

# UNIFICATION: A CHEERFUL REQUIEM FOR COMMON LAW COPYRIGHT\*

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The greatest change of the 1976 Copyright Act has been attended with the least controversy. Common-law copyright, the protection by state law of unpublished works, effectively disappears. A dual system that has persisted since the beginning of the republic gives way to a unified national copyright. To be sure, the cleavage between common-law and statutory copyright under the old scheme was far from total; likewise the absorption of state-created rights into the new statute is also not total. But the works now left entirely to state protection are almost wraith-like; and the states are given little authority to affect rights in works of authorship that are within the subject matter of the statute.

This paper will attempt to describe the extent of the changes, with a caution that we are dealing with a newborn statute, which may mature in unforeseen ways. We will first recall the strange shape that the 1909 Act took in accommodating to strained notions of "publication," and then see how the new law, by commencing statutory copyright with the first fixation of a work in any medium from which it can be reproduced, mostly wipes out the significance of publication. A forecast of some of the consequences for the major media will be essayed. The outcome is acclaimed as unifying, and is reinforced by the assertion of federal preemption, in section 301. However, examination of the enacted form of section 301 discloses significant and controversial ambiguities. My thesis is that these ambiguities ought to be resolved in the direction of more thorough unification, instead of leaving to the states substantial segments of artistic and literary production which, in my view, ought to have a uniform national disposition.

## I. THE OLD REGIME

What was there about common-law copyright which made it

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\* Certain citation conventions are employed throughout this Symposium. These conventions are presented at page vii.

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such a poor thing that no one fought to retain it? Its growth had continued even after some of its roots were severed by the House of Lords in *Donaldson v. Becket*,<sup>1</sup> and by the Supreme Court in *Wheaton v. Peters*.<sup>2</sup> Those leading cases held that published works must look to the respective English and American statutes for protection. But, at least in this country, the converse proposition remained intact: "That an author, at common law, has a property in his manuscript," said Justice McLean in *Wheaton v. Peters*, "and may obtain redress against anyone who deprives him of it, or by improperly obtaining a copy endeavours to realize a profit by its publication, cannot be doubted."<sup>3</sup>

The author's manuscript so stood and still stands as the archetype of the kind of work that needed protection before publication, just as the book typifies the central subject-matter of copyright in published works. The Statute of Anne<sup>4</sup> spoke only of books; the first American statute, appropriately for a new-found land, comprehended maps, charts and books.<sup>5</sup> These could be effectively disseminated only by "printing, reprinting, publishing and vending," (these were the rights secured by the statute) so that there were no gaps of any significance in the scheme.<sup>6</sup> Beyond this protection, the first Congress, apparently aware even then how fearful authors are that someone will steal their stuff, provided a "special action on the case" against anyone who without consent should "print or publish any manuscript."<sup>7</sup> Apparently no one at that time or subsequently read this provision as having any effect in pre-empting common-law rights; it was routinely included, apparently little noticed and modestly used, in the successive revisions of the statute through that of 1891.<sup>8</sup>

Meanwhile, beyond the primitive paradigm of the book and its manuscript, the range of works that sought and got statutory protection was expanding: in 1802, to "any historical or other

<sup>1</sup> 98 Eng. Rep. 257 (H.L. 1774).

<sup>2</sup> 33 U.S. (8 Pet.) 591 (1834).

<sup>3</sup> *Id.* at 657.

<sup>4</sup> 8 Anne, c. 19 (1709).

<sup>5</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

<sup>6</sup> The penalty provision provided for unauthorized imports. *Id.* §§ 2, 5.

<sup>7</sup> *Id.* § 6. All copyright has been statutory in England since 1911. E. P. SKONE JAMES, COPINGER AND SKONE JAMES ON COPYRIGHT 19 (1971).

<sup>8</sup> Act of Feb. 15, 1819, ch. 19, 3 Stat. 481; Act of Feb. 3, 1831, ch. 16, § 9, 4 Stat. 436; Act of July 8, 1870, ch. 230, §§ 102, 106, 16 Stat. 215; Act of March 3, 1891, ch. 565, §§ 9 (amending Act of July 8, 1870, ch. 230, §§ 102, 106, 16 Stat. 215), 13, 26 Stat. 1106.

Along the way, the "action on the case" became simply an action for damages. Act of July 8, 1870, ch. 230, § 102, 16 Stat. 215. See E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 124-26 (1879), on the use of § 102 and its predecessors. The cases cited by Drone suggest nothing more exciting than a duplication of common law rights.

print";<sup>9</sup> in 1831, to musical compositions;<sup>10</sup> in 1865, to photographs;<sup>11</sup> and in 1870, to paintings, drawings and other productions "intended as works of fine arts."<sup>12</sup> All these, while unpublished, doubtless had some common-law protection. Congress was now protecting their dissemination in published forms. It seems unlikely that it intended to provide any additional protection to unpublished works, beyond the old section that safeguarded manuscripts; one attempt by a litigant to extend "manuscript" beyond its common meaning to include a painting was rebuffed.<sup>13</sup>

The thorough-going revision of 1909 made a brave try at delimiting the spheres of common-law and statutory copyright. Section 2 was a flat affirmation that "nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."<sup>14</sup> Yet at the same time what is now section 12 (originally section 11) created an optional route to statutory copyright for works "of which copies are not reproduced for sale," that is, for unpublished works.<sup>15</sup> Simple deposit requirements provided statutory protection for dramatic works, lectures, musical compositions, photographs and other works—everything indeed except books, periodicals, maps, prints, and reproductions of works of art (if one can take the classes for registration set out in section 5<sup>16</sup> as a fair representation of the scope of the 1909 Act).<sup>17</sup> Section 12, however, was not taken as

<sup>9</sup> Act of April 29, 1802, ch. 36, § 2, 2 Stat. 171.

<sup>10</sup> Act of Feb. 3, 1831, ch. 16, § 5, 4 Stat. 436.

<sup>11</sup> Act of March 3, 1865, ch. 126, 13 Stat. 540.

<sup>12</sup> Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212. These and other expansions of the types of works protected by the statute are conveniently collected in Note, *Study of the Term "Writings" in the Copyright Clause of the Constitution*, 31 N.Y.U.L. REV. 1263, 1269 (1956). See also Derenberg, *The Meanings of "Writings" in the Copyright Clause of the Constitution*, COPYRIGHT OFFICE STUDY No. 3 at 72-73 (1956), reprinted in STUDIES ON COPYRIGHT 50-51 (Copyright Soc'y of the U.S.A. ed. 1963); Ringer, *The Unauthorized Duplication of Sound Recordings*, COPYRIGHT OFFICE STUDY No. 26 (1957), reprinted in 1 STUDIES ON COPYRIGHT 117 (Copyright Soc'y of the U.S.A. ed. 1963).

<sup>13</sup> *Parton v. Prang*, 18 F. Cas. 1273 (C.C.D. Mass. 1872) (No. 10,784).

<sup>14</sup> 1909 Act § 2.

<sup>15</sup> *Id.* § 12.

<sup>16</sup> *Id.* § 5.

<sup>17</sup> The basis for selecting these classes of works for inclusion in § 12 remains somewhat mysterious. Weil, a contemporary treatise-writer, suggested that they were "those chiefly useful for exhibition, representation, or performance"—that is, there was no need to disseminate copies of them. A. WEIL, *AMERICAN COPYRIGHT LAW* 155 (1917) [hereinafter cited as WEIL]. This is a plausible explanation, as is its corollary that the works not eligible under § 12—books and periodicals, maps, prints, and reproductions of works of art—could be exploited only by publication and therefore would have to seek statutory copyright in any

preemptive of common-law rights; rather, it was construed as affording an option which if chosen, it came to be agreed, did supersede common-law rights.<sup>18</sup>

What were common-law rights in lectures, dramatic and musical compositions and works of art? As to works of art, twentieth-century courts, with slim nineteenth-century precedents, recognized a common-law right to exhibit a work without losing the right to first publication of copies—provided that some reservation of rights was manifested by regulations of the exhibition against copying.<sup>19</sup> This exhibition right, while a desirable prop for the artist who wanted to display his paintings or sculptures, did not permit any extensive exploitation outside the statute. The artist who sought a reward by authorizing reproductions would be authorizing publication, and would have to publish with notice.<sup>20</sup>

The recognition of a common-law right to control performances, in the case of dramatic and musical works, had much wider

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event. To be sure, some of the kinds of works included in § 12 were also exploited by publication in print—notably musical compositions, in an era when sheet music was flourishing.

<sup>18</sup> See Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 477 (1955).

One can make an argument, now of only antiquarian interest, that §§ 2 and 12 of the 1909 Act have both been too narrowly applied, and that together they represented a complete system of federal protection for unpublished works—so complete that little would have been left to the states. First—the argument would go—§ 12 should be read preemptively. This was suggested by Weil, writing at a time close to the 1909 revision and to *Ferris v. Frohman*, 223 U.S. 424 (1912); WEIL, *supra* note 17, at 157 (1917); and again by Selvin, *Should Performance Dedicate?*, 42 CALIF. L. REV. 40, 45 (1954).

As for § 2, it has been routinely read only as recognizing common-law, *i.e.*, state-created, rights in unpublished works. Does it not say so, with its reference to rights “at common law or in equity”? And the House Committee Report on the 1909 Act, H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909), a piece of legislative history that has been kept alive by reference and reprinting, *e.g.*, H. HOWELL, *THE COPYRIGHT LAW* 214 (2d ed. 1948) [hereinafter cited as HOWELL], says that it wanted to “be perfectly clear that nothing in the bill was intended to impair in any way the common-law rights with respect to this kind of a work”—“this kind of a work” presumably meaning “an unpublished work.” But the Report also said, in the same short paragraph, that § 2 “is new in phraseology, although substantially the same provision is found in section 4967 of the Revised Statutes.” HOWELL, *supra*, at 222. Section 4967 is the provision, coming down from the Act of May 31, 1790, ch. 15, 1 Stat. 124, that creates a federal cause of action for damages for the unauthorized publication of a manuscript. Did the drafters mean to continue this federal remedy? If they did, no one ever noticed, except Judge Learned Hand, who in another connection noted the provenance of § 2, and that its predecessors gave a “remedy cumulative upon the state remedies.” *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 666 (2d Cir. 1955) (dissenting opinion); *cf.* *Wells v. Universal Pictures Co.*, 166 F.2d 690, 691 (2d Cir. 1948) (no federal jurisdiction if plaintiff’s “rights depend on principles of common law and equity”).

<sup>19</sup> *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907).

<sup>20</sup> *Letter Edged in Black Press, Inc. v. Public Bldg. Comm’n of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970).

consequences. The influential decision in *Ferris v. Frohman*<sup>21</sup> held that there was such a common-law performance right in dramatic works. Whether the Court read history correctly is still debatable and debated; but this did not much matter since it was making history. There had long been a statutory performance right in plays published in print.<sup>22</sup> Now it was settled that if the author of a play chose not to publish it in print, performance did not constitute a publication. The play could be exploited forever on the stage, with perpetual common-law copyright protection,<sup>23</sup> without compliance with statutory requirements. Common-law copyright protection of unpublished plays remained even after the 1909 revision made statutory copyright available to unpublished dramas.<sup>24</sup>

The position that performance was not a publication that divested common-law rights extended equally and easily to musical compositions.<sup>25</sup> But the case for common-law rights in musical compositions had a harder time resisting the insidious and persistent notion that the widespread dissemination of the work on phonograph records must amount to a publication. Though several judges and writers so argued, this notion never quite prevailed.<sup>26</sup> The Copyright Office supported the orthodox view that the sale of phonograph records did not divest common-law rights in the composition, by refusing to accept recordings as copies of the work for registration.<sup>27</sup> There was also general recognition that it would be unreasonable to treat recordings as a mode of publication unless there was some agreement on how, where, and by whom the statutory notice was to be applied.<sup>28</sup>

Finally, the impetus of *Ferris v. Frohman* carried forward into broadcasting, a medium barely invented in 1912 when *Ferris* was decided. Broadcasts were performances; rights in them were all protected by common law, although radio and then television came to fill the airwaves with a volume of performances that surely overwhelmed all the other performing media, including motion pictures. The bulk of these performances of course consisted of music and drama of independent authorship with their own

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<sup>21</sup> 223 U.S. 424 (1912).

<sup>22</sup> Act of August 18, 1856, ch. 169, 11 Stat. 138.

<sup>23</sup> See text accompanying note 39 *infra*.

<sup>24</sup> See text accompanying note 18 *supra*.

<sup>25</sup> *McCarthy & Fischer, Inc. v. White*, 259 F. 364 (S.D.N.Y. 1919).

<sup>26</sup> See generally, Kaplan, note 18 *supra*.

<sup>27</sup> 37 C.F.R. § 202.8(b) (1976).

<sup>28</sup> See Kaplan, note 18 *supra*; B. KAPLAN & R. BROWN, *CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL AND ARTISTIC WORKS* 79-93 (2d ed. 1974) [hereinafter cited as KAPLAN & BROWN].

copyrights. Yet beyond this sustenance derived from others, broadcasting created its own works. In their broadcast form, they had no home in the statute. Scripts for programs were not books until they were published; they were common-law manuscripts. And a radio or television program had only ephemeral life unless it was taped, recorded, or filmed. A radio program, even when it was recorded, was like a phonograph record, not acceptable for copyright.<sup>29</sup> A television program could be filmed with a sound track, and then qualify for copyright as a motion picture. But sound film was a cumbersome and expensive way to preserve a broadcast event. It soon gave way to videotape, a convenient medium but a foundling on the doorstep of the Copyright Office, not entitled to recognition because it was in no way visually perceptible. The Copyright Office had considered this to be a requisite for statutory copyrightability.<sup>30</sup> Nevertheless, the door opened in 1961. An amendment to the Copyright Office Regulations attempted to legitimize videotapes by treating them as motion pictures.<sup>31</sup> This was a solution only as long as no one challenged the copyright legitimacy of videotapes, or for that matter of the soundtracks of motion pictures.<sup>32</sup> Neither conveys anything directly to the eye, nor to the ear. In light of the difficulty of finding a niche for these new forms in the existing statutory scheme, it was perhaps better to continue to assert and accept that the dominant medium of our time, television, was best protected by the same common-law performance right pronounced on behalf of the authors of an 1894 melodrama, "The Fatal Card."<sup>33</sup>

This survey of the disjointed connections between common-

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<sup>29</sup> M. NIMMER, NIMMER ON COPYRIGHT 21 (1972) [hereinafter cited as NIMMER].

<sup>30</sup> The requirement of visual perceptibility was the product of a widespread misreading of a wrong-headed decision of the Supreme Court, *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). That case held that a player-piano roll was not, under the statute, an infringing "copy" of the musical composition. A copy, said Justice Day, "appeals to the eye." *Id.* at 17. This was taken to require that a work must be intelligible to the eye in order to qualify for statutory copyright. This extrapolation from what the Court decided of course excluded phonograph records, motion picture sound tracks, and videotapes until the copyright office nerved itself to ignore *White-Smith*, as does the new statute. See NEW ACT §§ 101 (definition of "copies"), 102.

<sup>31</sup> See Fritch, *Some Copyright Implications of Videotapes*, 37 S. CAL. L. REV. 214 (1964), also in 13 ASCAP COPYRIGHT L. SYMP. 87 (1964).

<sup>32</sup> See Yuzek, *Publication and Protection: In Qualified Support of the Copyright Office Approach to Motion Picture Soundtracks*, 22 BULL. COPYRIGHT Soc'Y 19 (1974). See also Copyright Office Regulations Amendment of March 19, 1975, 40 Fed. Reg. 12,500 (codified at 37 C.F.R. §§ 202.15(e), 202.15a(c) (1976)).

<sup>33</sup> This was the title of the work in *Ferris v. Frohman*, 223 U.S. 424 (1912). See Warner, *Protection of the Content of Radio & Television Programs by Common Law Copyright*, 3 VAND. L. REV. 209 (1950).

law (state) and statutory (federal) copyright may suggest why the distinction was largely swept away in the General Revision. In summary: Manuscripts—the unpublished forms of anything that when published would be a book, pamphlet, periodical, map, or print—were after 1909 protected only by state law. Practically every other kind of work that was protectable at all could, while unpublished, seek state protection against copying or performance; it could alternatively come under federal copyright while unpublished by way of section 12. Once any kind of work was “published”—essentially, when it was reproduced in copies for sale—it was protected, if at all, by statutory copyright under section 10, and had to carry a statutory notice. Works such as videotapes that could not be reproduced in visually perceptible copies might have common-law copyright, but they could not obtain statutory copyright until recently.

Relating these generalities to the usual practices of the major media, it can be said that:

- 1) Publishing in print *par force* within the federal statute.
- 2) Music composers used the statute, but not always, because if they stayed with state law they avoided—until recently—the compulsory recording license that came into play once a statutorily copyrighted work was recorded.<sup>34</sup>
- 3) Music makers—performers and recording companies, of whom we have said nothing up till now—had no federal rights until 1971, when they got statutory protection against duplicators.<sup>35</sup> They were previously enjoying similar state rights, and still have them in recordings made before 1972.<sup>36</sup>
- 4) Motion picture producers used the statute, although they might have claimed a state-law performance right so long as they stuck to leasing their product, and refrained from selling prints.<sup>37</sup>
- 5) Dramatists probably used the statute, although they assuredly had a state-law performance right.
- 6) Broadcasters until recently had no useful access to statu-

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<sup>34</sup> See notes 71-73 & accompanying text *infra*.

<sup>35</sup> Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified at 17 U.S.C. §§ 1(f), 5(n), 19, 20, 26, 101(e) (Supp. V 1975)); *cf.* NEW ACT § 114.

<sup>36</sup> See text accompanying notes 177-82 *infra*.

<sup>37</sup> See Nolan, *Copyright Protection for Motion Pictures: Limited or Perpetual?*, 18 ASCAP COPYRIGHT L. SYMP. 174 (1970).

tory protection and had to rely on state protection for their creations.

In a word, the situation was a muddle, even though the creator of every important literary, musical and artistic work had access to one or more avenues of protection.

There was at least one issue of principle that disturbed the constitutional integrity of the dual system. The Constitution confines federal protection to "limited times."<sup>38</sup> Common-law rights were generally assumed to be perpetual.<sup>39</sup> Although nothing barred a state from limiting duration of such rights, no state in modern times has done so. If the constitutional policy that in the end propelled all copyrights into the public domain was a sound one, it did not seem right that some kinds of producers could exploit some kinds of works in perpetuity. Judge Learned Hand believed that it was "the overriding purpose" of the constitutional clause "to grant only for 'limited Times' the untrammelled exploitation of an author's 'Writings,'" and further argued that "Uniformity was one of the principal interests to be gained by devolving upon the Nation the regulation of this subject."<sup>40</sup> Chief Justice Burger, on the other hand, in validating a state statute granting copyright protection against duplication of pre-1972 sound recordings,<sup>41</sup> observed that "the exclusive right granted by a State is confined to its borders. Consequently, even when the right is unlimited in duration, any tendency to inhibit further progress in science or the arts is narrowly circumscribed. The challenged statute cannot be voided for lack of a durational limitation."<sup>42</sup> He deprecated the need for uniformity: "The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope,"<sup>43</sup> and thus to ease the way of authors and inventors. But there is "enormous diversity"<sup>44</sup> in our society, and some interests may be "of purely local importance."<sup>45</sup> A state copyright will serve "to induce new artistic creations within that State."<sup>46</sup> "No conflict will necessarily arise from a lack of uniform state regulation . . . ."<sup>47</sup> Congress, he pointed out, is always em-

<sup>38</sup> U.S. CONST. art. I, § 8.

<sup>39</sup> See Strauss, *Publication of Unpublished Works*, COPYRIGHT OFFICE STUDY NO. 29 at 4 (1957), reprinted in 1 STUDIES ON COPYRIGHT 189, 194 (Copyright Soc'y of the U.S.A. ed. 1963).

<sup>40</sup> *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 667 (2d Cir. 1955) (dissenting opinion).

<sup>41</sup> *Goldstein v. California*, 412 U.S. 546 (1973).

<sup>42</sup> *Id.* at 560-61.

<sup>43</sup> *Id.* at 555.

<sup>44</sup> *Id.* at 557.

<sup>45</sup> *Id.* at 558.

<sup>46</sup> *Id.* at 559.

<sup>47</sup> *Id.* at 560.



powered to set national standards, to "eschew all protection" for some writings, to allow state protection, or to accept "concurrent exercise of the power to grant copyrights."<sup>48</sup> As we have seen, there has been a large range of concurrent exercise under the 1909 Act.

One may prefer either Judge Hand's or the present Court's assignments of value as to the pervasiveness of time limitations, and as to whether national uniformity or local diversity is preferred. Within the loose confines of the clause, these are for Congress to declare authoritatively. In the 1976 revision it has opted for national uniformity.

## II. UNIFICATION BY FIXATION

Section 102 of the New Act accomplishes the unification of common-law and national copyright. Buttressed by a powerful preemption provision, section 301,<sup>49</sup> section 102 makes simple fixation the starting point of statutory copyright,<sup>50</sup> rather than publication with notice. Thus, it must first be established that the work falls within the coverage of section 102,<sup>51</sup> which defines the subject matter of copyright, in order to preclude state protection. Section 102(a) provides:

Copyright protection subsists, in accordance with this

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<sup>48</sup> *Id.* at 559.

<sup>49</sup> See notes 110-82 & accompanying text *infra*.

<sup>50</sup> Section 102 contains substantially the same language as that of the original draft bill introduced in 1965. SUPP. REP. REG. at 4-6, 174; H.R. 4347, 89th Cong., 2d Sess. § 102 (1965). However, an earlier revision proposal did not reflect the same approach.

In 1961, the Report of the Register, after several years of preliminary study, proposed that common-law copyright be continued for manuscripts, essentially on privacy grounds; and that some of the distortions reviewed earlier in this paper be corrected by making "public dissemination," rather than "publication," the starting-point of statutory copyright. 1961 REP. REG. at 39-43. This proposal was not well-received. In the 1965 Supplementary Report the Register wrote:

The focal point of opposition to the *Report* was its proposal on the start and length of the copyright term, which lay at the heart of the entire revision program. We had recommended that copyright begin with the "public dissemination" of a work—a concept that would include public performance as well as the distribution of copies and sound recordings—and that it last for a first term of 28 years, renewable for a second term of 48 years. There was very little support for these recommendations, and there was strong sentiment favoring copyright from creation of the work, and the term most common in foreign copyright laws, based on the life of the author and a period of 50 years after his death.

SUPP. REP. REG. at x.

Dissatisfaction with "dissemination" as a new dividing-line between common-law and statutory copyright did not, it appears, spring entirely from distaste for common-law rights. There was unease about "dissemination" because it was unfamiliar. In any event, the shift to a unified system soon appeared in preliminary drafts; and it has never faltered. *Id.* at 82-83, 174-75.

<sup>51</sup> If the work is a compilation or derivative work within the meaning of § 103, it is within the subject matter of copyright. NEW ACT §§ 103, 301.

title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.<sup>52</sup>

The scope of this pronouncement is initially astonishing to one who thinks of a copyrighted work as robed in the dignity of publication with notice. Consider the following examples of the statutory categories of works of authorship that follow the sentence in section 102 just quoted. Tell yourself firmly that from the moment of creation and fixation, they are protected by the New Copyright Act, for they are:

- 1) literary works: you write a letter;
- 2) musical works: you compose a song and sing it to a tape recorder;
- 3) dramatic works: your children make up a play. When they perform it, you borrow a camera and make a video-tape of it;
- 4) pantomimes and choreographic works: your daughter performs a modern dance that she has devised. You make a movie of it;
- 5) pictorial, graphic, and sculptural works: you do a weekend watercolor;
- 6) motion pictures: you have already made one, of your daughter's dance. Make another, of highlights of your son's Little League championship game;
- 7) sound recordings: you are one of a barbershop quartet, and tape your rendition of "Sweet Adeline."

All this private trivia in copyright? Yes.<sup>53</sup> But if this seems hard to take, consider that all the described "works" could have claimed common-law protection, aside from possible difficulties with the means by which they were recorded<sup>54</sup>—difficulties that

<sup>52</sup> *Id.* § 102. See also *id.* § 101. The definitions of "created" and "fixed" are essentially the same: Creation is simply the first fixation of a work, and occurs whenever parts or versions of it are prepared and embodied in a permanent form. *Id.*

<sup>53</sup> Note that the House Report, the basic piece of legislative history, says that the standard of originality in § 102 "does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them." H. REP. at 51. Are some of these examples too minimal or uncreative to claim protection? One has to ask, protection against whom? Presumably against someone who undertakes to copy one's home movies or whatever. Against such a person, claims of infringement—if the work has not been published—would have an appealing element of protection of privacy. If the work had somehow found a market and been published, then a defendant's competing commercial publication in itself would tend to show that the work had value.

<sup>54</sup> See note 26 *supra*.

the statute now dispels by dispensing with any need for direct visual perception.<sup>55</sup>

One rewarding byproduct of the new dispensation is that persons approached because of their supposed expertness in copyright can now give a simple answer to the perennial inquiry: "I've written a novel (poem) (scenario) and I want to copyright it. What do I do?" The simple answer will be, "Nothing. You already have a copyright." The catch is that it will be a long time before lay persons will believe this. They will still want to send their creation to themselves by registered mail, or do something equally portentous.

What are other consequences of this ingathering of what were formerly common-law works and rights? Here is a survey by types of work.

#### A. *Manuscripts*

In considering the usefulness of the new law, we should separate contemporary manuscripts from historical manuscripts. As for one's own productions (which may now be on paper, tape, or for that matter computer cards), after January 1, 1978, the great benefit will be the decreased risk of unintended divestitive publication—where one loses common-law rights but has not attached the notice requisite to gain statutory rights.<sup>56</sup> The easing in this respect is in the requirements for notice rather than in the unified scheme itself. An authorized publication will still require the familiar notice,<sup>57</sup> but the opportunity for curing an omission is generous (it can be done by registration within five years after publication without notice);<sup>58</sup> and the sanctions for errors in form are mild too.<sup>59</sup> Along the way, the author can revise his work; each time he does so, copyright subsists in this revised version;<sup>60</sup> and he can make cautious circulation of it. Even if at some point he has made copies available to the public without attaching a notice

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<sup>55</sup> See NEW ACT § 101, definitions of "fixed" and "copies."

<sup>56</sup> The classic modern case is *White v. Kimmel*, 193 F.2d 744 (9th Cir.), cert. denied, 342 U.S. 957 (1952).

<sup>57</sup> NEW ACT § 401. There are some modifications in the notice requirements. For example, the year of first publication must be used on all works except certain useful articles. *Id.* § 401(b)(2). Under the 1909 Act, artistic works did not need the date. 1909 ACT § 19. However, works in statutory copyright by virtue of publication with notice prior to January 1, 1978, may follow the new or old notice provisions. NEW ACT, Transitional and Supplementary Provisions § 107 (to be codified as 17 U.S.C. 304 note).

<sup>58</sup> NEW ACT § 405.

<sup>59</sup> *Id.* § 406.

<sup>60</sup> See *id.* § 101 (definition of "creation").

—the statutory definition of publication does not give much leeway<sup>61</sup>—he still has five years to retrieve the copyright.<sup>62</sup>

With historical manuscripts, the problem has been not to preserve copyright, but to get rid of it. Here is one case where the imposition of the new durational limits, protracted as they are, will have some bite. The perpetual nature of common-law rights, and the fact that literary property in the content of a manuscript could be claimed by others than the possessors of the paper itself, made scholarly publication of documents often uncomfortable.<sup>63</sup> Suppose one had discovered an unpublished poem by John Milton. It was not likely that descendants of Milton would turn up with valid literary property claims. But one could never be wholly confident. The discoverer of a Milton manuscript, however, if he wants to take no chances, will still have to be patient. He must wait until January 1, 2003, for common-law rights now in existence to disappear. This is laid down in section 302, which basically provides that any pre-existing rights will be subject to the new term of life-of-the-author-plus-fifty years (or 100 years from creation in the case of anonymous or pseudonymous manuscripts).<sup>64</sup>

Arguments (I believe) had been made that Congress could not or should not summarily cut off the publication value of old manuscripts.<sup>65</sup> Suppose, for example, that the heirs of Emily Dickinson who slowly published her poems still had some locked away. They would of course still have the right of first publication. Anyone in lawful possession of a manuscript and the literary property in it has this right, which should not be viewed as inconsiderable. But once the poems were published, anyone could then print them, since the poet died more than fifty years ago. So the statute gives such a new publication a twenty-five year term, from January 1, 1978, to avoid any suggestion of an unconstitutional taking.<sup>66</sup> It further encourages publication of such buried treasures by offering another twenty-five year term from December 31, 2002, if publication is made by that date.<sup>67</sup>

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<sup>61</sup> *Id.* § 101; *cf. id.* § 405(a).

<sup>62</sup> *Id.* § 405.

<sup>63</sup> See, e.g., *Copyright Law Revision, Hearings Before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835*, pt. 2, 89th Cong., 1st Sess. 1139 (1965) (testimony of Professor Julian Boyd about rights in letters to and from Thomas Jefferson). See also *id.*, pt. 3, at 1549.

<sup>64</sup> NEW ACT § 302. See also *id.* § 303.

<sup>65</sup> Under the 1909 Act they could have the full two terms totaling 56 years from publication. I have not located a statement of the suggested concern.

<sup>66</sup> I take this to be the point of the reference to "constitutional requirements of due process" in H. REP. at 133.

<sup>67</sup> NEW ACT § 303. This protection approximates the two 28-year terms afforded under the 1909 Act.

## B. *Musical Compositions*

As we have seen, easy statutory protection has been available under the old law for unpublished music under section 12.<sup>68</sup> Now the nervous composer does not even need to take these steps. His situation will be like that of the author of any other form of manuscript: he will have statutory copyright from fixation. Automatic statutory protection has a price, however. It will no longer be possible to exploit the work on phonograph records while claiming to be free of the compulsory license provision of the statute.<sup>69</sup> A practice of this sort had developed based on the notion that the distribution of records does not amount to publication of the recorded composition,<sup>70</sup> and that the composer could rely on common-law copyright, free of requirements of the statute. This escape was cut off by the ingenious opinion of Judge Gurfein in *Rosette v. Rainbo Record Mfg. Corp.*,<sup>71</sup> in which he argued that Congress could not have intended such a large loophole by way of section 2. He held that the common-law copyright owner of music distributed in records must obtain copyright, file the statutory notice of use,<sup>72</sup> and thus accept compulsory licensing before he could sue for infringement one who made records of the composition without a license.<sup>73</sup> Now the statutory licensing arguments will prevail once authorized distribution of phonorecords of the work has occurred.

There is another requirement. The composer who disseminates his work on records (or tape) must identify himself in "the registration or other public records of the Copyright Office" before he can collect royalties under a compulsory license.<sup>74</sup> This requirement smoothes any awkwardness resulting from the persistence of the old vexation: Do phonograph records publish the composition? Apparently, the composer who makes records still does not in that way publish the work so as to necessitate a notice, because the statutory notice is required only on visually perceptible copies.<sup>75</sup> The public filing requirement should serve the function of a notice on the record.

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<sup>68</sup> See note 17 & accompanying text *supra*.

<sup>69</sup> NEW ACT § 115.

<sup>70</sup> See notes 26, 28 & accompanying text *supra*.

<sup>71</sup> 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd per curiam*, 546 F.2d 461 (2d Cir. 1976).

<sup>72</sup> See 1909 ACT § 1(e).

<sup>73</sup> 354 F. Supp. at 1193.

<sup>74</sup> NEW ACT § 115 (c)(1).

<sup>75</sup> *Id.* 401(a). Since "phonorecords" are not "copies," there is no need to place a § 401 notice on "phonorecords" of the work "to protect the literary or musical works embodied in the records." H. REP. at 145. The notice requirements for phonorecords in § 402 refer only to the protection of the sound recordings, that is, the performances or other sounds fixed on them.

### C. *Works of Art*

The painter and sculptor have long been plagued by ambiguities concerning their artistic property. The unified system largely clears up two of them. First, the uncertainty whether public exhibition may be a publication that requires a notice to be affixed, with a risk of loss of copyright if it is not, is categorically resolved. Artists who are disinclined (or forget) to put a notice on their paintings may be reassured. The authoritative House Report is emphatic that, since "publication" is defined as the distribution of copies<sup>76</sup> to the public, and since the definition goes on to say that "A public performance or display of a work does not of itself constitute publication" (Why the "of itself" hedge?), a notice is unnecessary.<sup>77</sup> Of course the converse is true. As soon as reproductions of the painting for distribution to the public are made, or offered to be made, a notice must appear on "all publicly distributed copies."<sup>78</sup>

The second ambiguity has concerned the transfer of copyright on the sale of the original work. In *Pushman v. New York Graphic Society, Inc.*,<sup>79</sup> the New York Court of Appeals, with support from older cases, held that, in the absence of contrary evidence, the "unconditional sale carried with it the transfer of the common-law copyright and right to reproduce."<sup>80</sup> The presumption that copyright followed a transfer was destroyed in New York by a statute which required an express writing for the right of reproduction to follow the ownership of the work of art.<sup>81</sup> But of course doubts would have persisted elsewhere. Since works of art will now have federal copyright from their creation, the content of both *Pushman* and the statute are pre-empted and are now simply historical data.

Congress regrettably was not as forthright as was the New York legislature. Section 202 simply echoes the old section 27,<sup>82</sup> with more words: transfer "of the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object . . . ." Again, the weak "of itself" locution. However, the House Report links this section to section 204(a), a general dictate that "a transfer of copyright ownership,

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<sup>76</sup> A copy includes the original. NEW ACT § 101 (definition of copy).

<sup>77</sup> *Id.* at § 101; H. REP. at 144. Nor is the sale of a unique work of art intended to be publication. 122 CONG. REC. H10,875 (daily ed. September 22, 1975) (remarks of Rep. Kastenmeier).

<sup>78</sup> NEW ACT § 401.

<sup>79</sup> 287 N.Y. 302, 39 N.E.2d 249 (1942).

<sup>80</sup> *Id.* at 308, 39 N.E.2d at 251.

<sup>81</sup> N.Y. GEN. BUS. LAW § 219-g (McKinney Supp. 1976-77). See also CAL. CIV. CODE § 982(c) (West Supp. 1976).

<sup>82</sup> 1909 ACT § 27.

other than by operation of law, is not valid unless" it is in writing.<sup>83</sup> Ambiguities of interpretation of contracts and bills of sale may still arise; but it seems fair to conclude, as did the Report, that at least the *Pushman* presumption is reversed.<sup>84</sup>

#### D. *Dramatic Works*

Common-law playwright and its perpetual protection is dead; long live statutory playwright! So might dramatists acclaim, with more force than felicity, as *Ferris v. Frohman* is interred. All fixed dramatic works are now perforce within the statute; but the rights that it confers are generous ones, covering the entire range of rights in section 106. Section 110, which deals with "Exemptions of Certain Performances and Displays" encroaches very lightly on dramatic works. As one scans its subsections, the word "nondramatic" recurs; the only significant exemption from public performance rights is for face-to-face teaching activities.<sup>85</sup> A last-minute addition exempting special broadcasts to the blind is so preposterously narrow that it serves only to emphasize the full protection otherwise afforded.<sup>86</sup>

#### E. *Motion Pictures*

The new statute makes no great change in the copyright status of motion pictures. As suggested above,<sup>87</sup> a movie under the old law might have rested under common-law rights as long as no copies of it were ever sold. But of course fixation ends even the possibility of state law protection; moreover, the definition of publication now includes distribution by "rental, lease, or lending."<sup>88</sup> In any event, industry practice has long relied on statutory copyright, which was made specifically available by an amendment of 1912.<sup>89</sup> Sound tracks, as we have said,<sup>90</sup> were of doubtful legitimacy under the old statute because they were not visually perceptible. But that is no longer a problem. They will now be firmly tied to their pictures, in law as in fact, by inclusion in the statutory definition of "motion pictures."<sup>91</sup>

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<sup>83</sup> H. REP. at 23, 124.

<sup>84</sup> H. REP. at 124.

<sup>85</sup> NEW ACT § 110(1).

<sup>86</sup> *Id.* § 110(9). The dramatic work must have been published at least 10 years prior to the performance to the blind; there can be no purpose of commercial gain; and the exemption applies only to one performance per organization.

<sup>87</sup> Text accompanying note 37 *supra*.

<sup>88</sup> NEW ACT § 101.

<sup>89</sup> Act of Aug. 24, 1912, ch. 356, § 5, 37 Stat. 488.

<sup>90</sup> See note 32 & accompanying text *supra*; KAPLAN & BROWN, *supra* note 28, at 93-94.

<sup>91</sup> NEW ACT § 101.

F. *Broadcasting*

In contrast to films, the great broadcasting industry and its works had no secure place in the old statutory scheme,<sup>92</sup> and they are still not specified in section 102. They will now have a choice of a sort, dependent on fixation. A broadcast—which need not be over-the-air; the statute speaks of a “transmission” by any medium to another place—is protected by the statute as soon as it is fixed. Furthermore, a transmission is considered fixed so that copyright subsists, “if a fixation of the work is being made simultaneously with its transmission.”<sup>93</sup> Thus, if a broadcaster/transmitter routinely tapes its output, there is automatically a fixation, and any imbedded works are in copyright. On the other hand, if a transmission is not fixed, either by oversight, by choice on a particular occasion, or as a routine matter of economical practice, then it is not in copyright. It would appear that broadcasters will need to review their practices about taping with the copyright law in mind. Of course, much of their material is taped or recorded before transmission, and thus already in copyright before the broadcast; the necessity for simultaneous fixation exists only as to the live components of broadcasting.

For what reasons might a broadcaster, before or after the event, wish to have a particular program or event in or out of federal copyright? For one thing, he may prefer the unqualified rights of the common-law author to the exemptions in the statute that would be applicable to the broadcast work. These exemptions may not amount to much; but they are set forth in sections of a complexity worthy of a tax statute. Look at section 118, on “Use of certain works in connection with non-commercial broadcasting.”<sup>94</sup> Sheer incomprehension might push a broadcaster who had a choice to leave his work unfixed.<sup>95</sup>

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<sup>92</sup> See notes 29-33 & accompanying text *supra*.

<sup>93</sup> NEW ACT § 101 (definition of fixed).

<sup>94</sup> *Id.* § 118.

<sup>95</sup> Can a transmission, once fixed, be unfixed? This is a puzzle, and it raises a quizzical point. If for any reason the inadvertent author wants to resort to common-law rights, *e.g.*, perpetual duration, will he be able to waive, renounce, or extinguish the fixation? We do not know. The problem of renunciation of a copyright arose, obscurely, under the 1909 Act, as an

oddy related to the manufacturing clause: an American author publishes with notice in the United States and then wants to have a second printing done abroad. The second printing can not be imported. § 107. Suppose the first publication was a minor one (*e.g.*, in microfilm). Is there any way to renounce the claim of copyright? See McCannon, *The Manufacturing Clause of the U.S. Copyright Law* 34, n.175 (1963) in *2 Studies on Copyright* (Fisher Mem. Edition) 1158, which suggests filing in the Copyright Office a statement of abandonment, and then presenting this recorded document to Customs.

KAPLAN & BROWN, *supra* note 28, at 820.

The existence of written scripts in the broadcasting field further complicates



Another possible reason why a broadcaster might wish to retain common-law rights is to avoid the privilege of fair use, now given statutory authority and dimensions in section 107. It has been said, on slight actual authority, that there is no privilege of fair use in common-law copyright.<sup>96</sup> This might be so with respect to the classic case of the privately-held manuscript. If, however, we are talking about a network newscast viewed by millions, it seems unreal to have the scope of fair use turn on whether the broadcast was fixed. More than that, it seems legally irrelevant; for if, as is nowadays maintained, the core of fair use is protected by the first amendment,<sup>97</sup> that constitutional mantle covers both state and federal copyright. So perhaps there is no refuge from fair use.

Why should one have any concern about copyright and fair use of news broadcasts? After all, it is accepted that the news itself is not subject to copyright. But broadcasting not only transmits news; it creates news on programs like *Meet the Press*. It is of significance for journalists and historians to be able to retrieve and disseminate the precise words that were said on *Meet the Press*, and what Walter Cronkite said or did not say—that is, how an influential commentator presented his version of the news. This is not to suggest that a station could simply appropriate a newscast rather than pay for it. It does suggest considerable scope for taping broadcasts for study and criticism.<sup>98</sup>

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the problem. Even if the broadcast itself is not taped, as in the case of a news broadcast, it is usually read from something. The script constitutes a fixation. But suppose that the script is promptly discarded—does that cancel the fixation? Suppose it is kept for a day, a week, and so on? Fixation in broadcasting is still a fairly elusive concept.

<sup>96</sup> See Warner, *supra* note 33 at 221; SPRING, RISKS AND RIGHTS IN PUBLISHING 181 (rev. 2d ed. 1962).

<sup>97</sup> See Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

<sup>98</sup> Cf. the uncompleted law suit by CBS against Vanderbilt University. The University had undertaken what it thought was a public service in taping and preserving major network newscasts. It appears that when Vanderbilt started this practice in 1963, the networks themselves were not retaining tapes or scripts of their newscasts. A CBS spokesman said that its concern was primarily to control the commercial licensing of its newscasts. The suit against Vanderbilt was not then being pressed. See *Copyright Law Revision, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary on H. R. 2223*, pt. 2, 94th Cong., 1st Sess. 683-90 (1975) (testimony of Robert V. Evans) [hereinafter cited as 1975 *Hearings on H.R. 2223*]; Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161, 1162, 1207 (1975). An outgrowth of all this is the American Television and Radio Archives Act, NEW ACT, Transitional and Supplementary Provisions, sec. 113 (to be codified as 2 U.S.C. 170). Also, NEW ACT § 108(f)(3) authorizes a library or archives to reproduce and distribute for non-commercial purposes a "limited number of copies" of an "audio-visual news program." See H. REP. at 77.

Broadcasting stands out from other forms of expression that might continue to resort to state law protection of productions that remain unfixed. There can be unfixed music, drama and dance.<sup>99</sup> But their audiences and revenues are meager compared, say, to the highly rewarded ramblings of a popular sportscaster. The portions of broadcasting that are likely to remain unfixed consist largely of talk. It may be helpful to comment on the status of talk under the new statute.

### G. *Talk*

When are talk, speech and conversations appropriate for either statutory or common-law protection? When the talk is structured, and the result of conscious authorship, and has been written down, it is eligible for protection under the 1909 statute as a "lecture, sermon, address or similar production," in which specific rights were elaborately conferred.<sup>100</sup> The whole category seems to have disappeared without a trace in the New Act, although we are assured that nothing protected by the 1909 Act has been omitted in the new.<sup>101</sup> Probably these productions are now thought of as either literary or dramatic works, protected when fixed. They can be taped when they are delivered; a prior manuscript will now be unnecessary. We move on to less structured public utterances like the sportscaster's or disc jockey's endless talk. Is there a difference between talking for a living, and just talking? The oceans of talk include the carefully premeditated, the utterly spontaneous, and an infinite range in between. And a distinction needs to be drawn between the content of talk, and its style. The latter may be the appropriate subject for a statutorily protected sound recording. A monologue, as well as a song, can qualify as a sound recording once it is fixed. But the protection is only against duplication, not against imitation or simulation.<sup>102</sup> It appears that a sound recording, over-simply, will not protect what you say, only the way you say it.

The mind recoils from the thought of conferring copyright on most kinds of talk. Major judicial consideration has been devoted only to conversation, where the problems are compounded by the fact that more than one speaker contributes to dialogue, with attendant allocations to be made of whatever rights exist. Ernest

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<sup>99</sup> Dance now has explicit statutory recognition in NEW ACT § 102(a)(4), bringing "pantomimes and choreographic works" into the categories of copyrightable works.

<sup>100</sup> 1909 ACT §§ 5(c), 1(c).

<sup>101</sup> 1961 REP. REG. at 11; SUPP. REP. REG. at 4-5.

<sup>102</sup> NEW ACT § 114(b). The definition of sound recording, *id.* § 101, includes "spoken" sound.

Hemingway's estate claimed common-law rights in conversations of the famous writer with his friend A. E. Hotchner and others; Hotchner had made careful notes and used much of Hemingway's talk in a memoir. The New York Court of Appeals held that Hemingway had implicitly authorized the publication.<sup>103</sup> Chief Judge Fuld's thoughtful opinion goes on to suggest that for conversational speech "there should be a presumption that the speaker has not reserved any common-law rights unless the contrary strongly appears" and that

it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication. In the conventional common-law copyright situation, this indication is afforded by the creation of the manuscript itself. It would have to be evidenced in some other way if protection were ever to be accorded to some forms of conversational dialogue.<sup>104</sup>

One would immediately suppose that a concurrent fixation, with appropriate "prefatory words"<sup>105</sup> could be one way of so indicating—and of course that would now throw the talk into statutory copyright, if it were to be protected at all. Is it enough that the speaker thinks well enough of his talk to record it, with an indication that he intends to have copyright? Perhaps so. Like many of the homely examples that were suggested at the beginning of this paper, no harm is done; no burden is at that point imposed on the Copyright Office; it is just a way, perhaps vainglorious, of saying, "This is mine." It is only when someone is charged with copying that questions of authorship and originality have to be faced. There is also a concern that claims of copyright might be

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<sup>103</sup> *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1969).

<sup>104</sup> *Id.* at 349, 244 N.E.2d at 256, 296 N.Y.S. at 779. Other cases advance the solution only slightly. *Jenkins v. News Syndicate Co.*, 128 Misc. 284, 219 N.Y.S. 196 (Sup. Ct. 1926), held that oral discussion by plaintiff of columns she proposed to write for defendant could not then be published by defendant as interviews. *CBS v. Documentations Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964), held that defendant could not reproduce on a phonograph record a news broadcast by plaintiff's employee; this misappropriated his voice and style of talking. *Cf. Current Audio, Inc. v. RCA Corp.*, 71 Misc. 2d 831, 337 N.Y.S.2d 949 (Sup. Ct. 1972), which held that Audio could reproduce on a record a public press conference held by Elvis Presley. Presley was not performing, and what he said was newsworthy.

Distinguish cases where A's talk as recreated by B in a copyrighted book is copied by C. B has a cause of action against C. *Harris v. Miller*, 50 U.S.P.Q. (B.N.A.) 306 (S.D.N.Y. 1941); *Marvin Worth Prod. v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970). See Dunlap, *Copyright Protection for Oral Works—Expansion of the Copyright Law into the Area of Conversations*, 20 BULL. COPYRIGHT SOC'Y 285 (1973).

<sup>105</sup> Dunlap, note 104 *supra*.

advanced to suppress speech that the public has an interest in.<sup>106</sup> This takes us back to the discussion of significant elements of broadcasting talk, as distinct from the mindless time-filling chatter that nobody cares about anyway. If the talk has in it something newsworthy, its news elements and even its actual content can be opened up by fair use.

#### H. Summary

On the whole, one may conclude that the unified system takes away nothing of major importance from the rights that state law has afforded the kinds of works that needed or whose creators chose state law protection. Obviously it takes away perpetual protection, in accordance with a constitutionally-mandated policy. It subjects the works that now perforce come under the statute to a variety of exemptions, each representing an articulated policy or at least an understandable compromise. This is all to the good: Much of the common-law rights rhetoric was nothing more than rhetoric; it inflated supposed natural rights of authors and property, and was unregarding of the policy considerations that pervade the statute. For example, we have noted the alleged absence in common-law copyright of a privilege of fair use, the play in the joints of copyright that keeps the whole structure from intolerable rigidity. A great advantage of the unified system will be that fair use, now given statutory recognition,<sup>107</sup> will be available in a uniform way.

Above all, what the statute confers on authors that some of them could not have obtained before is access to the federal courts<sup>108</sup> and to their heavy battery of statutory remedies, such as nationally enforceable injunctions, minimum damages, and discretionary attorney's fees.<sup>109</sup>

### III. WHAT IS LEFT TO STATE LAW BY SECTION 301?

The preceding parts of this paper discuss works that will come within the unified system as soon as they are fixed, along with those, such as improvised musical compositions, that will still be left to state law because they are created without authorized fixation. All this flows from section 102(a), the fundamental declaration that copyright subsists "in original works of authorship

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<sup>106</sup> See Thor, *The Interview and the Problem of Common Law Copyright in Oral Statements*, 17 BULL. COPYRIGHT SOC'Y 88 (1969).

<sup>107</sup> NEW ACT § 107.

<sup>108</sup> 28 U.S.C. § 1338(a) (Supp. V 1975).

<sup>109</sup> NEW ACT. §§ 502, 504(c), 505. To survey systematically the benefits and burdens of federal copyright rules would require a tour through the entire statute, an exercise beyond the scope of this Article.

fixed in any tangible medium of expression." Towering over all the act, however, is section 301, the equally fundamental preemptive provision. Section 301 precludes state protection of works in tangible form which fall within the subject matter of the New Act when the state attempts to provide protection equivalent to rights specified in the Act.

Although the preemptive force of section 301 has been, as the Committee Reports have unfailingly stated since 1966, "one of the bedrock provisions of the bill,"<sup>110</sup> its language was altered in recent years, and it was tinkered with on the floor of the House just before passage and transmission to conference. Section 301 has had a curious trajectory. While its language, as we shall see, was moving in the direction of a less detailed and more abstract content, giving ever less guidance as to congressional intentions, the attitude of the Supreme Court with respect to preemption was moving in the other direction. The messages from the Court signalled that Congress would have to assert its undoubted power to preempt, or else the States could act.

The major decisions of the Supreme Court in the twin cases that have come to be known as *Sears-Compco*<sup>111</sup> had just been decided when section 301 was first introduced as part of the 1965 revision bill. *Sears-Compco* declared a strong policy preference in favor of competitive copying unhampered by state law, unless the subject matter was explicitly given protection by the federal patent laws. Since the articles involved—pole lamps and fluorescent lighting fixtures—failed to qualify for either design or mechanical patents, and design copyright was not sought, the holdings of the cases did not directly control copyright matters. But a unanimous Court, through Justice Black's opinions, did declare that

when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.<sup>112</sup>

These decisions were interpreted generously by some federal

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<sup>110</sup> H.R. REP. NO. 2237, 89th Cong., 2d Sess. 125 (1966); H. REP. at 129.

<sup>111</sup> *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). I cite *Sears-Compco* almost nostalgically, mindful that they were simultaneously limited and reaffirmed in *Goldstein v. California*, 412 U.S. 546 (1973), and are being brushed aside by inferior courts, e.g., *Truck Equipment Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210 (8th Cir.), *cert. denied*, 97 S. Ct. 164 (1976).

<sup>112</sup> *Compco Corp. v. Day-Brite Lighting*. 376 U.S. 234, 237 (1964).

courts of appeals<sup>113</sup> (and less enthusiastically by state courts whose power was diminished).<sup>114</sup> They were widely understood to leave unprotected works that could fall within the copyright-patent clause, but that were unmentioned in the statutes. Consequently, when the key words of section 301 read, "All rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title," one could expect that section 301 would be given a broad preemptive reading.

But in 1973 came the decision in *Goldstein v. California*,<sup>115</sup> holding in essence that states could create copyrights in subject matter that Congress had not dealt with. *Goldstein* was followed in 1974 by *Kewanee Oil Co. v. Bicron Corp.*,<sup>116</sup> which took a similarly indulgent view of the power of the states to protect trade secrets in inventions, even if the subject matter might have been patentable. These two decisions, it must be said, practically reversed the presumption of preemption put forward in *Sears-Compco*, and called upon Congress to speak up if it chose to preempt.

Yet, in the 1975 Senate version of section 301 the key language of the section was changed to:

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that . . . come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title.<sup>117</sup>

Did these changes alter the scope of preemption, even atmospherically? If they did, in what direction? The earlier language, "in the nature of," sounds more encompassing than "equivalent to";<sup>118</sup> and the new version brings in, as the referent for equivalency, the rights "specified by section 106"—but it is the "general scope of

<sup>113</sup> *E.g.*, *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965). Compare *Columbia Broadcasting Sys., Inc. v. DeCosta*, 377 F.2d 315 (1st Cir. 1967), *cert. denied*, 389 U.S. 1007, with *DeCosta v. Columbia Broadcasting Sys., Inc.*, 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 96 S. Ct. 856 (1976).

<sup>114</sup> See Bricker, *Thirty Months After Sears and Compco*, 14 BULL. COPYRIGHT SOC'Y 293 (1967); Note, *Goldstein v. California: Breaking Up Federal Copyright Preemption*, 74 COLUM. L. REV. 960 (1974).

<sup>115</sup> 412 U.S. 546 (1973).

<sup>116</sup> 416 U.S. 470 (1974).

<sup>117</sup> S. 22, 94th Cong., 2d Sess. § 301 (1976).

<sup>118</sup> Equivalent can mean either "equal" or "similar"; but "Equivalent, referring to two or more, means not identical but having the same worth, effect, force or meaning." American Heritage Dictionary, ed. W. Morris 1147 (synonyms under "same") (1969).

copyright as specified." Does "specified" mean anything more than "listed"? Does "general scope" bring back the flavor of "in the nature of"?

These questions may be simply captious. The Senate Committee report, in commenting on the changes, continued the assertion found in earlier reports that the preemptive principle was "intended to be stated in the clearest and most unequivocal language possible," and added that the section and its analysis "have been modified . . . so as to more exactly define the intent of the Congress."<sup>119</sup> What the drafters did in 1975 was to make the language of section 301(a) symmetrical with the related portions of section 301(b) which saves from preemption

rights and remedies under the common law or statutes of any State with respect to:

- (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 203 . . . or
- (2) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.<sup>120</sup>

Sections 301(a) and 301(b) now appear to be mirror images. One part states the scope of federal preemption. The other says in the same words, with "not" added, that what is not preempted is left to the states. More than a little redundancy seems to be present. But redundancy can be simply a mode of emphasis, and there is more to section 301 than these verbal exercises suggest.

#### A. *Equivalent Subject Matter*

What kinds of works are left to the states? Literally, those that are not literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, motion pictures or sound recordings (section 102), or compilations or derivative works (section 103). These are the specified subject matters. What is left? Is it possible that, after the major unification that is the keystone of the New Act, a considerable volume of intellectual production is in fact not preempted? And if it is not preempted, what are the implications of state power to afford protection?

<sup>119</sup> S. REP. at 114.

<sup>120</sup> Section 301(b) had been expanded somewhat from its earlier version, by substituting "common law or statutes of any State" for "the law of any State" in the initial clause, and inserting "legal and equitable" before "rights" in subsection (3). S. REP. at 20. These additions merely clarify. Changes in subsection (1) with respect to unpublished and unfixated works are discussed at note 153 *infra*. Subsection (2) saves any cause of action arising from undertakings commenced before January 1, 1978. S. REP. at 20.

At this point it seems necessary to recall elementary propositions about the importance of the public domain in copyright and patent law. Most of the attention devoted to the New Act (and the old one for that matter) has focused on the scope of protection. Emphasis on the protected domain leads to neglect of the public domain. There are masses of writings and discoveries that are open to the public—for good reasons. If these works were once under copyright or patent, and the statutory monopolies have expired, it is of the essence of these grants that what they formerly protected is now open. Or the works may never have qualified for protection, either because they did not meet qualitative standards (relatively high in patent law, low in copyright), because they did not fall into statutory categories, or because they were of a degree of generality that was not thought appropriate for protection. A familiar way of referring to this last grouping is the frequent assertion that in copyright ideas are not protected, only their expression.<sup>121</sup> It is not only ideas that circulate in the public domain without paying toll. All sorts of literary and artistic products are likewise open; and this helps to satisfy another vital interest: the national policy pressing toward competition as the best way our economy knows of satisfying wants efficiently and therefore cheaply. “The competitive mandate,” Professor Goldstein’s telling phrase from another incarnation,<sup>122</sup> was the foundation for *Sears-Compco*.

What has this to do with preemption? Are not the states as capable of protecting the public domain as is the Congress? The answer, from my observation, is no. Suitors before state courts and legislatures are interested in extending the protected domain;

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<sup>121</sup> The problems of preemption in relation to the public domain are ably explored in Comment, *Copyright Law Revision and the Kewanee Preemption Issue: Is There a Doctrine in the House?*, 16 SANTA CLARA L. REV. 609 (1976), the author of which had “encouragement” from Professor Goldstein. *Id.* at 609 n.1. I have some reservations about the Comment’s public-domain “matrix,” but this is not the place to explore them. The Comment is especially useful (by my lights) in that it extracts from *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 546 (1974), a test for state power requiring first that the material be patentable or copyrightable (in a qualitative sense), and second that the state law must further federal policies. Comment, *supra*, at 628 *et seq.* This is rather more cautious than the sweeping language in *Kewanee* that “The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress.” 416 U.S. at 479. For another attempt to confine *Kewanee*, arguing *inter alia* that it ignored desirable limits (e.g., durational) on the scope of relief that should be available in state courts, consult Stern, *A Reexamination of Preemption of State Trade Secret Law After Kewanee*, 42 GEO. WASH. L. REV. 927 (1974). See also Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

<sup>122</sup> Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 CALIF. L. REV. 873 (1971).



and one has to look hard to find state statutes or decisions running counter to these pressures. Congress is of course equally besieged by interests seeking protection. But it hears other voices, notably the Antitrust Division of the Department of Justice; and it naturally takes a national view, and is less swayed by the supposed local interests that Chief Justice Burger found deserving in *Goldstein v. California*.

Congress can and does preempt works of authorship, forcing them into the public domain as well as into the protected domain; and some reasonable implication is permissible to find that it has done so. One substantial species of preemption occurs when the prospective subject matter is entwined with other kinds of works that Congress has embraced. Then it may be protectively preempted. For example, there has long been a concern in the broadcasting and motion picture industries that fictional or dramatic characters lacked copyright protection against appropriation by a competitor.<sup>123</sup> When creations that catch the fancy of the viewing public are so valuable, the search for security persists. It has consequently been suggested that since characters are not among the works specified in section 102, they are therefore open to state protection.<sup>124</sup> I would say that this argument fails, simply because characters all emerge from books, dramas, or movies. They are accordingly only a subset of these classes of preempted works.

A more complex example, pointing toward a verdict of preemption without protection, is found in the current attempt to bring within copyright protection the design of typefaces.<sup>125</sup> This may well be an instance where changing technology has created a need for some incentive to investment that did not earlier exist. When the realization of a type designer's drawings required an expensive set of molds for an expensive and monopolized machine, the Linotype, copying was unrewardingly expensive, and some reward did go to the type designer. Now, however, photographic composition has swept the field. It is said to be so easy to copy a typeface that few are willing to take the trouble to design one.<sup>126</sup> The Register of Copyrights, having first proposed rule making on this subject (the existing regulations are interpreted to exclude

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<sup>123</sup> This concern arose after *Warner Bros Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954); see KAPLAN & BROWN, *supra* note 28, at 308-12.

<sup>124</sup> See Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC'Y 77, 91 (1974); Rothenberg, *Some New Problems in Motion Picture Copyright Law*, 21 BULL. COPYRIGHT SOC'Y 214 (1974).

<sup>125</sup> See Nimmer, *The Subject Matter of Copyright Under the Act of 1976*, 24 UCLA L. REV. 978, 1016-24 (1977).

<sup>126</sup> These observations stem in part from a helpful class presentation by Alvin Eisenman, Professor of Graphic Design in the Yale School of Art.

typefaces and typography generally),<sup>127</sup> acceded to arguments that the question was one for Congress to deal with.<sup>128</sup> After a day of hearings in 1975,<sup>129</sup> the House Committee in its Report said that it had "considered, but chosen to defer, the possibility of protecting the design of typeface."<sup>130</sup> There are several reasons why the committee might well hesitate. Type is a "useful article." It also looks like a graphic work, and thus falls within section 102(a)(5). "Pictorial, graphic, and sculptural works" have been given a narrow statutory definition that excludes the "design of a useful article" unless the design can exist "independently of the utilitarian aspects of the article."<sup>131</sup> In addition to the definitional limitations, Congress was basically unsure about the scope of exclusive rights in "pictorial, graphic, and sculptural works" to which it spoke in section 113 with remarkable hesitancy.<sup>132</sup>

Furthermore, spokesmen for writers objected to creating exclusive rights in type design, in part because of the mixups that might occur, in a printed work, with the rights of the literary author.<sup>133</sup> This may seem ungenerous on the part of writers; but it is a position that Congress is entitled to consider; it may in the end conclude that another slice of exclusive rights should not be carved from a not-very-large pie.

With these and other considerations at issue, I submit that it should not be said, as the court did in *Goldstein* about old recordings, that Congress has not attended to the matter, so as to leave it to the states. The House Committee is attending to it. At least until some substantial span of years of inattention follows, I would say that states must keep hands off typefaces.

Section 113 especially does not let us escape history. If, as I have argued, typefaces are preempted and not protected, because Congress is in the process of attending to them, recall the situation of the designers of clothing, notably women's dresses, who have been beating on the door and have been denied admis-

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<sup>127</sup> 37 C.F.R. § 202.1(a) (1976).

<sup>128</sup> See 1975 Hearings on H.R. 2223, *supra* note 98, at 1008-09 (letter from Register of Copyrights to Rep. Kastenmeier, June 6, 1975).

<sup>129</sup> *Id.* 1008-238.

<sup>130</sup> H. REP. at 55.

<sup>131</sup> NEW ACT § 101. This definition, expanded in the 1976 bill from earlier versions, appears to be derived from Regulations of the Copyright Office, 37 C.F.R. § 202.10 (1976).

<sup>132</sup> See NEW ACT § 113(b), referring to the statutory and common law in effect on December 31, 1977, as the source for rights in works that portray useful articles.

<sup>133</sup> See 1975 Hearings on H.R. 2223, *supra* note 98, at 1194-91 (statement on behalf of Authors League of America in the Nov. 6, 1974, hearings before the Register).

sion to copyright protection for half a century.<sup>134</sup> Could it now be said that the New York courts are free to create a copyright in dress designs because they are not works specified in section 102? I should think not. Congress, as we have just seen, continues to be troubled about many aspects of protecting (or not protecting) the design of useful articles. Another part of the revision bill that the House declined to enact at this time (and the Senate acquiesced) was the whole of Title II, a separable law on "Ornamental Design of Useful Articles" that has been around even longer than the copyright bill, and has passed the Senate five times.<sup>135</sup> The House Committee has doubts whether the proposed design protection, though it looks like copyright and sounds like copyright, should be administered with copyright.<sup>136</sup> Meanwhile, although frenzied copying is the regular tempo of the clothing industry, there has been no want of private investment in the production of creative apparel.

The foregoing are examples of kinds of works that I consider to be preempted into the public domain until Congress acts further on them, even though it could be argued that they are not "specified" in sections 102 or 103. There are also what I will call *levels* of authorship that are public-domain preempted. One is the high-level paradise of ideas, concepts, and principles. The other is the low-level inferno of things too small or routine for copyright.

Paradise cannot be monopolized. The Court recalled approvingly in *Goldstein v. California* what Justice Brandeis said: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others free as the air to common use."<sup>137</sup> Chief Justice Burger went on to observe that "There is no fixed immutable line to tell us" what becomes free.<sup>138</sup> The drafters made a sweeping attempt in section 102(b): "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the

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<sup>134</sup> See KAPLAN & BROWN, *supra* note 28, at 255-57, 263.

<sup>135</sup> See H. REP. at 50.

<sup>136</sup> It was deleted for further study in the 95th Congress. H. REP. at 50; CONF. REP. at 82. It would in any event have excluded "three-dimensional features of shape and surface" of apparel. S. 22, 94th Cong., 2d Sess. tit. II, § 202 (e) (1976). S. REP. at 39. I suspect that the opponents of federal design protection for clothing would be astonished if it developed that their success had left the industry open to state protective regulations.

<sup>137</sup> 412 U.S. 546, 570 (1973) (quoting the dissenting opinion in *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918)).

<sup>138</sup> *Id.*

form in which it is described, explained, illustrated, or embodied in such work."<sup>139</sup>

The Committee Report rather downgrades this resounding statement, saying that it only restates, "in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged."<sup>140</sup> I would suggest that this dichotomy reaches beyond the federal system to prohibit any monopolization of ideas, procedures, and the like. Thus, some processes and discoveries are within the guarded monopoly of the patent laws. But patent policy, which also tries to maintain qualitative levels of invention, and limits its monopolies to a mere seventeen years, firmly excludes "scientific truths," "mental processes," and "phenomena of nature."<sup>141</sup> This policy surely cannot be circumvented by letting a state protect such discoveries. A policy barring protection of ideas, themes and historical knowledge, is even more necessary for copyright, with its modest standards of originality, its prolonged duration, and its willingness to reward unimaginative industry expended on compiling facts.<sup>142</sup> If a state were to attempt to confer a monopoly on "William Empson's discovery of the importance of ambiguity, Gerald Manley Hopkins' discovery of sprung rhythm, and Bach's tempering of the chromatic scale,"<sup>143</sup> it would clash hopelessly with the congressional scheme and, I would contend, with freedom of speech.<sup>144</sup>

Fortunately, state law does not in practice invade these celestial realms. The inferno that I mentioned is a busier place. It is full of little imps called titles, slogans, configurations, and trade dress. These are ordinarily considered not part of copyright; but they may have a legitimate function as distinctive designations of the source of a copyrightable work, or of anything else. In this function, they are siblings to trade-marks, and their deceptive or confusing trade-symbol use can be enjoined.<sup>145</sup> Even the *Sears-*

<sup>139</sup> NEW ACT § 102(b).

<sup>140</sup> H. REP. at 57.

<sup>141</sup> Phrases quoted from older cases in *Gottschalk v. Benson*, 409 U.S. 63 (1972) (denying patentability, under the statute, of a computer program).

<sup>142</sup> Telephone directories are such an example. See B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, ch. 2 (1967); Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963). The differing standards for patent and copyright, stemming from the first statutes in 1790, are cogently sketched by Judge Frank in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

<sup>143</sup> These elegant examples are taken from a discussion of patent preemption in Brief for the United States as Amicus Curiae at 18 n.7, *Kewanee Oil Co. v. Bicron*, 416 U.S. 470 (1974).

<sup>144</sup> Cf. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

<sup>145</sup> See KAPLAN & BROWN, *supra* note 28, at 612-49; NIMMER, *supra* note 29, at § 34, for a clear discussion of the status of titles.

*Compco* court so recognized.<sup>146</sup> But it would be another matter to say that since federal copyright custom does not protect them from competitive use other than as trademarks, a state may do so.<sup>147</sup>

The situation is similar for other inhabitants of the nether regions. Take, for example, simple outlines or synopses for larger works as yet unwritten or unfiled. These can have considerable value if they can be treated somewhat like trade secrets, and made the subject of an express contract or of avowed confidential disclosure reasonably implying a contract to pay for their use.<sup>148</sup> But the pressure for protection of these "ideas" sometimes pushes courts close to copyright, that is, to a recognition of literary property.<sup>149</sup> Is this allowable? Are these not embryonic literary works, and if so is not this statement from the House Report relevant?

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.<sup>150</sup>

Finally, what about miscellaneous works that are thought to be "lacking in originality?" Is it possible that a state can protect unoriginal works such as common slogans, simple color combinations and short musical phrases? How can a federal public domain be maintained if these creatures from the lower depths are labelled property and allowed to levy toll on those who copy them?<sup>151</sup>

With considerably more force than in the 1909 Act, Congress has now made a general preemptive statement. To find whether it has attended to a particular area, either to protect it or leave it open to competition, or leave it to regulation by the states, courts will naturally look first to section 301 and then to sections 102

<sup>146</sup> *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232 (1964).

<sup>147</sup> *Tomlin v. Walt Disney Prods.*, 18 Cal. App. 3d 226, 96 Cal. Rptr. 118 (2d Dist. 1971) (the *Sears-Compco* doctrine precludes protection of a song title on misappropriation grounds; likelihood of confusion must be shown).

<sup>148</sup> See Meadow, *Television Formats: The Search for Protection*, 20 ASCAP COPYRIGHT L. SYMP. 73 (1972).

<sup>149</sup> See, e.g., *Galanis v. Procter & Gamble Corp.*, 153 F. Supp. 34 (S.D.N.Y. 1957).

<sup>150</sup> H. REP. at 131.

<sup>151</sup> Again, a state (or the federal trademark law) may protect some of these productions to the extent that they acquire trademark significance. For an extreme example of federal trademark protection of a slogan, see *Application of Marriott Corp.*, 517 F.2d 1364 (C.C.P.A. 1975) ("We Smile More" held registrable, despite a refusal by the Arizona Court of Appeals to recognize exclusive rights in *Ramada Inns, Inc. v. Marriott Corp.*, 16 Ariz. App. 459, 494 P.2d 64 (1972)).

and 103. But I suggest that they will have to look further, to the definitions in section 101, to the legislative history (notably in the House Report), and always to the pages of history. The Supreme Court, as it often does, has been rewriting history,<sup>152</sup> but not in a way that inhibits the Congress; and it is my view that Congress, in making a broad preemptive declaration, did not intend to turn over to the states any significant pieces of the public domain.

### B. *Equivalent Rights*

This discussion of section 301 has so far dwelt on the kinds of works that are or are not preempted.<sup>153</sup> But the section itself speaks primarily of rights. The rights that are free of preemption are those that are not "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." This clause sounds a little more expansive than the "works" clause because of the "general scope" phrase tucked in with "specified." Until the very last hour of the long legislative process, the statute also furnished a catalog of non-equivalent rights left to the states, or rather of kinds of activities that could be repressed because they would invade non-equivalent rights. It came at the end of section 301(b)(3), and mentioned "breaches of contract, breaches of

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<sup>152</sup> Especially in *Goldstein v. California*; see Brown, *Publication and Preemption in Copyright Law: Elegiac Reflections on Goldstein v. California*, 22 UCLA L. REV. 1022 (1975).

<sup>153</sup> Major attention no longer needs to be given to § 301(b)(1), "Subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression." NEW ACT § 301(b)(1). The "subject matter" clause now simply restates § 301(a). Until the 1975 changes to § 301, it read "unpublished material that does not come within the subject matter of copyright." SUPP. REP. REG. at 232. Of what significance is the change from "unpublished material" to "subject matter"? Presumably one should now infer that exempted subject matter may be either published or unpublished, so far as Congress is concerned, despite the strong tradition that publication divests common-law rights. The disappearance of "unpublished material" undercuts an argument I made that the exemption of unpublished material implied the preemption of published material not within the subject matter of § 102. See Brown, *supra* note 152, at 1050.

As for unfixed works, there is an ambiguity in the connective "including," but it apparently is of no significance. The House Report is clear that unfixed works generally are not preempted. H. REP. at 52, 131. This leaves to state law, as has been discussed earlier in this Article, the task of protecting from unauthorized recording and reproduction, and from other forms of imitation and exploitation, "choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down." *Id.* at 131. But states have no obligation to protect an unfixed work, for example, a conversation that has not been identified as a work of authorship. See *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968); notes 103-05 & accompanying text *supra*.

trust, invasion of privacy, defamation and deceptive trade practices such as passing off and false representation."<sup>154</sup> These of course were all familiar wrongs with familiar applications to literary and artistic properties. Sometimes state courts pushed them rather far in the direction of creating rights close to those of the statutory scheme. Thus the desire of celebrities to exclude others from publishing their names and faces in advertisements, without paying for the privilege, became an invasion of privacy.<sup>155</sup> Or a court would reach out to protect an idea not substantial enough for copyright by finding an "implied in law" contract barring its use<sup>156</sup>—that is, a non-contract imposed on a non-contracting party. But by and large, discernible and manageable boundaries separated these rights from copyright.

The 1975 rewriting of section 301 enlarged the catalog. "Trespass" and "conversion" crept in, venerable and perhaps harmless common-law torts. "Rights against misappropriation not equivalent to any of such exclusive rights"<sup>157</sup> was the major addition to the list of activities that states could control. Even with the reiteration of "not equivalent," suspicions were aroused. Some people are suspicious of the very word "misappropriation."<sup>158</sup> To them it suggests not a euphemism for theft, but a shapeless tort that releases powerful anti-competitive impulses, rationalized by scriptural admonitions against reaping where one has not sown. Indeed, the 1966 House Report said flatly that misappropriation was "nothing more than copyright protection under another name," and that section 301 was intended to preempt it.<sup>159</sup> But in 1975 it was not preempted, but specifically exempted from preemption. The 1975 Senate Report spoke of giving state law flexibility to curb appropriation of facts "constituting 'hot' news, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918), or in the newer form of data uptakes from scientific, business or financial data bases."<sup>160</sup> It went on about sanctions against cryptographically breaching security arrangements, accessing proprietors' data, intercepting laser transmissions, and making unauthorized printouts

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<sup>154</sup> H. REP. at 24.

<sup>155</sup> See, e.g., *Palmer v. Schonborn Enterprises*, 96 N.J. Super. 72, 232 A.2d 458 (Ch. 1967).

<sup>156</sup> See P. GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES, CASES AND MATERIALS 69 (1973); NIMMER, *supra* note 29, § 168.

<sup>157</sup> That is, to the exclusive rights in NEW ACT § 106. The additions were made in S. 22 as submitted in S. REP.

<sup>158</sup> See, e.g., Brown, *Product Simulation: A Right or a Wrong*, 64 COLUM. L. REV. 1216, 1227 (1964).

<sup>159</sup> H. R. REP. No. 2237, 89th Cong. 2d Sess. 129 (1966).

<sup>160</sup> S. REP. at 116.

from cathode ray tube displays—all quite mystifying to pre-IBM minds. There was no further explanation.<sup>161</sup>

One can however surmise the kind of invasion the Committee was talking about. Suppose that an oil company has made thousands of seismic (underground explosive) tests to seek out oil-bearing formations. It has analyzed these and stored them in a central computer.<sup>162</sup> It transmits data from this geological bank to many of its minions, and to consultants and others with whom it shares information on a confidential basis. It is understandably concerned that a competitor will illicitly intercept some of these messages. Very well; but why does it need a veiled exception from copyright preemption? All this is surely protected by trade secret law; it is like a valued customers' list, grown electronic and expensive.<sup>163</sup> If, however, the proponents of this amendment wanted to authorize state court controls on *published* "data bases," they should have been more open about their problems, and explained why copyright is inadequate.<sup>164</sup>

They might then have not aroused agents of the Antitrust Division of the Department of Justice, who tend to be among those who mistrust misappropriation remedies. They need remember

<sup>161</sup> If it is possible to adduce a legislative history of a legislative history, the paragraph in S. REP. paraphrased above seems to have its genesis in an American Bar Association Committee Report. A.B.A. SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW, REPORTS TO BE PRESENTED AT [AUG. 1975] MEETING, REPORT OF COMM. NO. 309, COPYRIGHT AND NEW TECHNOLOGY 177, 180-82 (1975). This report deprecates the House Committee statement about misappropriation, text accompanying note 159 *supra*, raises the alarms about "data uptakes," and proposes the reinforcing addition of trespass and conversion to the catalog in NEW ACT § 301(b)(3).

The ABA Report also explains the proposed addition of what is now NEW ACT § 301(d), that "nothing in this title annuls or limits any rights or remedies under any other Federal statute." Some of the reasons are cautionary, *e.g.*, to reassure that the new Copyright Act does not override other federal statutes, such as the patent law. One is forehanded: "to facilitate the proper demarcation between the Copyright Act and the enlarged misappropriation provisions (Sec. 43(a) (3) and (4)) of the Lanham Act proposed under Sec. 7 of the Unfair Competition Bill, S.31, 94th Cong." *Id.* at 181. The congressional reports say nothing about § 301(d). The ABA Report concludes with a suggested redraft of § 301(b), which is that adopted by the Senate. *Id.* at 182.

<sup>162</sup> See Application of Prater, 415 F.2d 1378, *superseded*, 415 F.2d 1393 (C.C.P.A. 1968).

<sup>163</sup> See, as to customer's lists as a conventional type of trade secret, Heyman A.R. Winarick, Inc., 325 F.2d 584 (2d Cir. 1963); as to improper means in discovering a trade secret, RESTATEMENT OF TORTS §§ 757-759 (1938).

<sup>164</sup> With respect to computerized data that are not attempted to be kept secret, the problem may be that the material is quite open, like stockmarket quotations, and a claimant of protection wants to protect his diligent service of collecting and disseminating it, see Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905); or it may be like a computer program, where the developer of the program seeks his reward not from copiers, but from users of the program. See Brown, *Property Rights Under the New Technology*, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 189 (M. Greenberger ed. 1971).



no farther back than the facts in *Sears-Compco*, where a court (and worse a federal court,<sup>165</sup> but purporting to apply state law) in effect said to the plaintiffs, "We find you have no claims to patents, but never mind; your designs are being copied and misappropriated, so we will give you a common-law monopoly of indefinite duration." Accordingly, the Antitrust Division, when the bill was about to pass the Senate in February 1976, proposed that the misappropriation clause be deleted.<sup>166</sup> Nothing happened. Then the Assistant Attorney General for Legislative Affairs, in presenting to the House Committee the views of the Department on a number of last-minute matters, went beyond the argument that to exempt misappropriation remedies was anticompetitive. He expressed concern that other items in the catalog of tolerated state remedies might also be used "to nullify preemption," and proposed that the entire catalog be deleted.<sup>167</sup> Again, no response. Then, when the bill was before the House for passage in September, with its managers keeping a fairly tight rein on floor amendments, Congressman Seiberling (D.-Ohio) moved to strike "including" and everything following in section 301(c). He tersely made severe animadversions on misappropriation, citing the Justice Department's position. But he reassured Congressman Railsback (R.-Ill.) that he was not trying to change existing law in certain states that recognize misappropriation. Congressman Railsback then accepted the amendment for his side. Chairman Kastenmeier explained that the Justice Department position was not made known to the Committee until the last day of markup (Mr. Seiberling interjected: "I understand"), and accepted the amendment on his side. The amendment was agreed to.<sup>168</sup> The Senate conferees also accepted it.<sup>169</sup> So there is no catalog of recognized state remedies in the New Act. Of such is the legislative process.

Perhaps, as the Department of Justice feared, the tail of section 301(b)(3) might have wagged the whole preemptive dog. But now the tail has been cut off. Are we then to infer that states are not free to enforce contracts with respect to works in copyright, or to enjoin the passing-off of an inferior movie as the work

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<sup>165</sup> *The Seventh Circuit, Day-Brite Lighting, Inc. v. Compco Corp.*, 311 F.2d 26 (1962), *rev'd*, 376 U.S. 234 (1964); *Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115 (1963), *rev'd*, 376 U.S. 225 (1964).

<sup>166</sup> Letter from Asst. Att'y Gen. T. E. Kauper to Senator Hugh Scott (Feb. 13, 1976), *reprinted in* 122 CONG. REC. S2042 (daily ed. Feb. 19, 1976).

<sup>167</sup> Letter from Asst. Att'y Gen. M. M. Uhlmann to Chairman Robert Kastenmeier, at 3-7 (July 27, 1976), on file at the UCLA Law Review office.

<sup>168</sup> 122 CONG. REC. H10,910 (daily ed. Sept. 22, 1976).

<sup>169</sup> CONF. REP. at 79.

of Mark Twain?<sup>170</sup> Surely not. Here also, as with issues of pre-empted works, there is a lot of history to draw on, and there is guidance in the statute beyond the slender enumeration of rights in section 106.

As a general proposition, I think it can be said that section 301's reference to the rights specified in section 106 must embrace all the rest of Chapter 1 of the Act, that is, sections 107 through 118, because, as their headings show, they are all concerned with either "limitations on exclusive rights" or the "scope of exclusive rights." Chapter 1 really has a quite elegant fine-boned skeleton, even if its flesh is bloated by elaborate detail, and layers of compromises on compromises.<sup>171</sup>

Take, as a stark example of how one must read beyond sections 102 and 106, the recent addition to federal law of rights in sound recordings. These are carefully confined, in section 114, to rights against unauthorized duplicating (or rearrangement) of the sounds in a recorded performance. They "do not include any right of performance under section 106(4)."<sup>172</sup> A diligent effort has been mounted in recent years to confer on record makers the right to extract royalties, notably from broadcasters, for the commercial playing of the records. It has not succeeded, although the question is still a live one.<sup>173</sup> Since a performance right is fundamentally part of section 106, I should think it clear that a state cannot create such a right, and require radio stations to pay record makers.

Similarly, section 114 withholds any right to prevent an "independent fixation . . . even though such sounds imitate or simulate those in the copyrighted sound recording."<sup>174</sup> Since the statute denies relief against what in any other context might be infringement—certainly it would be so if someone "simulated" the musical composition that was being performed—then a state cannot create such a right.<sup>175</sup> But if it can be established that a simulated performance is being passed off as, say, the authentic sound of Artie Shaw, then a state has its usual authority to repress this kind of deceptive trade practice.<sup>176</sup>

<sup>170</sup> *Cf. Chamberlain v. Columbia Pictures Corp.*, 186 F.2d 923 (9th Cir. 1951).

<sup>171</sup> "It has been said that this bill is a compromise of compromises," 122 CONG. REC. H10,877 (daily ed. Sept. 22, 1976) (remarks of Rep. Railsback).

<sup>172</sup> NEW ACT § 114(a).

<sup>173</sup> See BROWN, *supra* note 152, at 1047 n.118; 122 CONG. REC. S2044 (daily ed. Feb. 19, 1976) (remarks of Sen. Williams of N.J.).

<sup>174</sup> NEW ACT § 114(b).

<sup>175</sup> This outcome is anticipated by *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

<sup>176</sup> *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975). Artie Shaw objected to the re-creation of his arrangements

There is a curious reverse twist to these preemptions in the case of pre-1972 sound recordings. The 1971 law that created rights against dubbing in anticipation of the general revision had a disclaimer of any effect on existing sound recordings.<sup>177</sup> The Supreme Court in *Goldstein v. California*<sup>178</sup> held that this left the state free to penalize dubbing of pre-1972 records. It was suggested to the Senate Committee in 1975 that it might want to leave intact this kind of state protection (which by then had become quite widespread). So a subsection (4) was added to section 301(b), preserving any state rights and remedies with respect to sound recordings fixed before February 15, 1972.<sup>179</sup> It was then pointed out that this exemption from preemption perhaps went too far. Did it leave the states free to create performance rights in old recordings? To forbid simulations? To endow perpetual rights? Did Congress really intend to let the states put the owners of old sound recordings in such a preferred position?<sup>180</sup>

The response was only a partial one. The House, and ultimately the bill as enacted, in a new section 301(c)<sup>181</sup> confirmed the existence of *any* state rights and remedies until February 15, 2047—a seventy-five year term *commencing* in 1972, for sound recordings that may have been made 1, 10, or 50 years earlier. Never mind whether there is any rational explanation for this prolonged period of possible state protection (maybe it was to compensate for the general failure to protect recordings before 1972). The real difficulty is that Congress said nothing in section 301(c) about the permissible scope of state rights. Arguably, using the approach of *Goldstein v. California*, it is willing to let the states recognize performance and simulation rights that it denies to post-1972 recordings. It may even welcome the experience to be gained from local variations.

Is there any harm in this? Neither the economy, nor the free flow of old sounds, is gravely injured by congressional indulgence of expansive state protection to record makers.<sup>182</sup> Indeed, the

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and "sound" in a large collection of "Swing Era" recordings. The Court of Appeals reaffirmed that he had no property interest in the "sound," but said that he was entitled to a trial to explore whether the advertising and labelling of the records might amount to passing-off.

<sup>177</sup> Sound Recording Amendment of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 392.

<sup>178</sup> 412 U.S. 546 (1973); see Brown, *supra* note 152, at 1041.

<sup>179</sup> S. 22, 94th Cong., 2d Sess. § 301(b) (1976). S. REP. at 116.

<sup>180</sup> Letters cited notes 166-67 *supra*.

<sup>181</sup> Cf. 1975 Hearings on H.R. 2223, *supra* note 98, pt. 3, at 1911 (comments of the Register).

<sup>182</sup> *But cf.* Note, *Record Piracy and Copyright: Present Inadequacies and Future Overkill*, 23 MAINE L. REV. 359 (1971).

extensions of state remedies may never occur. And if a state attempted to create a performance right in old recordings, the broadcasters might try to say something about a burden on commerce. Do radio signals move in commerce more than pirated records? Perhaps they do. But if a state attempted to curb close imitations of old records, is that any more repressive than what the federal law now does for the authors of books and plays? Perhaps not.

### CONCLUSION

The chief difficulty with the chiselled symmetry of section 301 is that it suggests clean lines and sharp boundaries that could indeed be brought into being by mechanical interpretation. If a work is not fixed, it is not in federal copyright. If a work is not in federal copyright, because it is unfixed, or not listed in section 102, the states can deal with it. Even if it is in federal copyright, the states can recognize rights that are not copyrights. Such a quickstep—which in my view is a caricature—will overlook the deeper intricacies of the statute, and the lessons of history. Mechanical readings of section 301, especially when they lead to extensions of protection, also neglect, I have argued, the importance of maintaining the public domain.

Every claimed interest is not entitled to protection. It should be, and I believe is, a significant part of the federal scheme to leave some interests unprotected, and to erect no higher protective walls than are necessary to carry out the constitutional mandate “to promote the Progress of Science and useful Arts.”<sup>183</sup> To set levels of protection only in response to assertions of the needs of “Authors” is distorting. Congress also observes another mandate—the preference for competition—in the interest of efficiency and plenty. And there is still another mandate that affects the limits of protection of expression, namely the first amendment’s devotion to freedom of expression. Finally, while we are reciting constitutional priorities, we might recall that the federal system and state-created rights do not quite stand on an equal footing so that we choose indifferently from one or the other. The federal system is embodied in laws that are passed pursuant to the Constitution, and that are therefore supreme, but not all-embracing.

If we fleetingly enlarge our view to take in all three branches of law that have as their province intellectual and industrial property—copyright, patents, and unfair competition—it is interesting that all have been dual systems. The patent law has strong pre-

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<sup>183</sup> U.S. CONST., art. I, § 8.

emptive elements, but Congress accepts, and the Court blesses, a substantial body of state-regulated industrial property in trade secrets. Under the commerce power, Congress could legislate extensively about unfair competition, and it has done so, in setting up the Federal Trade Commission and in passing trademark laws. But at the same time the state common and statutory law of unfair competition flourishes.

The dual system of common-law copyright has been the first to go, or if not to go to be pushed into the background. Yet, what we have hailed as a new unified system of copyright still turns out to have significant dual aspects, their extent depending on what is made of section 301. That vaunted assertion of federal preemption on examination begins to look like a paper tiger. My position is that it needs to be stiffened by recognition of the federal interests that have been brought forward. The federal interests are emphasized not from devotion to insidious centralism, but because they are *national* interests—linked moreover with international copyright relations. There are still local disputes that can be remitted to local law. And the law, national and local, must still be responsive to the just claims of the individual author and artist. But the major pressures for protection and the major calls for limits on protection arise from the reality that America is one big communications network, dominated by entities with names like the American Society of Composers, Authors and Publishers, the American Broadcasting Company, and the Music Corporation of America. An all-American system of copyright is a necessary response to this reality.