It is through the federal law of copyright that Congress pursues the constitutional mandate "to promote the Progress of Science and useful Arts." The first copyright act—passed in 1790 and covering books, maps and charts—announced certain principles that have shaped our federal law through the bicentennial year, including a rather short term of protection, a renewal copyright, and a preoccupation with "published" works, with the regulation of unpublished works being largely relegated to state law. The better part of this century has been dominated by a copyright statute enacted in 1909, before the discovery or full commercial development of radio, television, the phonograph, the photograph, the motion picture, the computer, the photocopy machine. The growth of these media for the creation and dissemination of creative works, the resulting growth in the number of persons whose livelihood depends on these media, and the expansion of our leisure time have all combined to focus attention upon the obsolescence of the 1909 Act. After a painstaking reform effort over a period of twenty years, Congress in 1976 approved a new Copyright Act, most of the provisions of which became effective on January 1, 1978. The purpose of this Essay is to discuss the principal features of the new law.

All lawyers should have some familiarity with the basic contours of our copyright law. It no longer touches the lives of a minuscule segment of our society, witness the number of times we or our family or friends have written a research piece for school (which we want to protect against the poaching of our academic supervisor), or have written a poem or song, or have formed a rock group or even cut a phonograph record or tape, or have gotten an idea for a new board

* This Essay is intended to provide practitioners, students, and interested laymen with a general overview of the changes in copyright protection brought about by the Copyright Act of 1976, which went into effect this year. Those wanting a more detailed analysis of specific provisions may find more comprehensive works to be more useful. Professor Nimmer's treatise remains the standard reference in the field. 1 & 2 M. Nimmer, Copyright (1963 & Supp. 1978). Also very useful are the Articles in Symposium: The Copyright Act of 1976, 24 U.C.L.A. L. Rev. 951 (1977).

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game, or have written a letter to the editor, or have photocopied a
newspaper article, a drawing or a photograph, or have taped recorded
music or a television program off the air. It is not possible to dis-
cuss—or even to set forth—all of the provisions of the new law in the
compass of a short Essay. The Act covers more than sixty pages in
the statute books (almost fifteen percent of which is devoted to the
elaborate provisions dealing with cable television). For details, the
full text of the Act must be consulted. Only the basic contours can
be explored here.

To understand the 1976 Copyright Act, it is helpful to explore
the 1909 Act, if only because so much of the new law is designed to
remedy the omissions and the weaknesses of the old. Both the
1909 and the 1976 Acts will be considered with five principal issues in
mind: (1) the relationship of federal and state law; (2) the concept
of "publication"; (3) copyright formalities; (4) ownership and dura-
tion of copyright; and (5) allowable uses of copyrighted material.

THE COPYRIGHT ACT OF 1909

The Dual System of Protection. The Constitution empowers
Congress, in order to promote authorship, to grant by legislation an
exclusive right to exploit one's writings. This federal right is to
last only for a limited time. Since the first Copyright Act, however,
Congress chose to leave undisturbed the power of the individual
states to make their own laws (generally by judicial decision rather
than by statute) regulating the exploitation of "unpublished" works.
It was through state law that the author of a manuscript kept in his
desk drawer, or of a letter sent to an acquaintance, was to vindicate
his right to publish those writings first and to prevent others from
doing so. This "right of first publication" was known as common
law copyright. It was unlimited in duration.

Congress did choose to accord to authors of most classes of un-
published works the right—by registering the work and depositing
copies—to secure protection under the Federal Act, with federal sub-
stantive rules and remedies to be enforced exclusively in the federal
courts. But this was an option to be exercised at the will of the
author, who could still choose to keep the work "private" and
governed by state law. Moreover, federal protection for unpublished
works was available only for works that were commonly exploited
through modes other than the distribution of hard copies, such as
musical compositions, dramatic works and works of art. Federal

1 Copyright Act of 1909, ch. 320, § 11, 35 Stat. 1078 (1909), codified at
copyright for unpublished literary works (that manuscript and letter) was not available, and the author was necessarily remitted to state law.

It was not until a work was "published" that state common law copyright protection was ousted. Once the book, the play, or the painting was reproduced in hard copies and distributed generally, with the consent of the author, the "right of first publication" was exercised, the author began to derive commercial benefit while relinquishing physical control over his tangible work product, and state copyright was "divested." This rule found its source in both state doctrines of common law copyright and federal doctrines derived from (although not entirely explicit in) the Copyright Act. If the author of such a published work took no action to comply with the Federal Act, then there would be neither state protection nor federal protection and the work was said to "fall into the public domain," free for others to copy, to perform or otherwise to exploit commercially. If, however, the first publication was accompanied by steps to bring the work within the shelter of the Federal Copyright Act, then although state protection was lost, federal protection was substituted.

Some of the implications of this dual scheme of copyright protection—such as the significance of "publication" and of federal copyright formalities—are discussed below. Another significant implication is that the publication of a work preempted state law only to the extent that state law purported to generate rights akin to those afforded under the Federal Act, that is, rights "in the nature of copyright." At base, copyright represents the forms of commercial exploitation that the law gives exclusively to the copyright owner, after weighing the interest in remuneration as an incentive for the author against the interest in inexpensive dissemination to the public. When the state law that would limit the dissemination of published works is rooted in some other individual or social interest—for example, preserving a relationship of trust or contract between the author and the user, or protecting the public against misleading assertions of authorship—that state law can to a large degree continue to flourish alongside the copyright protection afforded by Congress.

The Importance of "Publication." Since the line dividing state common law copyright from federal copyright, or alternatively from irretrievable dedication to the public domain, was that of "publication," that concept dominated our law of copyright for almost two centuries. Around this concept swirled a host of abstract and arti-
AN OVERVIEW OF THE COPYRIGHT ACT OF 1976

Official guidelines. There developed, for example, the distinction between "limited" publication and "general" publication, with only the latter divesting common law copyright. The distribution of copies of a work to a limited number of persons for a limited purpose was a non-divesting limited publication. Classic examples are the submission of copies of an unpublished poem to a handful of literary magazines, or the dissemination of a scholarly manuscript to several experts in the field for perusal and criticism. Once the poem or manuscript, however, is copied in substantial numbers by the author and distributed (even without charge) to all comers without restriction on their use of it, we no longer have a limited distribution, and—failing compliance with the notice requirements of the Federal Act—copyright is forever lost. Where to draw the line between limited and general publication in particular cases was anybody's guess (with the guess of the court of last resort being controlling).

More abstract and artificial yet was the application of the concept of "publication" to works that were profitably exploited through means other than the distribution of hard copies. The performance of a play or a musical composition, or the delivery of a lecture or speech, to hundreds or thousands of persons (or, through the magic of motion pictures, radio or television, to millions of persons), surely forfeited any valid concern of the author for his privacy and often generated compensation far in excess of the prototypical sale of hard copies of literary works. Yet the prevailing view under our law, before and throughout the life of the 1909 Copyright Act, was that "performance does not divest" common law copyright, which could flourish in perpetuity. Only the dissemination of hard copies in eye-readable form was regarded by the courts as a "publication" that could entail loss of state copyright protection.

Strict Federal Copyright Formalities. Under the 1909 Act, the "publication" of a work resulted in forfeiture of copyright absent

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2 E.g., White v. Kimmell, 193 F.2d 744 (9th Cir.), cert. denied, 343 U.S. 957 (1952).
4 The seminal White-Smith Music Publ. Co. v. Apollo Co., 209 U.S. 1 (1908), decided even before the advent of the 1909 Act that recordings of copyrighted songs for playback on player pianos (and thus, by extension, phonograph recording) did not infringe the copyright in the musical compositions as such "copies" were not in eye-readable form. Courts have continued to puzzle whether that case requires the conclusion that a phonograph recording is not a divestive publication of the underlying music. Compare Shapiro, Bernstein & Co., Inc. v. Miracle Record Co., Inc., 91 F. Supp. 473 (N.D. Ill. 1950), with Yacoubian v. Carroll, 74 U.S.P.Q. 257 (S.D. Cal. 1947).
compliance with federal copyright formalities. Those formalities were (and remain today) rather simple, but greatly misunderstood. The copyright proprietor must place a notice of copyright on each distributed copy; nothing more. With some exceptions, the notice required by the 1909 Act contained three elements: the word “Copyright” (or a designated abbreviation or symbol), the name of the copyright proprietor, and the date of publication. The notice was to be placed on the work at a location expressly stipulated in the Act. Failure to affix a correct notice at the correct location on any number of copies thrust the work into the public domain.  

Such grave consequences did not, however, attach to a failure to register the copyright or to deposit copies of the work with the Copyright Office. Registration and deposit were held not to be prerequisites for securing or maintaining a valid copyright. They were prerequisites to a suit for copyright infringement. The Supreme Court held that even if registration and deposit were delayed for many months after publication of a work, they could be validly effected by the copyright proprietor immediately prior to commencing an action, and damages could be secured even for infringements which took place prior to registration and deposit.

Indivisible Ownership and the Duration and Renewal of Copyright. In many important respects, ownership of copyright in a work of literature, music or art is like ownership of a cow. It gives exclusive rights to the use of a “thing,” which rights can be conveyed to others inter vivos or by will or intestate succession. Copyright ownership, too, since the beginnings of American law has been traceable to a particular person or persons who have “title” to the thing. The 1909 Copyright Act generally referred to that person or persons as the “proprietor” of copyright. It was that person in whose name the copyright was registered, whose name was entered in the copyright notice, and who was the proper and necessary party plaintiff in actions for infringement of copyright. That person could permit others, by a “license,” to serialize his novel or read his poem on commercial television or sing his song in the concert hall, just as the owner of the cow could permit others to ride on her, milk her or use her for mating. But such licenses or permissions did not fragment the ownership; it was said to be “indivisible.” Because of the doctrine of indivisibility of copyright ownership—and the attendant implications for registration, notice

5 See, e.g., National Comics Publ., Inc. v. Fawcett Publ., Inc., 191 F.2d 594 (2d Cir. 1951) (Superman v. Captain Marvel).
and suit—our law derived the distinction between the license, which did not transfer proprietorship of copyright, and the assignment, which did. Courts were often called upon to count and weigh the number of straws from the copyright "bundle" conveyed by the proprietor to the user.\(^7\)

Copyright ownership was, however, different from cow ownership in at least two major respects. Commercial exploitation of the cow generally required control over her physical presence—whether that was for riding, milking or mating. Not so copyright, which could be exploited without the original object near at hand, witness the performance of a play or song or the distribution of copies of an original work of art. This distinction between copyright and physical object sometimes led to disputes between the owner of the physical object and a purported copyright proprietor as to whether transfer of the object carried with it an assignment of copyright. Because a number of these disputes centered upon works that were unpublished at the time of their transfer, they were commonly resolved in state courts. Although the decisions are few, they tended to announce a presumption that an unqualified transfer of the physical object (the manuscript or the painting) carried with it an assignment of copyright as well.\(^8\) When the work was, at the time of transfer, already protected under the Federal Copyright Act—whether as published or unpublished—that Act announced the converse presumption.\(^9\)

A second principal distinction between ownership of copyright and ownership of a chattel has been that, once a work is exploited in published form, the copyright is limited in duration. Congress' power to grant copyright is subject to the constitutional requirement that the right be "for limited Times." (No such limitation as to common law copyright was thought deducible, as against the states, from the constitutional provision.) For nearly two hundred years, Congress provided for copyright protection for a stipulated number of years, to be followed by a second term of protection at the option of the author, upon compliance with additional formalities. Under the 1909 Act, the initial term of copyright protection was twenty-eight years; so too was the renewal term. American law has been unique among the copyright laws of the world in utilizing


such a renewal format. Its purpose was at least twofold. First, it invited the expiration of copyright (and thus free public utilization) after a relatively short time, should a renewal copyright not be secured; the great preponderance of copyrighted works fell into the public domain after the first term. Second, it protected the author against unremunerative transfers of copyright in works whose value was speculative; courts held that the renewal term of copyright vested in the author, free and clear of copyright transfers and other encumbrances suffered during the initial term. (A rather gaping hole was made in this protective scheme when the Supreme Court held in 1943 that the author could during the initial term make a binding transfer of his interest in the renewal term.)

If the author had died when the renewal term was to begin, ownership of that term could be claimed by the surviving spouse and children; or, if there were none, then by the author’s executor for persons named in the author’s will; or, if there were no spouse, children or will, then by the author’s next of kin. This elaborate protective arrangement was expressly spelled out in the 1909 Act and applied to most works copyrighted under the Act (the principal exception being “works made for hire,” the renewal term of which could be claimed by the “proprietor” or assignee of copyright as distinguished from the individual author).

The effect of the “limited times” provision of the Constitution, and the 28-year initial term and 28-year renewal term of the 1909 Act, was that many precocious authors, artists or composers found their copyrights expiring during their lifetime. Moreover, because the running of the 28-year or 56-year period commenced with the date on which federal copyright was secured (generally, the date of first publication) for any particular work, different works of the same author, artist or composer would fall into the public domain at different times.

Permitted Uses of Copyrighted Works. Although the 1909 Copyright Act nowhere defined the term “infringement,” it was obvious that this was the unauthorized exercise of any of the exclusive rights granted to the copyright proprietor in section 1 of the Act. Certain exclusive rights were granted regardless of the kind of work copyrighted. Whether the work was a literary work, a musical composition, a work of art or a motion picture (brought within the statute in 1912), it was, absent the consent of the copyright owner, an infringement to print or copy the work, to sell it (if one had not acquired the original work or copy through a lawful transfer), or to

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prepare what became known as a "derivative work," such as a translation, dramatization, adaptation or other version. Other kinds of works, which could be exploited through means other than copying and the preparation of derivative works, were given additional protection against infringement. The copyright proprietor of a lecture or sermon or other nondramatic literary work had the exclusive right to render or read it "in public for profit" or to make (and play) any recording of it. The owner of copyright in a dramatic work had comparable rights, except that the "performance right" extended to all public performances, whether or not for profit. Copyright in a musical composition conferred the exclusive right to perform it in public for profit, to make an arrangement of the music for such performance, and to make the first recording of the composition; after the copyright owner permitted the making of such first recording, other recording artists could make their own recordings (with their own musical arrangements) upon filing notice and paying a royalty normally calculated at two cents per record. This latter statutory provision, designed to avoid a monopoly over the manufacturing of record discs and piano rolls in the early years of this century, became known as the "compulsory license" provision, because others were permitted to record whether or not the copyright proprietor gave consent. In 1972, limited protection was granted to owners of copyright in a "sound recording," the fixed rendition of sounds on a record or tape as distinguished from the text or musical composition rendered. No other person may duplicate the same sound recording by capturing the sounds directly from it (sometimes known as "dubbing" or, by the less charitable, as record or tape "piracy").

Despite the broad range of exclusive rights given the copyright proprietor, many uses of copyrighted works were permitted under the 1909 Copyright Act. A person rightfully owning a physical object, such as a manuscript or a painting, could sell it to any person he wished at any price he wished (indeed, he could presumably destroy it) without the consent of the copyright proprietor. Dramatic and nondramatic literary works, musical compositions, and sound recordings could be rendered to others, if the performance were not "public" (nowhere defined in the 1909 Act). Even public performances of nondramatic literary works and musical compositions were permitted, provided they were not for "profit" (nowhere defined in the 1909 Act). Such unauthorized private or non-profit performances were assumed by Congress not to interfere unduly with the economic recompense, and thus the incentive, of
the author or composer. Even profitable public performances of musical compositions were privileged if done by means of a phonograph in a jukebox; the statute expressly provided this so-called "jukebox exemption" in 1909, thus tolerating the de minimis incursions of the "penny parlor" or coin-operated player-piano performances at the turn of the century, and what became the not so de minimis incursions on public-performance rights during the past four decades. Nor did the public and for-profit performance of a "sound recording"—by playing it, for example, over radio or television or at a discotheque—result in liability to the copyright owner of the sound recording (as distinguished from the liability for royalties to the owner of copyright in any musical composition inscribed thereon).

In addition to these permitted uses of copyrighted works, set forth with varying degrees of explicitness in the 1909 Act, the courts have been responsible for creating two rather striking exemptions from the reach of the copyright monopoly.

The more recent of these two exemptions was that accorded cable television. It was argued by owners of copyright in television programs (dramatic, nondramatic or musical) that cable systems that captured and transmitted television signals so that they could be seen by viewers to whom they were otherwise inaccessible were "performing" the work, just as a song is "performed" not only by the orchestra in the television studio but also by the television broadcaster itself. (The copyright proprietors also argued that the performance by the cable system was in public and for profit.) The Supreme Court rejected this claim in 1968, in *Fortnightly Corp. v. United Artists Television, Inc.*,¹¹ and again in 1974, in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,¹² both as to cable systems serving a "fill in" function in locations where the broadcast signal would be received were it not for tall buildings or mountains, and to cable systems transporting television signals for hundreds of miles, well beyond the market in which the program was initially broadcast. The Court simply concluded that cable systems were functionally more akin to viewers of television, who do not "perform" the copyrighted work, than to broadcasters, who do.

The judicially developed privilege of more ancient vintage—known as the "fair use" doctrine—dates back almost a century and a half. The Supreme Court, and other courts, have frequently held

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that certain uses of copyrighted works that appear to constitute infringements are in fact "fair" and allowable, without the consent of the copyright proprietor, in view of the public interest in disseminating portions (and on rare occasions all) of a copyrighted work. The classic examples are the "copies" of short quotations from literary works for the purpose of serious criticism in books or periodicals, and the handwritten "copy" of short passages from a scientific work made by a scholar for his personal research files. The "fair use" doctrine was not announced in the 1909 Act, and its shape and limits are all but impossible to articulate in anything but the most general terms. Somewhat related to the fair use doctrine is the doctrine of comparable vintage which permits users of copyrighted works to borrow, use and exploit the "idea" or "system" which is described in a copyrighted work, as distinguished from the sequence of words in which that idea or system is communicated. 1

Here too, it is believed that to grant the broader monopoly would disserve the public interest, at least absent compliance with the more rigorous requirements (and shorter protection) of the patent system.

The Copyright Act of 1976

Exclusive Federal Protection for Written Works. The single change in the new Copyright Act that is of perhaps the greatest jurisprudential moment is that which altogether displaces common law copyright under state law for works that are embraced by the Federal Act and that "are fixed in a tangible medium of expression." 14 From the moment that the author's pen imprints words on foolscap, or the composer's pen makes musical markings on blank notation paper, or the artist puts brush and oil to canvas, the work has become in the constitutional sense a "Writing" and is, pursuant to the 1976 Act, covered by federal copyright—with federal court jurisdiction, federal substantive rules and federal remedies—and state law equivalent to copyright is completely ousted from operation. This federal preemption of the field applies not only to works created after January 1, 1978, but also to works already created at that date, whether those works are published or unpublished. The so-called "right of first publication" of written or "fixed" works is now protected exclusively by federal law, and not at all by state law. No longer will unpublished fixed works be subject to per-

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petual protection in the nature of copyright. No longer will the line of "publication"—and within that narrow line, the distinction between limited and general publication—demarcate the departure from state law and the entry into the domain of federal law.

Since most works presently known or contemplated by the mind of man fall within the list of works to which federal copyright extends under the new Act (even a computer program is to be deemed a "literary work" 15), the principal exclusion from the statute's preemptive reach will be works that are not "fixed in a tangible medium of expression." (Such "fixation" need not be eye-readable, for the new Act requires simply that the work have sufficient permanence so that it may be perceived, reproduced or otherwise communicated "either directly or with the aid of a machine or device." 16) Examples of such unfixed works are extemporized—or even rehearsed, provided there is nothing comparable to a written script—dances, comedic routines or musical performances. Any such unfixed work is thus subject to regulation by the states which may bar others from making readable copies of the work, or filming or taping it, or even performing it. If, however, the copyright owner permits such a work to be "fixed" simultaneously with the extemporaneous performance, for example by a recording or a motion picture, the work falls within the preemptive reach of the new Federal Act.

A potentially far more important exception from the preemptive reach of the Federal Act—even with regard to "fixed" works within the coverage of the Act—gives to the states, under their common law or statutes, the power to accord "rights that are not equivalent to any of the exclusive rights within the general scope" of those accorded by the 1976 statute. 17 Although the penultimate version of section 301(b)(3) of the new Act had contained an itemization of those kinds of rights not equivalent to copyright, that list was stricken after a most cryptic colloquy on the floor of the House of Representatives. The House Committee Report that accompanied the bill to the floor nonetheless probably still states what will be regarded as the state causes of action with respect to copyrighted works that survive the new Federal Act: "The evolving common law rights of 'privacy,' 'publicity,' and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion

15 Id. § 101.
16 Id. The distinction under the 1909 Act is discussed at note 4 supra.
of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement." \(^{18}\) (The Report also adverted to the continuing vitality of actions for breach of contract under state law.) For example, a person may lawfully secure both physical possession of, and copyright ownership in, certain handwritten letters, such that his reproduction of those letters will not infringe any federal copyright interest of the author; but the reproduction of those letters might in appropriate circumstances lay open that person to a valid claim that there has been a violation of the author's "privacy" interest under state law. So, too, that state cause of action theoretically might still be available to the heirs of the author long after the author has died and the federal copyright has expired.

A particularly vexing issue—both under the 1909 Act and the 1976 Act—is the extent to which the state may continue to grant a cause of action against "unfair competition" in the use of copyrighted works. That branch of state unfair competition law commonly known as "passing off" is in substance a tort that is the converse of copyright infringement; the defendant does not plagiarize the work or the product created by a plaintiff-author, but rather disseminates his own work or product and creates the misleading impression by labeling or advertising that the plaintiff, generally better known and more highly regarded than he, is the author. It is rather clear that the state tort of passing off, a branch of the law barring deception and fraud, may still flourish after the 1976 Act; the plaintiff complains not that his work has been copied, but that the defendant's work is indeed terribly different from his. That branch of state unfair competition law commonly known as "misappropriation" is, however, more reminiscent of copyright. The defendant is taking the intellectual (or industrial) product of the plaintiff author, and disseminating it to the public while creating the impression that he, the defendant-user, is the author. In substance, the defendant is deriving commercial benefit from the exploitation of a work or product "not his own" (even apart from any misleading impression on the part of the public about who the creator really is); in a word, he is "copying" or "performing" another's work. This is misappropriation. But it is also copyright infringement.

\(^{18}\) H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 132 (1976) [hereinafter cited as "REPORT"]. For a recent decision upholding an action premised on a state-created "right of publicity" against "appropriation" (by means of a television news camera) of a performer's act, see Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849 (1977) ("the human cannonball").
One would think that state outlawry of copying or performing, under the rubric of "misappropriation," would be preempted by the 1976 Federal Act for works listed in the Act and fixed in tangible form.\(^9\) While that presumably will be true in most instances, one must reckon with the apparently lively ghost of the Supreme Court decision in *International News Service v. Associated Press*;\(^{20}\) in which the Supreme Court held that the common law could outlaw the competitive dissemination by one news service of uncopyrighted (and perhaps uncopyrightable, as lacking in authorship) news stories and news content unearthed and written by a rival news service. The gist of the common law claim was plagiarism, which was arguably congruent with and preempted by federal statutory claims, but the Court found that this damaging competitive use generated "unjust enrichment" and "reaping where one had not sown" and held it tortious and enjoinable. The Report of the House Committee accompanying the bill that was to become the 1976 Act states that the principle of the *INS* case, and some vestige of state misappropriation law, will survive the Act, particularly with regard to the unauthorized tapping of computer data banks (normally uncopyrightable in their substance as opposed to their configuration) for competitive commercial purposes.\(^{21}\) Whether that suggestion will be endorsed by the courts, and whether it will be expanded, is a major issue awaiting resolution.

*The Vanishing Significance of "Publication."* As has been noted above, federal copyright attaches the moment a work is fixed in tangible form, and state protection in the nature of copyright is ousted. "Fixation" is the magic moment for this loss of state protection, and not any longer "publication." No longer is there any concern whether an instantaneous loss of all copyright protection has followed from a distribution, more general than limited, of hard copies, or from a performance. We are not altogether rid of the "publication" beast, however, because the 1976 Act provides that its protection will not be available to works created prior to January 1, 1978 if "theretofore in the public domain."\(^{22}\)

"Publication" is in fact, and at last, defined in the new Act, and the definition is similar to that obtaining under the 1909 Act. Publication is "the distribution of copies or phonorecords of a work by sale or other transfer of ownership, or by rental,

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\(^{20}\) 248 U.S. 215 (1918).

\(^{21}\) Report, supra note 18, at 132.

lease, or lending. . . . A public performance or display of a work does not of itself constitute publication." 23 The date of "publication" is important for two purposes under the 1976 Act. The period of copyright protection for works whose author is not identified (anonymous or pseudonymous works) expires 75 years from publication or 100 years from creation (or fixation), whichever is sooner. 24 Copyright notice for most works must bear the year date of publication, and must—as will be explained immediately below—normally be affixed to the work within five years of publication.

More Lenient Statutory Formalities. While the United States remains unusual in its emphasis on such formalities as notice, registration and deposit, those formalities do not have quite the grave implications they did under the 1909 Act where, for example, publication without notice immediately thrust the work into the public domain. The new Act still states that a notice “shall” be placed on all copies of a work, and on all phonorecords embodying a sound recording, when these have been “published” (that is, distributed in hard form) with the authority of the copyright owner. 25 The form of notice is substantially what it has been under the 1909 Act (including P-in-a-circle to protect sound recordings against dubbing), although the statutory rules regarding the placement of the notice are not quite as particularized as in the 1909 Act. The notice shall be placed “in such manner and location as to give reasonable notice of the claim of copyright,” and the Register of Copyrights is directed to prescribe illustrative methods and positions of affixation. 26

Omissions of and errors in the copyright notice, formerly fatal, are no longer so. Federal copyright protection will not be divested if notice is omitted altogether from only a “relatively small number” of copies or phonorecords distributed to the public. 27 More important, even if the notice is omitted from all distributed copies or phonorecords, the copyright is not invalidated if the work is registered with the Copyright Office within five years of publication without notice and if a “reasonable effort” is made to add notice to all copies or phonorecords distributed to the public after the omission has been discovered. 28

A person who innocently “infringes” a copyright that is saved by registration within the five-year grace period, and who relied on

23 Id. § 101.
24 Id. § 302(c).
25 Id. §§ 401(a), 402(a).
26 Id. § 401(c).
27 Id. § 405(a)(1).
28 Id. § 405(a)(2).
the absence of notice, is not in an altogether happy position; no damages may be assessed for infringements committed prior to being notified of the copyright owner's registration (although the statute appears not to shelter him similarly for his "works in process" at that time), and the court has the discretion to direct the innocent infringer to disgorge profits made by him even during the period of "innocence" and the discretion as well to enjoin future infringements. The effect of this provision of the 1976 Act is to require all persons making copies of (or performing or recording or dubbing) a work that lacks any copyright notice to consult the registration files of the Copyright Office, lest he become committed to a commercial venture which may be aborted should the copyright proprietor, having registered the work in the meantime, give notice of such registration to the prospective user of the work.

This emphasis on "title searching" in the Copyright Office is highlighted further by a new statutory provision dealing with error in the name incorporated in the copyright notice. Under the 1909 Act, the insertion of the name of a person other than the "proprietor" would in almost all cases forfeit the copyright. Under the 1976 Act, however, such an error is not fatal, but merely provides a defense to a user of the work who, relying on the erroneous name in the notice, "began the undertaking in good faith under a purported transfer or license from the person named therein." And even this defense is lost if, before the undertaking was begun, the work was registered in the name of the true copyright owner. Nor are errors in the year date fatal any longer, as they were under the 1909 Act if the error, by noting a year date which is later than the actual date of publication, purports to extend the duration of copyright. Under the 1976 Act, if the year date is more than one year later than the year of first publication, the case is treated as though the notice was altogether omitted, so that the five-year grace period for registration will obtain.

As was true under the 1909 Act, registration and deposit under the new Act are not conditions to preserving the copyright, but they are conditions upon initiating an action for infringement and upon

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29 Id. § 405(b).

30 This pitfall is typified by Group Publs. v. Winchell, 86 F. Supp. 573, 576 (S.D.N.Y. 1952) ("[T]he substitution of the name of an assignee in a notice of copyright prior to the recording of assignment, results in an abandonment of the copyright and a dedication of the work to the public.").


32 Id. § 406(b).
the award of certain desirable remedies for pre-registration infringe-
ments.  

Single, Extended Term of Protection. While it is the federal-
preemption feature of the new law that may most attract the interest
of the cognoscenti, the feature that will have perhaps the greatest
impact upon the use of copyrighted material is the elimination of
the fifty-six year limit on copyright protection and the elimination
of the renewal format for newly created works. All works "created"
on or after January 1, 1978 will be protected by federal copyright
for a single term, until fifty years after the death of the author. If
the work has been jointly authored, the fifty-year period begins to
run from the death of the last surviving author. The basic effect
of this change is to extend the period of copyright protection for
most works, although it will of course shorten the period of per-
petual protection formerly available under state law for unpublished
works. It has been estimated that the "life plus fifty" format will
extend copyright in most works to an average of roughly seventy-five
years. When initially proposed, this substantial extension beyond
the former 28-year or 56-year period upset certain user groups,
particularly in the scholarly community, but their opposition was
dissipated fairly early in the battle for copyright revision. The
arguments for extension—particularly the increase in life expectancy
since 1909, the ever-developing media for the exploitation of creative
works, and the significant endorsement of the "life plus fifty" format
among foreign nations—carried the day.

Because the date of "publication" will no longer constitute the
measuring point for the protection of most works, copyright pro-
tection for all of the works created by an author—regardless of date
of creation or publication and regardless of genre—will terminate at
the same time. While this will simplify copyright accounting in the
case of authors whose date of death is known, it will in other cases
make life rather more difficult for the user since it will no longer
suffice (for a work bearing a copyright date of 1978 or later) to add
twenty-eight or fifty-six years to the year date in the copyright notice
to determine whether the copyright is still valid. The user will
instead have to determine the year date of the author's death, which
will be accessible through records of the Copyright Office and per-
haps through library card catalogues.

The "life plus fifty" format is declared by the 1976 Act to be
applicable not only to works created after January 1, 1978, but also

33 Id. § 411.
34 Id. § 302.
to earlier created works that on that date remain unpublished and covered by state common law copyright (that is, to works that have not yet fallen into the public domain). Those works—for example, letters written by important historical figures—will thus be thrust into the public domain fifty years after the death of the author. In fairness to works that would already have passed this point as of January 1, 1978, the statute provides that no such work will fall into the public domain prior to December 31, 2002; if the work is first published before that date, the period of protection will be extended to the year 2027 (a statutory inducement to bring the work into the open through publication).  

By according federal copyright protection for "life plus fifty" to works created after January 1, 1978, Congress has eliminated the "renewal" feature that has characterized our federal law since 1790. Because of its complexities and its intimate relationship for so long with that hoary concept "publication," the renewal feature was an early, and unlamented, target in the movement for copyright reform. But Congress did feel a need to emulate the renewal format in one of its objectives: the protection of authors against unremunerative transfers of copyright that would otherwise disadvantage those authors for the life of the copyright. No longer (for works created after January 1, 1978) can the copyright "spring back" to the author automatically after twenty-eight years, to be renewed free and clear of earlier conveyances during the initial term. Instead, the new law empowers the author, or a surviving spouse and children, to terminate any transfer of an interest in the copyright, thirty-five years after the date of that transfer, when the initial transfer was made by the author inter vivos. The termination after thirty-five years is not automatic, but must be precipitated by timely notice given by the author or, if the author is dead at that time, by persons who under the statute are entitled to exercise more than one-half of the author's interest. The statute protects the persons who are empowered to terminate an earlier transfer by providing that they may not divest themselves of this power in advance by any agreement. These "termination of transfer" provisions are extraordinarily elaborate, making the 1909 renewal provisions read like light prose; they must be consulted for an appreciation of the details.  

In spite of the perceived virtues of the "life plus fifty" format for newly created works—an extension of copyright and a scrapping
of the renewal format—it was thought too disruptive of expectations and business arrangements to substitute that format for works already copyrighted under the Federal Act at the time the 1976 Act went into effect. Congress did, however, conclude that it was appropriate to extend the duration of copyright protection for such works while preserving the renewal format of the 1909 Act. Thus, works in their renewal term on January 1, 1978 will have that term automatically extended from twenty-eight years to forty-seven years; the original term of twenty-eight years along with the extended forty-seven-year renewal term will give the author a total of seventy-five years of copyright protection.38 The same benefit is given to owners of copyrights that are in their first twenty-eight-year term on January 1, 1978.39 If copyright in those works is timely renewed (pursuant to the elaborate provisions carried forward from the 1909 Act for different classes of statutory successors, if the author is not alive), the renewal term will run for forty-seven years. But if copyright is not timely renewed in the twenty-eighth year of the initial term, copyright will lapse. Thus, the obligation to renew will be with us for twenty-eight more years, for all works in their first copyright term at the end of 1977, and this fact ought not be ignored in our exuberance for the “life plus fifty” format.

In tidying up the provisions governing the transition to the new law, Congress considered the case of the author (or family) who, prior to January 1, 1978, had transferred an interest in the renewal copyright, of course not appreciating that under the new Act the renewal term would be extended from twenty-eight to forty-seven years. Congress wanted to give the benefit of the additional years in the renewal term to the author or his family rather than to any person to whom the renewal term might have been effectively transferred prior to January 1, 1978. Accordingly, the transfer of the renewal interest in such cases may be terminated (by the author, or by stipulated survivors in stipulated proportions) at the end of fifty-six years from the date copyright was originally secured.40 Like transfers made in 1978 and thereafter, terminations of these “renewal term” transfers are not automatic, and if the persons with the power to terminate fail to do so in a timely manner, the transfer will continue in effect.

The new Act makes two other important declarations with regard to copyright ownership, one of which confirms an earlier rule

39 Id. § 304(a).
40 Id. § 304(c).
and one of which reverses an earlier rule. Under the new Act, as under the 1909 Act, an unqualified transfer of title to the physical object embodying a work of literature, art or music will not, of itself, convey the copyright. A distinct intention to transfer the copyright must thus be clearly manifested. In any event, the copyright transfer in order to be valid must be manifested in a writing (either the conveyance itself or a memorandum thereof) that is signed by the transferor or his agent. What was the prevailing principle of “indivisibility” of copyright ownership has been changed by the 1976 Act, which contemplates the “ownership” of any exclusive right comprised in a copyright, and the assertion by such an owner of many of the rights which under the 1909 Act would have been held exclusively by the “proprietor” or “assignee,” such as the right to include one’s name in the copyright notice and the right to sue. Thus, the exclusive right to dramatize a novel, or the exclusive right to perform a play in public, can be owned separately and enforced independently.

The Expanded Definition of Infringement. The 1976 Copyright Act gives to the copyright owner a significantly expanded set of exclusive rights beyond those given in the 1909 Act. Phrased another way, many formerly permitted uses will now be infringe-ments. The one significant respect in which it might be said that the copyright interests of the author have been curtailed is the extension of the “compulsory license” concept beyond the field of musical recordings. As will be seen below, the right given by the new law to jukebox operators, cable television operators and non-commercial broadcasters to make certain uses of copyrighted works without the consent of the copyright owner (upon the payment of certain stipulated royalties) does to some extent deprive those owners of the “exclusive Right to their respective Writings.” As a practical matter, however, since the law under the 1909 Act gave the copyright owner no recourse whatever against the kinds of uses now subject to the compulsory license, the 1976 Act can be read as rather consistently expanding the exclusive rights of the copyright owner, even if not necessarily to their constitutional limits.

Most of the copyright owner’s exclusive rights under the 1976 Act represent merely a new collation and streamlining of the rights under the earlier law: to reproduce (rather than “to print, reprint, publish, copy”), to prepare derivative works (rather than to trans-
late, to make versions, to dramatize, to convert into a novel, to arrange, to adapt, to complete, execute and finish), to distribute copies by sale or other transfer, and to display publicly. The latter exclusive right—defined by the new statute as the public showing of a copy of a work either directly or by means of a film, slide, television image or any other device—is one that some courts were hesitant to find in the 1909 Act, but that could at least in the case of a slide or television projection, rather comfortably fall within the term "copy" in that legislation. The public exhibition, for direct viewing, of a work of art by its rightful owner is not an infringement of copyright, even if the consent of the copyright owner has not been secured; this is an explicit exception to the exclusive right of public display. The new law also puts an end to the confusion generated under the 1909 Act by the limitation under the old law of the term "copy" to works readable by the eye. It will henceforth be an infringement to reproduce a work in other than eye-readable form; it is now unlawful, without the consent of the copyright owner, to "fix" the copyrighted work in any manner through which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Copyright can thus be infringed when a work is, without authorization, inscribed upon a computer punchcard, a magnetic tape or a wax phonorecord.44

The most broad-ranging changes in the 1976 Act on the issue of infringement relate to the performance right. Certain performances of copyrighted works that were allowable under the 1909 Act are now infringements. Other formerly allowable performances are now subject to compulsory license, with the user obligated to pay a royalty specified in the statute.

Under the 1909 Act, one could freely sing or play music, read a poem or deliver a sermon or lecture in public, provided the performance was not "for profit." Under the 1976 Act, a public performance of a musical composition, nondramatic literary work, dramatic or choreographic work, or a motion picture will infringe, even if not "for profit." The new Act goes on, however, specifically to exempt—in the fairly elaborate provisions of section 110—a number of public performances from the reach of the copyright monopoly, and thus renders the new law in most respects congruent with the old. To the extent there are differences, the copyright owner is generally favored.

44 See id. § 101 (defining "copies").
Thus, the performance of a dramatic work by students and teacher in a classroom would not infringe, either under the 1909 Act (because not a "public" performance) or the 1976 Act (because of a specific exemption in section 110(1)). However, if the classroom actors are professionals, or the student performance is rendered in the school auditorium, the performance will not clearly fall within the 1976 exemption and will infringe. It is doubtful that these performances would have been infringements before, since they probably would have been held not to be "public" performances under the 1909 Act, which left that term undefined. The 1976 Act defines that term, rather broadly, to embrace "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." 45

Public performances of songs or nondramatic literary works at school, religious or charitable functions were also broadly exempted under the 1909 Act, if—in spite of the fact that they were public—they were "not for profit," a phrase also left undefined by the Act. Now, such public performances are prima facie infringements, and a number of formerly allowable performances are no longer specifically exempted. Even if school or church performers render a song or poem without payment for their services, if there is an admission charge to the event—even though the proceeds are exclusively devoted to educational, religious or charitable purposes—the copyright owner may object to the performance by giving timely notice.46 Thus, performances of music by school bands or church choirs, at money-raising events for their institutions, can be infringements under the new law. It remains to be seen, of course, how many copyright owners will learn of these events in advance and file timely notices of objection. There will be no infringement, however, if the poem or song is performed live, without direct or indirect admission charge, and without compensation to any performers or promoters. There is an additional specific exemption if the performance takes place in the course of religious services at a place of worship.

Another specific statutory exemption endorses a recent decision of the Supreme Court, *Twentieth Century Music Corp. v. Aiken,*47 by declaring that it is not an infringing performance to transmit in public a copyrighted work "on a single receiving apparatus of a kind

45 Id.

46 Id. § 110(4)(B).

47 422 U.S. 151 (1975).
commonly used in private homes," 48 such as a radio set in a doctor's office or a television set in a taproom. The statute sets forth certain other, rather refined, circumstances in which public performances of nondramatic literary or musical works—face-to-face or by direct transmission—will not infringe.

In addition to giving the copyright owner the privilege to forbid certain public performances which were formerly allowable, the 1976 Act extends the "compulsory license" concept to certain uses for which the copyright owner under the prior law could not collect a penny. One prime example is the "public performance" of musical compositions on jukeboxes. 49 The jukebox exemption has been abolished, in light of the substantial remuneration reaped by jukebox operators when musical performers have done the sowing (by making phonograph records). If the jukebox operator files with the Copyright Office and affixes a certificate to the box, any phonographs may be placed therein (the "compulsory" part of the compulsory license), but the operator must pay $8.00 per box per year as a total royalty covering all of the records used. All of these proceeds, to be paid to the Copyright Office, are then to be divided among the owners of copyright in songs that have been in jukeboxes during the year. It is expected that the division of the proceeds will be expeditiously handled by the methods utilized under the 1909 Act by the principal performance rights organizations (American Society of Composers, Authors and Publishers, and Broadcast Music, Inc.) to distribute royalties for performances on radio and television broadcasts, in restaurants and nightclubs, and the like. Any disputed claims are to be resolved by a new and important administrative agency established under the 1976 Act, the Copyright Royalty Tribunal. The compulsory license for music in jukeboxes generates royalties only for the owner of copyright in the musical composition (generally, the composer or publisher) and not for the recording companies or the recording performers; there is as yet no performance right for musical renditions as distinct from musical compositions.

Also eliminated under the 1976 Act is the exemption, by virtue of two major Supreme Court decisions, for transmission of copyrighted works through cable television. 50 Although the Court held that cable systems do not "perform" copyrighted dramas, lectures or songs, as that term was to be understood under the 1909 Act, the

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49 See id. § 116.
50 See text accompanying notes 11-12 supra.
1976 Act now expands the definition of "perform" and provides a definition of "transmit" that together bring cable transmissions within the scope of the copyright monopoly. But here too, the monopoly is "impaired" through the device of the compulsory license. The cable-television provisions are by far the most lengthy and complex provisions of the new Copyright Act. They must be perused to be believed, if not understood. To oversimplify somewhat: any cable re-transmission of copyrighted material televised over the air will be allowed, provided the cable re-transmission is authorized under the rules of the Federal Communications Commission and provided the cable system pays a royalty specifically articulated in the statute. By deferring to the rules of the FCC, Congress has attempted to coordinate copyright policy and communications policy. Exemption from copyright liability upon the payment of royalties will foster the growth of a developing industry along the lines contemplated by the congressional commerce committees and the FCC, while the payment of royalties will protect in some measure the creative talents who develop and produce over-the-air television programs. Accordingly, the elaborate fee schedule for the "compulsory licensee" cable systems represents a blend of ability to pay along with a measure of the expanded audience to which the copyright owner's work is transmitted through the cable (or, phrased in other terms, the audience from which the copyright owner can no longer reap an economic benefit by virtue of the pre-emption on the part of the cable system). It is hoped, again, the royalties will be amicably divided (with a boost in the form of an exemption from the antitrust laws for this purpose) by those claiming copyright in re-transmitted programs during the accounting period, with controversies to be resolved by the Copyright Royalty Tribunal. A cable transmission will infringe if, among other things, it is not permitted by the FCC, or if the cable system willfully alters the transmitted program or transmits it at a later time, or if the cable system fails to file certain stipulated notices with the Copyright Office or to account with that Office for royalties due.

The compulsory license continues to operate under the 1976 Act where it originated in 1909: Once the copyright owner permits the distribution of a phonorecord of his musical composition, any other persons may make and distribute their own recording of the same composition, provided they comply with the notification and accounting provisions of the act. Instead of paying two cents per

52 Id. § 115.
recording to the owner of the musical copyright, the compulsory licensee is now required by the act to pay two and three-quarters cents, a generous concession to inflation since 1909. Direct dubbing from another record, however, remains an infringement of copyright in the sound recording (as distinguished from the work inscribed thereon). This dubbing right, and the right to dub sounds directly for the purpose of creating a "derivative work," are the only rights in the nature of copyright that are presently owned by the proprietor of the sound recording; there is no performance right generating royalties for the recording company or recording artist when the phonorecord is played in public.\textsuperscript{53}

The compulsory license device is also used—again by way of giving the copyright owner rights not previously available—in the field of noncommercial broadcasting, the prime exemplar being public television stations.\textsuperscript{54} Such stations are free to perform published nondramatic musical compositions or to display published pictorial, graphic and sculptural works, provided they pay a royalty to the copyright proprietor. The royalty will hopefully be negotiated between representatives of copyright owners and representatives of public broadcasting, but if not it will be fixed by the Copyright Royalty Tribunal. No such compulsory license will extend to broadcasts of literary works, whether dramatic or nondramatic.

The Copyright Royalty Tribunal is empowered and directed periodically to examine and if appropriate to revise the existing schedules of compulsory royalties in the fields in which it oversees the compulsory license: phonorecords of musical compositions, jukebox performances of musical compositions, cable transmissions of all copyrighted works, and public-broadcasting transmissions of musical compositions and works of art.

The one remaining major issue in the area of infringement and allowable uses is the doctrine of fair use. That doctrine, elusive and judicially developed, has found its way into the statute, where it remains elusive. The draftsmen have made it clear that their purpose is not to modify the doctrine, but simply to endorse it as developed at common law. Section 107 of the 1976 Act acknowledges that there is no finite list of fair uses of copyrighted works. Instead, the section gives some illustrations of situations in which fair use is commonly invoked—"criticism, comment, news reporting,\

\textsuperscript{53} As of this writing, a report by the Register of Copyrights is due that may suggest creation of performance rights for recording artists. \textit{See id.} § 114(d).

\textsuperscript{54} \textit{Id.} § 118.
teaching (including multiple copies for classroom use), scholarship, or research”—and articulates four criteria which it will be the task of the court to employ in particular instances:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

It will be for the courts to continue to weigh the importance to the public interest of the dissemination of the copyrighted material against the economic harm to the copyright proprietor.

Perhaps the most common situation in which fair-use criteria are invoked is that of the photocopying of copyrighted material. Photocopy machines have become widely accessible, not only in businesses and other large institutions, but also to the public generally, with such machines being commonly placed in libraries and post offices. Much of the material now photocopied, such as one's own personal letters or tax and insurance forms, raise no substantial issue of infringement. But there may be infringement when one photocopies such material as newspaper and journal articles, poems, maps, songs and drawings (particularly when they are copied in full rather than in part). Perhaps all that can be said with any confidence, as a guide to persons making photocopies of copyrighted material, is that it is more likely that “fair use” will not be available when all or almost all of the work is copied, and when multiple copies are being made, and when the photocopying person is doing it in pursuit of a business purpose, and when the photocopying is substituting for what realistically would be a purchase of one or more copies of the copyrighted work from trade sources.

The frequency of photocopying by libraries induced Congress to prepare a specific set of statutory directives, which are designed to supplement and not to supplant the ordinarily applicable principles of fair use. A library open to the public may photocopy a work, provided there is no commercial advantage and provided that it affixes a copyright notice, under any of the following circumstances: it copies an unpublished work for purposes of preservation and security, or for deposit in another library for research pur-

55 Id. § 108.
poses; it copies a published work that is damaged, deteriorating, lost or stolen, provided it cannot find an unused replacement on the market; it makes, at the request of a person using it for private study or research, a copy of a single entire article or of a "small part" of any other copyrighted work; it makes, at the request of a person using it for private study or research, a copy of an entire work or of a "substantial part" of it, provided the work is not obtainable at a fair price. The library is not rendered liable for any copying done on its premises, by a library user, at an unsupervised photocopy machine, provided the library has posted a notice there which warns that the user may be subject to the copyright law. Presumably, an individual at that machine or elsewhere may lawfully make photocopies—without asking the library to do the work—under the same conditions the library could, that is, of an entire article or an entire larger work not obtainable at a fair price, provided the purpose is private study or research. If the work is a musical work or a work of art, the library's permission to photocopy may only be for the purpose of preservation, security and replacement on account of loss or theft, but not for the purpose of satisfying user requests for study or research. It is likely, however, that some of the latter kinds of requests for library photocopying might fall within the fair use doctrine. Finally, all of the above library privileges are limited to the making of single copies on separate occasions, and do not justify the making of "related or concerted" multiple photocopies. Nor may the library make even otherwise allowable single and unrelated copies, if that library engages in "systematic reproduction" (a term that is left undefined and that may, if broadly construed, very substantially undermine the privileges given to libraries by Congress in the body of section 108).

In keeping with the general intention of Congress to preserve the preexisting rules of fair use, the 1976 Act explicitly endorses what had earlier been the law regarding the right to borrow the "ideas" or "systems" described in copyrighted works: such ideas and systems are not copyrightable. Section 102(b) of the new law provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 56

56 This principle was freely borrowed from the decision of the Supreme Court in Baker v. Selden, 101 U.S. 99 (1880).
There are some who have questioned whether the world of entertainment and the arts is better off now than under the 1909 Act. For this author, it is clear that the 1976 Act marks an important and constructive step forward, in at least three major respects.

First, the 1976 Act simplifies the law of copyright. Some will no doubt find this proposition dubious, if not laughable, given the proliferation of words and details in the new law. It is true that the statute is far more prolix and in many respects far more intricate and complex than was the 1909 Act. One can point to the provisions on cable television, exempted performances of musical and literary works, library photocopying, and termination of copyright transfers. But for all their complexity, these provisions do deal squarely with issues that are themselves complex and that call into play sharply conflicting interests that must be accommodated to make the law work. These provisions, though complex, provide concrete guidance and solutions, and for the most part they can be understood (at least by lawyers, or even by intrepid laymen), and that is a form of “simplicity.” Greater simplicity is also provided by the new principles and definitions articulated in the 1976 Act. Among the simplifying principles are those of federal preemption of copyright from the date a work is created, a single term of protection for newly created works, and the divisibility of copyright ownership. Among the simplifying definitions are those given to the words reproduce, copy, publish, display, public, perform, joint work and work made for hire.

A second overall improvement in the statute is the greater protection it gives to authors. The duration of protection is now generally longer than before, and is in any event guaranteed (for newly created works) substantially to outlive the author. The more lenient provisions dealing with copyright notice will also cause fewer forfeitures of copyright than in the past. The right to terminate transfers of copyright interests will not be subject to divestiture in advance through contractual arrangements (unlike the renewal right under the 1909 Act). Copyright protection is now given for uses of a work on cable television, in jukeboxes, on public broadcasting stations and, in many instances, in nonprofit educational and charitable institutions. Some might argue that the expanded protection of the copyright owner has gone too far. Surely it is questionable whether, for example, the draftsmen made out a sufficient case to warrant extending the net of infringement around
classroom performances of dramatic works using an actor from outside the school, or around the performance of a scene from a play in the school auditorium, or around the performance of a song by the high school band at half time, or around the photocopying of short segments of an article by a library that fills such requests "systematically" (whatever that may mean). But I believe that on the whole the statute, particularly through its extension of the principle of the compulsory license, strikes a better balance between the author and the public than did the 1909 Act, at least as that Act was construed by the courts.

Finally, quite apart from the manner in which the new Act deals with the technology that has developed since the motion picture, at least it does deal with that technology. It brings the law of copyright into the second half of the twentieth century, and attempts to cope with most issues surrounding radio, television, the photocopy machine, the computer, and other techniques of reproduction known and unknown. The tough issues of copyright regulation have now been decided by the Congress rather than by the courts, as was consistently the case under the 1909 Act. The courts did less than a sterling job in adapting the opaque provisions of the old Act to the problems of the new technology, witness such holdings as that the widespread sale of phonograph records did not divest common law copyright;\textsuperscript{57} that the delivery of a speech before tens of thousands of persons and the transmission of that speech throughout the nation by television did not divest common law copyright;\textsuperscript{58} that the display of a pictorial or sculptural work on television did not infringe, since no "copy" was made;\textsuperscript{59} that an author could, during the first term of copyright, make a binding transfer (typically through a form contract) of his interest in the renewal term;\textsuperscript{60} that cable-television transmissions of copyrighted programs being shown on conventional broadcasts, without the consent of the copyright owner and across hundreds of miles, were not an infringement (because cable transmission is functionally akin to "viewing" the program);\textsuperscript{61} and that the question of performance rights in phonograph records was principally a matter of local concern to be regulated by state misappropriation law undisturbed by any preemptive implica-

\textsuperscript{60} Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).
tion of the Federal Copyright Act. While the courts of the twenty-first century may fare no better, we have, at least for now, a detailed set of rules, representing an accommodation of deeply felt interests of enormous economic import, rules that have been shaped by the legislature rather than by the courts. The legislative process can better develop a factual record upon which these interests can be assessed in the context of a larger industry picture. The 1976 Act also creates an administrative agency, the Copyright Royalty Tribunal, that will provide some facility for the adaptation of the law, without formal statutory amendment, in response to changing economic facts.

Congress has not, unfortunately, been able to resolve all of the tough questions, and it may have left too many unresolved. It deals with the issue of infringement of copyrighted works through their application in a computer, simply by saying that the law is to be the same as it was under the 1909 Act. It deals with the issue of the extent to which copyright protects a work that blends decoration and utility, simply by saying that the law is to be the same as it was under the 1909 Act. It postpones resolving the issue of "performers' rights" in radio and jukebox plays of phonograph records, although the issue has been debated thoroughly for almost two decades. Yet the computer issue and the issue of performers' rights are presently being addressed by a presidential commission and by the Register of Copyrights, respectively, and as to both there has been constructive movement toward a resolution, which will presumably be incorporated in the new Act.

In sum, the 1976 Copyright Act is a substantial improvement over what went before. One hopes that its performance will be as satisfactory as its promise.

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64 Id. § 113(b).
65 Id. § 114(d).