⁷⁷ 221 F.2d 657 (2d Cir. 1955).

Circuit held, over the vigorous dissent of Judge Learned Hand, that the question of divestitive publication was one to be decided according to state, not federal, law.⁷⁸ That such a decision could be reached illustrates the inherent weakness of a dichotomous system of legal protection of rights in literary property, part common law and part statutory, viewed in light of the doctrine of *Erie R.R. v. Tompkins* that state law must be applied in federal diversity cases.⁷⁹ Such a problem should certainly be brought to the attention of Congress in its investigations attendant to the proposed revision of the act. Congress should note further that it will probably not be sufficient merely to legislate in the area of protection of unpublished works to accomplish the result that federal, not state, law will be applied to determine the fact of publication. The federal courts have been reluctant to rule that legislation by Congress in the field of copyright indicated its intent to occupy the field to the exclusion of state law. The prime example is *De Sylva v. Ballentine*,⁸⁰ where the Court interpreted section 24 of the act, dealing with renewal rights, according to *California* law, despite the strong dissent that Congress had obviously intended that *federal* law should determine the question.⁸¹ It would seem that the law of property rights is as much an area of state law as is the law of family relations, which was involved in the *De Sylva* case. Thus, if Congress wants federal law to determine the question of publication, it should spell out in the revision of the law what acts will, and will not, constitute divestitive publication.

B. Investitive Publication in the Law of Statutory Copyright

1. Statutory Provision

The basic requirement for publication under the statute is found in section 10, which provides in part that "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title"⁸² Although compliance with several formalities was required under former copyright statutes, it has been established that only publication and proper notice are required to obtain valid copyright protection under this section.⁸³

⁷⁸ *Id.* at 662.

⁷⁹ 304 U.S. 64 (1938). There are exceptions to the *Erie* doctrine, the most notable being when the Supreme Court is convinced that the question is in a field that requires uniformity of decision throughout the circuits. See, e.g., *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). Judge Hand, dissenting in *Capitol Records*, argued that federal law should govern the question of publication, partially because there was a need for uniformity, but also because Congress, by passing a highly detailed copyright statute (including § 2 of the act dealing with common law rights), had indicated complete occupation of the field, and because to allow state law to govern in this case would be to grant perpetual monopoly to record producers contrary to the mandate of the Constitution.

⁸⁰ 351 U.S. 570 (1956).

⁸¹ The Court was concerned with the interpretation of the term "children" found in § 24—does it include illegitimate children? In looking to California law, the Court indicated that it was not interested in declaring a federal common law of family relations, an area traditionally left to the states.

⁸² 17 U.S.C. § 10 (1958).

⁸³ *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939). No action may be maintained to enforce this copyright until the deposit requirements of § 13 are met. *Advertisers Exch., Inc. v. Anderson*, 52 F. Supp. 809 (S.D. Iowa 1943), *aff'd*, 144 F.2d 907 (8th Cir. 1944). At least to that extent, deposit of copies of the work is a necessary formality of statutory copyright.

2. Case Law Definition of Investitive Publication

There is no definition of what constitutes investitive publication in the statute. The term, "the date of publication" is defined in section 26, in the case of a work of which copies are reproduced for sale or distribution, as "the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority. . . ."⁸⁴ It has been held, however, that this is not a definition of what constitutes publication,⁸⁵ and there are indications that Congress deliberately abstained from defining the term in the act in order to avoid the dangers of not including some works of art of which copies were not reproduced.⁸⁶ This conclusion is further supported by the fact that section 5 allows copyright on some types of works that are not reproduced for sale or distribution.⁸⁷ The minimum behavior held to satisfy the requirement of publication has been the sale of a single copy of the work.⁸⁸ It has been held that deposit of copies pursuant to section 13 is sufficient publication to invest copyright,⁸⁹ but there is significant authority to the contrary.⁹⁰ The cases involving the existence of investitive publication are few, the courts having been mainly concerned with whether *publication with proper notice* has taken place.⁹¹ Therefore, I will only briefly list some of the acts that the courts have held to constitute investitive publication without attempting to analyze any of the decisions.

It has been held that delivery by a court reporter to the state's secretary of state of copies of court reports, pursuant to his authorization as exclusive reporter to print and sell copies at large, was compliance with the publication requirement of the then existent copyright statute.⁹² Public exhibition of a painting was held to be a publication within the meaning of the statute in an early case.⁹³ The issuance and loan of a book or credit ratings to subscribers to a credit-rating service is sufficient investitive publication.⁹⁴ Finally, the circulation of copies of a safety campaign to interested parties, in an attempt to promote the sale of the campaign idea

⁸⁴ 17 U.S.C. § 26 (1958). For works registered under § 12, the term begins to run as of the day of deposit. 37 C.F.R. § 202.17 (1961). See also *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938).

⁸⁵ *Patterson v. Century Prods.*, 93 F.2d 489 (2d Cir. 1937).

⁸⁶ See congressional hearings on the 1905 bill that became the 1909 act, quoted in Strauss, *supra* note 62, at 8-9.

⁸⁷ *E.g.*, § (c), providing for registration of lectures, sermons, and addresses (prepared for oral delivery); § (g), providing for registration of models or designs for works of art.

⁸⁸ *Atlantic Monthly Co. v. Post Publishing Co.*, 27 F.2d 556 (D. Mass. 1928).

⁸⁹ *Cardinal Film Corp. v. Beck*, 248 Fed. 368 (S.D.N.Y. 1918); *Stern v. Jerome H. Remick & Co.*, 175 Fed. 282 (S.D.N.Y. 1910).

⁹⁰ *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946); *Pastime Amusement Co. v. Witmark & Sons*, 2 F.2d 1020 (4th Cir. 1924) (by implication). Judge Learned Hand, who wrote the opinion in the *Stern* case, later voiced some regret over his broad statement that deposit was publication, in his opinion in *Joe Mittenenthal, Inc. v. Irving Berlin, Inc.*, 291 Fed. 714 (S.D.N.Y. 1923). But since in the *Mittenenthal* case no question of publication was raised, this regret is dictum at best.

⁹¹ See, *e.g.*, *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 280 F.2d 800 (2d Cir. 1960); *Fader v. Twentieth Century-Fox Film Corp.*, 169 F. Supp. 880 (S.D.N.Y. 1959); *Dieckhaus v. Twentieth Century-Fox Film Corp.*, 54 F. Supp. 425 (E.D. Mo. 1944), *rev'd on other grounds*, 153 F.2d 893 (8th Cir. 1946).

⁹² *Callaghan v. Myers*, 128 U.S. 617 (1888). But see note 71 *supra*.

⁹³ *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 Fed. 54 (1st Cir. 1896). But see note 35 *supra*, casting doubt on the continuing validity of this case.

⁹⁴ *Ladd v. Oxnard*, 75 Fed. 703 (C.C.D. Mass. 1896).

and formulation, was held a publication under section 10.⁹⁵ Although no court has as yet ruled on the issue, the Copyright Office has ruled that a closed circuit television broadcast of an operatic production was investitive publication of the magnetic tape recording that was the physical source of the broadcast material.⁹⁶ Because the cases are sporadic and often complicated by the presence of the issue of valid notice, it is hard to determine whether a thread runs through the opinions indicating the application of a single rule. Nevertheless, the modern cases indicate a distaste on the part of the federal courts for any ruling that results in the divestment of anybody's property rights where it is at all possible to preserve them.⁹⁷ Thus, it may be expected that a court will hold that behavior constituting minimum disclosure to the public results in publication where a finding of a valid statutory copyright follows. On the other hand, if a finding of publication leads to a holding of *no* valid copyright, as, for example, when the notice on the work does not meet the statutory requirements, then a court will try to avoid a finding that a publication has taken place.⁹⁸

3. Deposit of Works in the Copyright Office

The statute calls for deposit of copies of works in two distinct situations. Section 12 provides that copyright may be obtained on certain classes of works "of which copies are not reproduced for sale" by the deposit—together with claim of copyright—of one copy with the Copyright Office.⁹⁹ Section 13 requires the deposit of two copies of each published work promptly after copyright has been secured;¹⁰⁰ if, however, the published work is one that had been previously registered under section 12, the copy filed at the time of initial registration will count as one of the copies required under section 13. Dunne states that the deposit provisions achieve

⁹⁵ *American Visuals Corp. v. Holland*, 239 F.2d 740 (2d Cir. 1956). *Accord*, as to divestitive publication, *Gottberger v. Aldine Book Pub. Co.*, 33 Fed. 381 (C.C.D. Mass. 1887).

⁹⁶ See 8 BULL. COPYRIGHT Soc'y 205-07 (1961). This was a significant departure from the Copyright Office's usual reluctance to accept for registration works not specified in § 5. Although § 5 declares that the specifications of classes of works enumerated for registration purposes in §§ (a) through (m) thereof "shall not be held to limit the subject matter of copyright," the Copyright Office has been difficult to convince. It has, accordingly, tended to limit the works it would accept for registration to the categories specifically mentioned. See COPYRIGHT REPORT 12-18. Thus, it has consistently refused to accept for copyright sound recordings, whether on disc or tape, despite the fact that a great amount of performed art—especially improvised jazz works—is preserved in permanent, tangible form on recordings only. Although the Register of Copyrights has no power to refuse to register any copyrighted work entitled to registration under law, *Bouvé v. Twentieth Century-Fox Film Corp.*, 122 F.2d 51 (D.C. Cir. 1941), neither does he have the power to accept for registration any work that is not so entitled, *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958). Thus, a court could hold that no valid copyright was possible in a television tape or that closed circuit broadcasting was not investitive publication.

⁹⁷ See Judge Frank's statement, quoted in text accompanying note 119 *infra*.

⁹⁸ There is no evidence in the cases that the doctrine of limited publication exists in this situation, except where the courts talk as if there were no difference between divestitive and investitive publication.

⁹⁹ There are variations in the deposit requirements under this section depending on the type of work for which copyright is sought.

¹⁰⁰ Failure to make the deposit promptly, however, does not, under the present statute, invalidate copyright already secured. See note 83 *supra*. On the other hand, the deposit called for by § 12 is fundamental to the copyright itself, *i.e.*, there is no copyright until the deposit is made. See *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938).

Similar to the wording of § 12, § 13 also requires that the deposit be accompanied by "claim of copyright." The Copyright Office interprets this to mean "application for copyright."

two ends: to identify the work for the purpose of copyright registration and to provide copies of copyrighted works for the Library of Congress.¹⁰¹ Since the decision in *Washingtonian Publishing Co. v. Pearson*,¹⁰² it seems clear that the primary object of registration is to facilitate the administrative record-keeping connected with the running of a national copyright system. In order to gain compliance by copyright owners with the registration and deposit provisions, Congress has added the incentive of a certificate of registration that serves two purposes: first, no action for infringement of statutory copyright may be maintained until the provisions with respect to deposit and registration have been complied with;¹⁰³ and second, the certificate of registration must be accepted in any court as prima facie evidence of the facts stated therein.¹⁰⁴ Moreover, under section 14 of the act, the Register of Copyrights may compel deposit of the requisite copies (and probably application for registration) of any copyrighted works, under penalty of fine and forfeiture of copyright.¹⁰⁵

Determination of the significance of deposit in the scheme of statutory copyright does not, of itself, solve the problem of whether the act of deposit should divest the author or proprietor of the work of his common law rights. There are two bases upon which it could be held that deposit equals publication: because deposit of the work in fact exposes the work of the public's view, or because deposit signifies the existence of statutory copyright, which is inconsistent with the continued existence of common law rights. Under the first rationale, the work could be deemed to be exposed to public view either when the staff of the Copyright Office sees it or when it is placed in the Library of Congress. It is a question of policy for the courts to determine whether the fact that a work is submitted to the Copyright Office in attempted compliance with the deposit provisions of the act should, of itself, divest the owner of his common law rights. The staff of the Office, upon seeing the work, might determine that it is not copyrightable. Has the work, nevertheless, been divestitively published? It seems too severe to ask an author to deposit his work with the Copyright Office with the chance that it will be refused statutory copyright and will, at the same instant, fall into the public domain because it was exposed to the view of the Office staff. The answer to the argument that a work should be deemed divestitively published when deposited because it will be placed in the Library of Congress, and thereby subject to public scrutiny, is that not all works deposited are placed in the Library.¹⁰⁶ Some are destroyed and some are returned to the owner.¹⁰⁷

Nor is the second rationale—that of seeming inconsistency—a satisfactory basis for finding deposit divestitive. Deposit does *not* signify the existence of statutory copyright; the Copyright Office has accepted deposits made *before* publi-

¹⁰¹ Dunne, *Deposit of Copyrighted Works*, U.S. COPYRIGHT OFFICE, COPYRIGHT REVISION, STUDY No. 20, at 34 (1960). This excludes the additional purpose of investing copyright in unpublished works registered under § 12.

¹⁰² 306 U.S. 30 (1939), in which it was held that registration was not a condition precedent to the existence of valid copyright.

¹⁰³ 17 U.S.C. § 13 (1958).

¹⁰⁴ 17 U.S.C. § 209 (1958).

¹⁰⁵ There have been no appellate cases interpreting or applying § 14. It is not known to this writer to what extent, if at all, the power granted by this section is utilized by the Register.

¹⁰⁶ 17 U.S.C. § 213 (1958).

¹⁰⁷ 17 U.S.C. § 214 (1958).

cation with notice,¹⁰⁸ and section 10 requires publication with notice as a condition precedent to valid copyright. Moreover, in one case deposit was accepted where publication was neglected altogether.¹⁰⁹ Thus, despite the language of section 10, the courts have found valid copyright in both situations.¹¹⁰ If deposit itself were divestitive, no statutory copyright could ever be had in works deposited before publication under section 10, because section 8 of the act disallows statutory copyright for works already in the public domain. The proper rule would seem to be that it is not until statutory copyright is actually procured that common law rights cease, barring, of course, any other independently significant publication.¹¹¹ Under this rule, if a work were deposited in the Copyright Office in compliance with section 13 and the attempted publication turned out to be unsuccessful, then statutory copyright would never come into being and common law rights would remain in effect.¹¹² Two cases have so held.¹¹³

4. The Difference Between Investitive and Divestitive Publication

There remains to be considered the question whether investitive and divestitive publication are two different concepts. The older cases ignored this question. When they found it necessary to discuss the dichotomy between common law and statutory rights, they simply stated that publication was the dividing line between the two.¹¹⁴ Before the *Washingtonian* case,¹¹⁵ it was thought that publication was only one of several formalities that had to be satisfied before statutory rights could become vested in the author or proprietor of the work. Since that case's holding that only publication and notice are necessary, however, publication has become a more important area of inquiry by the courts in statutory copyright cases.¹¹⁶

¹⁰⁸ *Belford v. Scribner*, 144 U.S. 488 (1892); *Falk v. Donaldson*, 57 Fed. 32 (2d Cir. 1893); *Joe Mittenenthal, Inc. v. Irving Berlin, Inc.*, 291 Fed. 714 (S.D.N.Y. 1923). See also Cary, *Proposed New Copyright Office Regulations*, 6 BULL. COPYRIGHT SOC'Y 213-14 (1959), explaining 37 C.F.R. § 202.2(b)(6) (1961), which allows deposit with notice postdated up to one year.

¹⁰⁹ *Cardinal Film Corp. v. Beck*, 248 Fed. 368 (S.D.N.Y. 1918), in which the deposit itself was held to satisfy the investitive publication requirement. *Contra*, *Stern v. Jerome H. Remick & Co.*, 175 Fed. 282 (S.D.N.Y. 1910). Somewhere between these two positions is *American Visuals Corp. v. Holland*, 239 F.2d 740 (2d Cir. 1956), which held that circulation of copies of the work among potential customers was investitive publication *even if deposit with the Copyright Office was not*.

¹¹⁰ See cases cited in notes 108 & 109 *supra*.

¹¹¹ It is, of course, necessary that common law rights cease when statutory rights become effective. Otherwise there would be a clash with the mandate of the copyright clause, U.S. CONST. art. I, § 8(8), that protection be for limited times. This clash would have to be resolved under the supremacy clause, U.S. CONST. art. VI, § 2, in favor of the statutory right.

¹¹² Again, this is assuming that there would be found neither investitive nor divestitive publication. Thus, if the attempt to secure copyright fails because the book, while published by common law standards, does not bear proper notice, *all* rights are extinguished.

¹¹³ *Fader v. Twentieth Century-Fox Film Corp.*, 169 F. Supp. 880 (S.D.N.Y. 1959); *Dieckhaus v. Twentieth Century-Fox Film Corp.*, 54 F. Supp. 425 (E.D. Mo. 1944), *rev'd on other grounds*, 153 F.2d 893 (8th Cir. 1946). *Contra*, *Brown v. Select Theatres Corp.*, 56 F. Supp. 438 (D. Mass. 1944) (dictum). Under the analysis set out in the text, this latter case would have to be discarded as wrong.

¹¹⁴ See, e.g., *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594, 598 (2d Cir. 1951). See also *Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193, 198-200 (1890).

¹¹⁵ *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939).

¹¹⁶ The courts that have been called upon to enforce common law rights have, on the other hand, long been occupied with the question of publication.

It is not surprising to find modern courts analyzing the question of publication in the light of its purpose under the statute and coming to the conclusion that investitive publication need not be the same thing as divestitive publication.¹¹⁷ The best statement of the problem and its solution is by Judge Frank in *American Visuals Corp. v. Holland*:¹¹⁸

In deciding whether certain acts constitute "publication," satisfying the requirements of 17 U.S.C. § 10, we are confronted with numerous conflicting cases which, by their holdings, though not in their stated rationale, raise more than a suspicion that the term "publication" is clouded by semantic confusion where the term is defined for different purposes, and that we have here an illustration of the one-word-one-meaning-only fallacy.

A number of cases have explicitly assumed that facts which would constitute "publication" for purposes of securing the author federal copyright protection, will also operate to divest him of his common law protection if he has not secured a federal copyright. In other words, the stated rationale of many copyright cases is that federal statutory copyright begins with the same acts of "publication" which will end the common law protection, and vice versa.

It is, however, perfectly clear that the word "publication" does not have the same legal meaning in all contexts. Its copyright definition, for example, differs from its meaning where applied in respect of torts . . . or in respect of privacy. . . .

[The] cases . . . indicate that . . . the courts apply different tests of publication depending on whether plaintiff is claiming protection because he did not publish and hence has a common law claim of infringement—in which case the distribution must be quite large to constitute "publication"—or whether he is claiming under the copyright statute—in which case the requirements for publication are quite narrow. *In each case the courts appear so to treat the concept of "publication" as to prevent piracy.*¹¹⁹

Judge Frank's "true rule" may be paraphrased as follows: Investitive and divestitive publication are not the same; it takes considerably wider public dissemination to accomplish the latter than the former.¹²⁰ The courts are guided in their determination of whether or not publication has taken place by a desire to avoid aiding literary piracy; thus, unless the owner has acted in such a manner as to lead a reasonable man to believe that he has no interest in preserving his private property rights in his work,¹²¹ the courts will rule in favor of or against the existence of publication in whatever manner is necessary to aid the owner of the rights.¹²²

¹¹⁷ Some writers have also taken this position. See Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 197 n.104 (1956); Yankwich, *Some Observations on "Publication" in the Law of Copyright*, 5 BULL. COPYRIGHT SOC'Y 329, 339-41 (1958). See also *Hirshon v. United Artists Corp.*, 243 F.2d 640, 645 n.9 (D.C. Cir. 1957).

¹¹⁸ 239 F.2d 740 (2d Cir. 1956).

¹¹⁹ *Id.* at 742-44. (Emphasis added.)

¹²⁰ Since it takes a wider dissemination to accomplish divestitive than investitive publication, any publication that is sufficient to divest common law rights *must* be sufficient to invest statutory copyright.

¹²¹ The judge did not include this qualification in his formulation of the rule. It seems implicit in his talking in terms of "piracy," however, for there is surely no "piracy" by one who makes use of works in the public domain. Moreover, one who acts in such a manner as to truly dedicate or forfeit his work to the public domain should be in no position to complain of the loss of his rights. An example of this qualification in action is *Continental Cas. Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958), where plaintiff had acted with such gross disregard of his own rights that even the rule of the *American Visuals* case could not save him.

¹²² Judge Frank's reasoning was specifically followed in *Fader v. Twentieth Century-Fox Film Corp.*, 169 F. Supp. 880, 882 (S.D.N.Y. 1959). Moreover, the D.C. Circuit extended his rule to cover the instance of publication after § 12 registration. *Hirshon v. United Artists Corp.*, 243 F.2d 640, 645 (D.C. Cir. 1957).

C. Publication After Registration Under Section 12

Section 12 of the Copyright Act allows registration of certain classes of works, provided that the works have not been reproduced in copies for sale¹²³ and have not already fallen into the public domain.¹²⁴ Ordinary copyright under section 10 can later be secured by reproducing for sale copies bearing the notice required by that section.¹²⁵

The protection afforded by section 12 is in lieu of, rather than concurrent with, common law protection—the author of a work registrable under the section need not register it, but if he does, he must look solely to the statute for his remedy.¹²⁶ Furthermore, it seems clear that the rights granted to the registrant may be lost—we are not here concerned with expiration of section 12 copyright upon the running of the statutory term¹²⁷—by the later reproduction for sale of copies that do not bear proper notice of copyright.¹²⁸ This would constitute a publication divestitive of the section 12 copyright. It may be asked whether an act by an owner of a work protected by a section 12 copyright that might be divestitive of common law rights in an unregistered work would divest the section 12 registrant of his statutory protection. Assume, for example, that the author of a play wishes to interest a theatrical producer in his play. He produces no copies for sale and does no other act that might jeopardize his common law rights in the play. He then registers it with the Copyright Office under section 12, complying with all the formal requirements of that section and the regulations thereunder.¹²⁹ Next he makes up one hundred mimeographed copies of the play, none of which bears copyright notice, and sends them to leading producers in the country, asking if they are interested in producing the play on the Broadway stage. Should he still be protected under section 12? The answer one gives will reflect his opinion of the role section 12 copyright should play in the entire scheme of the Copyright Act. If he believes that the purpose of the section is to secure statutory protection only so long as the author treats the work as his exclusive property, and prevents all but his assignees from seeing it, he will say that the author's rights in the play have terminated: the registration under section 12 has destroyed his common law rights;¹³⁰ the distribution of the copies has destroyed his rights under section 12; and publication was without statutory notice as required by sections 10 and 19, so he has no valid section 10 copyright. Of course, the author can protect himself against such an eventuality by including on the copies he distributes notice that complies with section 19, so that if he is held to have divested himself of his section 12 rights, he will nevertheless have perfected his rights under section 10.

On the other hand, one may believe that the purpose of section 12 is to secure for the author the remedies available under the statute before he has sold or offered for sale copies of his work. In return, the author gives up his perpetual common law rights and allows the work to fall into the public domain at the end of the statutory

¹²³ 17 U.S.C. § 12 (1958). Registration under this section is, in terms, not available for any of the classes of works listed in § 5(a), (b), (f), (h), and (k).

¹²⁴ 17 U.S.C. § 8 (1958).

¹²⁵ 17 U.S.C. §§ 12, 13 (1958).

¹²⁶ *Loew's, Inc. v. Superior Court*, 18 Cal. 2d 419, 115 P.2d 983 (1941).

¹²⁷ 17 U.S.C. § 24 (1958). See *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938).

¹²⁸ 17 U.S.C. §§ 12, 13 (1958).

¹²⁹ 37 C.F.R. §§ 202.3(b)(1), (2), (4), (5); 202.3(c); 202.7 (1961).

¹³⁰ See text accompanying note 126 *supra*.

term. If one prefers this view of section 12, he will say that the author's rights under his section 12 copyright are still intact.¹³¹ Since it is the Copyright Act that is being interpreted, a federal judge should feel free to find that section 12 rights survive such a distribution, even if the cases dealing with common law rights indicate that a divestitive publication would have been found under similar circumstances, a result by no means certain. Such freedom of interpretation would obviate the need of importing into statutory copyright cases judge-made ameliorative doctrines such as limited publication.¹³² It is to be hoped that if the revised Copyright Act retains section 12, it will at least be amended to define accurately the circumstances under which the rights therein granted will terminate.

III

THE STRAUSS STUDY

The Copyright Office study on the subject of publication¹³³ was made by Mr. William Strauss of the staff of that Office. After a careful analysis of the problems connected with publication, he made three alternative proposals for solution, which he then submitted to the Register of Copyrights. He summarized them as follows:

(1) To continue the system of alternative protection under the common law or by voluntary registration under the statute, but with the privilege of registration being extended to all classes of unpublished works.

(2) To extend the concept of publication to include all methods of public dissemination, by protecting under the statute all works made available to the public in any manner, and to limit common law protection to works which have not been made available to the public.

(3) To eliminate protection under the common law and to provide only for statutory protection for all unpublished as well as published works from creation.¹³⁴

A. Alternative Protection of All Unpublished Works Under Common Law or Voluntary Registration

This proposal is based on the theory that most of the problems relating to protection of unpublished works could be solved by providing for voluntary registration of all classes of works prior to publication instead of limiting the classes as is done now under section 12.¹³⁵ The basis of this theory is that many authors and distributors desire to voluntarily register works not belonging to the classes enumerated in the section, primarily to have official evidence of the existence and content of their works prior to publication.¹³⁶ The statute now discriminates against certain classes of works. Protecting all classes prior to publication would end this discrimination. This solution would have the additional advantage of simplicity in that it would require only an amendment to section 12. Also, the copyright bar would not be put to the discomfort of having to learn a completely new system of protection of literary and related property.

¹³¹ *Ilyin v. Avon Publications, Inc.*, 144 F. Supp. 368 (S.D.N.Y. 1956), so held.

¹³² See text accompanying notes 14-47 *supra*.

¹³³ See text accompanying notes 1-4 *supra*.

¹³⁴ Strauss, *Protection of Unpublished Works*, COPYRIGHT REVISION, STUDY No. 29, at 27 (1957).

¹³⁵ See note 123 *supra*.

¹³⁶ Strauss, *supra* note 134, at 27.

The principal disadvantage of this proposal is that its effectiveness in eliminating perpetual monopolies in unpublished works would depend upon *voluntary* registration. Also, none of the difficulties concerning what constitutes, or should constitute, publication would be solved. Thus, the problem of perpetual monopoly in performed works¹³⁷ would persist; and the doctrine that performance does not dedicate would still be applicable to any newly developed mass media of communications.¹³⁸ The difficulties of determining what conduct should be considered publication of exhibited works¹³⁹ or lectures¹⁴⁰ would not be mitigated. And worst of all, the problem of records¹⁴¹ would persist except to the extent that the composer chose to register his work under the amended section 12.¹⁴² A further problem left unsolved by this proposal is whether state or federal law should apply to determine the fact of publication,¹⁴³ although it seems probable that Congress would not be content to continue to allow state law to determine the existence of publication. Furthermore, since this solution puts so much emphasis upon the workings of the voluntary registration provisions of section 12, that section should spell out in great detail what acts would have the effect of divesting section 12 rights.¹⁴⁴ Finally, one problem that overlies the entire proposal is that it amounts to little more than an expansion of the present section 12; it virtually ignores many of the problems and inconsistencies that presently exist in this area. Thus, if this proposal is adopted by Congress, it is almost certain that some courts will be inhibited in the working out of fair solutions in the cases presented to them by the application of the rule of statutory interpretation that the silence of Congress at the time of re-enactment of legislation amounts to approval of the case law as it then exists.

*B. Statutory Protection After Public Dissemination;
Common Law Protection Until That Time*

The main feature of this proposal is that it solves the problems centered around divestitive publication by moving the datum point of divestment up to the time of first public dissemination. "The phrase 'public dissemination' is used here in the sense of communicating a work to the public visually or acoustically by any method and in any form, whether permanently fixed or not."¹⁴⁵ Any such activity would, under this definition, terminate common law rights in a work; protection, if any, would be had under the statute. Prior to public dissemination, common law rights would persist *in perpetuum*. It is obvious that this proposal solves the present problems of perpetual monopoly in works that have been exposed to vast segments of the public, and yet have not been "published." Thus, it is clear that performance of a play, public exhibition of a painting, delivery of a lecture, sale of records, and deposit in a library would all constitute a public dissemination of the works. This would not deprive the authors or proprietors of the works of all pro-

¹³⁷ See text accompanying notes 24-32 *supra*.

¹³⁸ See text accompanying notes 29-32 *supra*.

¹³⁹ See text accompanying notes 33-40 *supra*.

¹⁴⁰ See text accompanying notes 41-44 *supra*.

¹⁴¹ See text accompanying notes 48-64 *supra*.

¹⁴² This proposal does not include making records, as such, registrable.

¹⁴³ See text accompanying notes 77-81 *supra*.

¹⁴⁴ See text accompanying notes 126-32 *supra*.

¹⁴⁵ Strauss, *supra* note 134, at 28.

tection. Rather, it would require that they be registered under the act prior to such dissemination. It should be noted that private letters and manuscripts would still be protected by the common law so long as they have not been disclosed to the public in any manner.

Under this solution, it would be possible to do away completely with any distinction between the kinds of acts that serve to divest common law rights and those that invest statutory rights. It has been shown that the courts have required considerably wider public dissemination of work to divest than to invest.¹⁴⁶ By doing away with the concept of publication, and by making any dissemination divestitive, it would seem that a standard would be applied that is very similar to that now used to determine whether or not a work has been investitively published. Moreover, the federal-state controversy could be solved by limiting state court jurisdiction to suits to protect works that had not been disseminated in any way; all others would be subject to federal jurisdiction to determine rights under the statute.

The difficulties attending this proposal are not internal. They grow out of the fact that the United States is a signatory nation to the Universal Copyright Convention (UCC). This convention, while not applicable to the works of domestic authors, controls the rights of foreign authors when their works are sold, distributed, or otherwise disseminated in the United States. The difficulties arise because "publication" is specifically defined in the UCC in a manner consistent with the narrow doctrine of divestitive publication as it now exists in this country.¹⁴⁷ If a foreign work is disseminated, but not published (as that term is defined in the UCC), it may not be subjected to formalities such as would be required under a revised Copyright Act in order to gain protection in our courts.¹⁴⁸ The problem is chiefly one of discrimination against the American author in favor of the foreign, a result hardly considered politic. Although Strauss makes some suggestions how this solution could be brought into line with the UCC and yet remain palatable to American authors,¹⁴⁹ the matter cannot be further discussed in this comment. Suffice it to say that if the objections related to the apparent conflict with the UCC can be surmounted, this solution is an attractive one.

*C. Statutory Protection Only for All Works*¹⁵⁰

This proposal would do away with all common law protection, even for works entirely undisseminated. Private letters and unpublished manuscripts would be protected for some statutory term, and then they would fall into the public domain. The chief advantage of such a proposal is that it would make available to scholars the private papers of important figures of history at a time (presumably a certain number of years after their deaths) when they would no longer be interested in privacy. Aside from the possible distaste for making private papers available to the public, even though many years after the death of the writer, the chief obstacle

¹⁴⁶ See text accompanying notes 114-22 *supra*.

¹⁴⁷ UCC art. VI, defines "publication" as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived."

¹⁴⁸ UCC art. III, § 4.

¹⁴⁹ See Strauss, *supra* note 134, at 29-30.

¹⁵⁰ This proposal does not differ greatly from the one last discussed. The only problems that will be examined will be those unique to this proposal, the previous discussion being equally appropriate here.

to the present solution would be its attempted application to unpublished works in which common law rights already exist, the familiar constitutional problem of retroactive limitation of existing property rights. Strauss' discussion and suggested solution of this problem is extensive and the reader is referred to that study for detail.¹⁵¹ It seems to this writer that the questionable advantage of gaining access to the private papers of historical figures after their deaths does not warrant subjecting a general copyright law revision to constitutional challenge on this ground.

IV

THE COPYRIGHT OFFICE REPORT

The Copyright Office adopted, in effect, the second Strauss proposal as its recommendation to Congress of a solution to the publication problem. It did, however, add a proposal for special treatment of manuscripts placed in libraries or other archival institutions. I will quote the recommendations in full:

1. The statute should apply, and common law rights should end, when a copyrightable work is publicly disseminated by the publication of copies, registration in the Copyright Office, public performance, or the public distribution of sound recordings.

2. Common law protection should be left in effect for copyrightable works not publicly disseminated. The privilege of securing statutory copyright in lieu of common law protection, by voluntary registration in the Copyright Office, should be extended to all copyrightable works.

3. When any holder of a manuscript has made it accessible to the public in a library or other archival institution:

(a) The institution should be permitted to supply any applicant with a single copy of the manuscript for his use in research.

(b) The manuscript should be subject to fair use.

(c) The manuscript material should go into the public domain when it is 50 years old and has been in the institution for more than 10 years, unless the owner of the literary property rights has registered a claim of copyright which is still subsisting. With respect to manuscripts placed in an institution before the effective date of the new law, this rule should not become applicable until 10 years after the effective date.¹⁵²

While the text of the report talks of public dissemination in general terms,¹⁵³ the types of dissemination that would be divestitive of common rights are carefully specified in the recommendations. This is a more restrictive view than the Strauss proposal, which would terminate common law rights in a work whenever it was communicated to the public "visually or acoustically by any method and in any form, whether permanently fixed or not."¹⁵⁴ The Strauss view seems the more desirable because it allows for future advances in the field of communications. When the types of communications that constitute divestitive dissemination are specified, a new development in the field requires an amendment to the Copyright Act, if we are to insure against a newly created perpetual monopoly system by judicial application of the *inclusio unius* doctrine. One example of a dissemination within the limits of present technology that would not be covered by the word-

¹⁵¹ See Strauss, *supra* note 134, at 33-37.

¹⁵² COPYRIGHT REPORT 43.

¹⁵³ *Id.* at 40.

¹⁵⁴ Strauss, *supra* note 134, at 28.

ing of the recommendation would be the public distribution of video tape recordings;¹⁵⁵ yet, there is no reason to distinguish them from sound recordings.

The key word of the second recommendation is "copyrightable." This refers to the standard established in an earlier chapter of the report, which requires that a work be in some tangible form in order to be copyrightable.¹⁵⁶ Thus, it is explained that an impromptu speech or a musical improvisation, because not fixed in some tangible form, could not be copyrighted.¹⁵⁷ It is questionable whether, under the wording of the recommendation, a recording of such a speech or musical improvisation, before being distributed publicly, could be voluntarily registered.

The treatment of works placed in archives seems self-explanatory.¹⁵⁸ The availability of a manuscript to scholarly examination depends on the voluntary placing of the work in the archive by the recipient or the author. Thus, works kept private will never fall into the public domain. The recommendation allows the author to protect his rights in the work by registering it under the Copyright Act, even though it has already been placed in an archival institution by someone else. If he does this, it will not fall into the public domain until the statutory term for registered works expires.

It should be noted that although the report contains a chapter on "International Aspects of Copyright,"¹⁵⁹ and there discusses the UCC and its relation to domestic copyright law,¹⁶⁰ there is no mention made of the problems of making the recommendations respecting protection of unpublished works consistent with this nation's obligations under the UCC. These problems were discussed earlier in connection with the second Strauss proposal.¹⁶¹ It must be assumed, therefore, that the treatment accorded unpublished works under the report's recommendations is meant to apply only to the works of domestic authors. Apparently, the Copyright Office believes that there is no difficulty in granting a greater degree of protection to foreign than to American authors.

V

CONCLUSION

Except for the previously discussed problems left unsolved by the recommendations of the Copyright Office, these recommendations appear to be sound. They will, for the most part, provide adequate and essentially fair solutions to the problems that have developed with respect to the protection of unpublished works since the early days of this century. The greatest accomplishments that will be credited to these recommendations if they are adopted will be the solution of the perpetual monopoly problems relating to performed works and records. It is to be hoped that Congress acts favorably.

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¹⁵⁵ See note 96 *supra* and accompanying text.

¹⁵⁶ COPYRIGHT REPORT 9.

¹⁵⁷ *Id.* at 41. See also note 96 *supra*, with respect to musical improvisations.

¹⁵⁸ COPYRIGHT REPORT 42-43.

¹⁵⁹ *Id.* at 111-26.

¹⁶⁰ *Id.* at 116.

¹⁶¹ See text accompanying notes 146-48 *supra*.

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