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# NOTES

## COPYRIGHT PROTECTION FOR SHORT-LIVED WORKS OF ART

### INTRODUCTION

The Copyright Act of 1976 (Act)<sup>1</sup> signals a legislative intent to expand the categories of works eligible for copyright protection. For example, the Act explicitly protects nondramatic choreography and pantomime,<sup>2</sup> as well as live broadcasts that are taped simultaneously with transmission.<sup>3</sup> As the legislative history of the Act shows, Congress anticipated that this expansion would continue as communications technology grows.<sup>4</sup> A 1980 amendment<sup>5</sup> clearly applied the Act to computer programs.<sup>6</sup> New technology forced Congress to address the conceptually difficult, but seldom litigated, copyright requirement that a work be fixed in a tangible form of expression.<sup>7</sup> Phrasing the Act to cover as yet undiscovered<sup>8</sup> tangible forms of expression, Congress left it to the courts to answer the more basic question of how long a work must be fixed in tangible form before it is copyrightable.<sup>9</sup>

The thesis of this Note is that two types of briefly fixed or short-lived works of art merit explicit copyright protection. The first type is a collection and arrangement of objects that is in itself a work of art.

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1. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. IV 1980)).

2. 17 U.S.C. § 102(a)(4) (Supp. IV 1980). Prior to the Act, works of this nature were protected only if they could be considered "[d]ramatic or dramatico-musical compositions." See 17 U.S.C. § 5(d)(1976). Courts have held that dance that did not tell a story was not copyrightable. See *Fuller v. Bemis*, 50 F. 926 (S.D.N.Y. 1892); *Dane v. M. & H. Co.*, 136 U.S.P.Q. (BNA) 426 (N.Y. Sup. Ct. 1963).

3. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 52, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5665 [hereinafter cited as House Report]. 17 U.S.C. § 101 (Supp. IV 1980), in defining "fixed," provides that a "work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation of the work is being made simultaneously with its transmission."

4. House Report, *supra* note 3, at 51 ("The bill does not intend . . . to freeze the scope of copyrightable subject matter at the present stage of communications technology . . .").

5. Patent Rights in Inventions Made with Federal Assistance, Pub. L. No. 96-517, § 10, 94 Stat. 3028 (1980) (codified at 17 U.S.C.A. §§ 101, 117 (1977 & West Supp. 1982)).

6. H.R. Rep. No. 1307, pt. 2, 96th Cong., 2d Sess. 19, reprinted in 1980 U.S. Code Cong. & Ad. News 6492, 6509.

7. 17 U.S.C. § 102(a) (Supp. IV 1980).

8. See House Report, *supra* note 3, at 51 ("Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.")

9. See *id.* at 53 (the definition of fixation "would exclude . . . purely evanescent or transient reproductions such as those projected briefly on a screen").

This display work is of great commercial value<sup>10</sup> and is created daily for department stores, museums, advertising agencies, photography studios, motion picture companies and magazines. The other short-lived work considered in this Note is an environmental or "site" work of art which by its very nature is temporary. Such works include a "Running Fence" of nylon cloth strung across 24.5 miles of California countryside<sup>11</sup> or lines painted in an unusual pattern on a city street.

Even though short-lived works of art fulfill the constitutional and statutory requirements for copyright protection, artists, their employers and copyright lawyers rarely attempt to copyright them.<sup>12</sup> This is the unfortunate consequence of congressional failure to give them explicit copyright protection.<sup>13</sup> Without such protection, a freelance stylist who creates arrangements cannot bargain effectively for a fair

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10. One of Congress' reasons for extending explicit copyright protection to a work of authorship is the "commercial importance of the product to the national economy." *Goldstein v. California*, 412 U.S. 546, 562 (1973).

11. W. Spies & W. Volz, *The Running Fence Project: Christo* (rev. ed. 1980). See *infra* notes 12, 127.

12. The need for copyright protection for an arrangement of objects first became apparent to the student-author when she was Home & Design Editor of *Ladies Home Journal*. In interviews with many designers and stylists she discovered that while the artists felt entitled to a property right in their work, most of them had never tried to assert it simply because they had no knowledge of it ever having been done. Increasingly, however, artists and stylists are becoming more aggressive about pursuing their rights, in part due to the influence of organizations such as the Graphic Artists Guild, which sponsor seminars on the legal rights of artists. Also, a display of objects, such as those in a store window, is increasingly being recognized as a work of art. See B. Wood, *Show Windows* (1982), reviewed by Wintour, *New York*, Sept. 13, 1982, at 56.

Interviews with practicing copyright lawyers demonstrated that some are skeptical about whether short-lived works of art qualify for copyright protection, while others have, in fact, been copyrighting a variety of temporary environmental works. See *infra* note 127. Florists' Transworld Delivery (FTD), for example, does not want to copyright its flower arrangements because they may vary, depending on the availability of flowers around the country. Moreover, they are not even sure that a flower arrangement is protectible. Telephone interview with David Vaillancourt, FTD attorney, Southfield, Mich. (Aug. 31, 1982). FTD does seek copyright protection, however, for certain of its containers, and trademark protection for the names of its arrangements. *Id.* Similarly, Christo's lawyer intends to trademark the name of some of this environmental artist's more monumental works, which no one could afford to duplicate. Telephone interview with Scott Hodes of Arvey, Hodes, Costello & Burman, Chicago, Ill. (Aug. 6, 1982). Trademarking the name, however, would not prevent someone from photographing or otherwise copying the work.

13. This oversight is not Congress' first in the copyright field. Sound recordings, for example, were not copyrightable until 1971. Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(b), 85 Stat. 391 (codified at 17 U.S.C. § 102(a)(7) (1976 & Supp. IV 1980)). "[S]ound recordings are clearly within the scope of the 'writings of an author' capable of protection under the Constitution, and the extension of limited statutory protection to them was too long delayed." House Report, *supra* note 3, at 56; see also Chafee, *Reflections on the Law of Copyright: I*, 45 Colum. L. Rev. 503, 520 (1945) (commenting on the "judicial pressing and squeezing" of art forms into statutory

return from the photographers and magazines that employ her. In turn, a magazine cannot prevent its competitors from duplicating and photographing an arrangement it has financed and produced. Similarly, an environmental artist cannot prevent others from photographing her work and reaping the economic reward she not only deserves but needs in order to finance these especially costly works.<sup>14</sup> Extending protection to short-lived works would further the short-term constitutional goal of giving an artist a fair return for her work,<sup>15</sup> as well as the long-term goal of promoting "the Progress of Science and the useful Arts."<sup>16</sup>

Part I of this Note sets up two examples of short-lived works of art to which reference is made throughout the discussion. Part II shows that these short-lived works of art fulfill the statutory, and indeed, constitutional, requirements of originality and authorship. The third requirement, that the works be fixed in a tangible form of expression, is slightly more problematic. By analogy to traditionally recognized works of authorship, however, short-lived works should be considered copyrightable from the moment they are created. Part III investigates the possibility of common-law copyright protection for short-lived works of art and shows that such protection is illusory. While the Act specifically did not preempt state-law protection for works not fixed in tangible form, the states themselves require a work to be so fixed in order to be protected. Finally, Part IV discusses the practical considerations of extending copyright protection to short-lived works of art.

## I. EXAMPLES OF SHORT-LIVED WORKS OF ART

### A. *An Arrangement of Objects*

A typical example of an arrangement of objects, to which reference is made throughout this Note, appears on the cover of the August 1982

categories, and giving an example of how "motion-pictures were crowded into the 'photographs' compartment before they were separately listed by the 1912 amendment.").

14. Christo's "Running Fence," for example, cost \$3 million, which the artist financed from the sale of some of his earlier works. *W. Spies & W. Volz, supra* note 11.

15. One purpose of copyright protection is to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8; *see Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Burke v. NBC*, 598 F.2d 688, 691 (1st Cir.), *cert. denied*, 444 U.S. 869 (1979); *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 452 (C.D. Cal. 1979), *rev'd in part, aff'd in part and remanded*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-1687). *But see United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.").

16. U.S. Const. art. I, § 8, cl. 8.

issue of *House Beautiful* magazine. There the stylist decided to do a story on homes with walls painted in the *trompe l'oeil* technique. The wall shown on the magazine's cover has a blue and white vase painted on it, with painted branches extending out of the vase and a bird perched on a branch. The stylist gathered four vases from elsewhere in the house and arranged them on a chest of drawers in perfect juxtaposition to the painting. She asked the homeowner, who is a flower stylist, to arrange flowers in one of the vases in counterpoint to the bare branches on the wall. The freelance photographer then took a picture of the entire arrangement.<sup>17</sup>

In the meantime, a photographer from the local newspaper arrived,<sup>18</sup> ostensibly to photograph the stylist and photographer at work. What she did, in fact, was photograph all the other arrangements that the stylist had created throughout the house. The stylist may have wanted to assert copyright protection in her arrangement in order to prevent the photographer from using her work before it was published by *House Beautiful*.

The stylist, however, would not be the copyright owner in this situation. As an employee of *House Beautiful*, her work would be considered a "work for hire."<sup>19</sup> Similarly, when a freelance photographer signs an agreement to that effect with a magazine, her work is also a work for hire.<sup>20</sup> Therefore, *House Beautiful* is considered the author of the work and the owner of the copyright.<sup>21</sup> As a practical matter, however, the stylist on the scene has to protect the magazine's

17. Telephone interview with Beverly McGuire, Tabletops Editor of *House Beautiful* (Aug. 4, 1982).

18. While a newspaper photographer did not actually interrupt *House Beautiful*'s shooting of the painted walls, such an interruption is not infrequent, particularly when a major magazine photographs a home in a small town. Telephone interview with Liza Hamill, art director, Philadelphia, Pa. (Sept. 22, 1982).

19. 17 U.S.C. § 101 (Supp. IV 1980) ("A 'work made for hire' is . . . a work prepared by an employee within the scope of his or her employment."); see Scherr v. Universal Match Corp., 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

20. 17 U.S.C. § 101 (Supp. IV 1980) ("[A] work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them . . . shall be considered a work made for hire."); cf. Meltzer v. Zoller, 520 F. Supp. 847, 855 (D.N.J. 1981) (architectural plans, not designated for statutory protection, are not subject to the statutory work for hire doctrine).

21. See Murray v. Gelderman, 563 F.2d 773, 775 (5th Cir. 1977), *aff'd on rehearing en banc*, 566 F.2d 1307 (5th Cir. 1978); Siegel v. National Periodical Publications, Inc., 508 F.2d 909, 914 (2d Cir. 1974); Lumiere v. Robertson-Cole Distrib. Corp., 280 F. 550, 552-53 (2d Cir.), *cert. denied*, 259 U.S. 583 (1922); Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 652 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); Avedon v. Exstein, 141 F. Supp. 278, 279-80 (S.D.N.Y. 1956); Dielman v. White, 102 F. 892, 894 (D. Mass. 1900).

interest in her work by telling the newspaper photographer that the work is copyrighted.

While this Note uses the *House Beautiful* cover for the purpose of illustration, the thesis of the Note is equally applicable to other arrangements. Copyright protection should cover, for example, Diana Vreeland's costume exhibits for the Metropolitan Museum, a florist's arrangement of flowers, a department store window display, Bloomingdale's model rooms<sup>22</sup> and even a theater company's stage set.

### B. An Environmental Work of Art

Environmental works of art can also take many forms, but one hypothetical work will be referred to throughout this Note. An artist, after nine months of work, turned on the lights in twelve city skyscrapers in a unique pattern one night. To achieve the desired effect, she had made detailed engineering drawings showing how each window and air shaft would be treated; for example, whether lights would be on or off or shades up or down. A photographer took a picture of this light display, which was published in the city's daily newspaper. The photographer was subsequently approached by a calendar company with an offer to buy the photograph. The artist may have wanted to assert copyright protection in her work and to require the photographer to pay her a fee before selling the photograph.

## II. SHORT-LIVED WORKS OF ART AND THE STATUTORY REQUIREMENTS FOR COPYRIGHT PROTECTION

According to the Act, "[c]opyright protection subsists . . . 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>23</sup> The three statutory requirements for copyright protection derived from this definition are originality, authorship and fixation.

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22. No cases have been found that deal with whether room design is copyrightable. *But see infra* note 50. It could be argued that interior design differs from a decorative display of objects, such as that featured on the *House Beautiful* cover, because room design is governed by practical considerations, such as how people will use the room, and not solely by artistic considerations. Nevertheless, this Note takes the position that interior design also should be copyrightable because the design of a room is not only conceptually separable from its utility, but many elements of it are also physically separable. See *infra* notes 84-88 and accompanying text. Moreover, it could be argued that Bloomingdale's purpose in creating the model rooms is not for someone to live in them, but for them to be attractive enough to entice the shopper to buy the furniture displayed. Obviously, it would not be in Bloomingdale's interest to sue its customers for copyright infringement, but Bloomingdale's, in theory, might want to copyright its rooms to prevent other stores from copying them.

23. 17 U.S.C. § 102(a) (Supp. IV 1980).

### A. Originality

Because courts considered the concept of originality to be implicit in the word "author" as used in the Constitution, originality was a judicial requirement before it became a statutory requirement.<sup>24</sup> The Supreme Court defined an author as one "to whom anything owes its origin; originator; maker."<sup>25</sup> Under this definition, if two authors independently conceived the same work, both works would be considered original for copyright purposes.<sup>26</sup> The courts have not created strict criteria for originality,<sup>27</sup> following instead the spirit of Justice Holmes' advice on the dangers of "persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."<sup>28</sup> Courts have since found sufficient originality for copyright purposes in a color matching chart,<sup>29</sup> a candy box<sup>30</sup> and the label on a can of furniture polish.<sup>31</sup> The legislative history of the Act indicates that the

24. 1 M. Nimmer, *Nimmer on Copyright* § 1.06[A] (1982); see *Synercom Technology, Inc. v. University Computing Co.*, 462 F. Supp. 1003, 1009 (N.D. Tex. 1978) ("[O]riginality is judicially imposed gloss upon the copyright statute . . ."); House Report, *supra* note 3, at 51 ("The phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute."); 1 M. Nimmer, *supra*, § 2.01[A] ("[I]t is now clearly established, both as a matter of congressional intent, and judicial construction, that the originality necessary to support a copyright merely calls for independent creation, not novelty." (footnotes omitted)).

25. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). This definition comports with contemporary dictionary definitions. See, e.g., Webster's Third New International Dictionary 146 (1976) (defining author as "one that is the source of some form of intellectual or creative work . . . esp: one that writes or otherwise composes a book, article, poem, play, or other work which involves literary composition and is intended for publication" and as "one that compiles material . . . in such a way that the finished compilation can be regarded as a relatively original work").

26. *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 n.3 (2d Cir. 1977); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924). In *Sheldon*, Judge Learned Hand hypothesized that "if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem . . ." 81 F.2d at 54.

27. See, e.g., *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1094 (2d Cir. 1974); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

28. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

29. *Pantone, Inc. v. A.I. Friedman, Inc.*, 294 F. Supp. 545 (S.D.N.Y. 1968).

30. *Barton Candy Corp. v. Tell Chocolate Novelties Corp.*, 178 F. Supp. 577 (E.D.N.Y. 1959).

31. *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87 (9th Cir. 1963), *cert. denied*, 377 U.S. 907 (1964).

Act adopts the courts' construction of originality: For a work to be original, it does not have to be new, novel, ingenious or aesthetically pleasing.<sup>32</sup>

An arrangement of lights in twelve buildings, involving an ambitious conception and a complicated arrangement, would unquestionably meet the low threshold of the originality requirement. Most arrangements of objects would also satisfy the requirement, notwithstanding the likely objection that an arrangement often consists of objects made and copyrighted by another artist or of objects in the public domain.<sup>33</sup> Such copyrighted objects may be used with the permission of the copyright owner.<sup>34</sup> The stylist's copyright, however, would extend only to her arrangement of the previously copyrighted material.<sup>35</sup>

Moreover, the few courts that have considered the originality of arrangements have been alert to another possible danger in copyrighting them: that the author of every commonplace arrangement would seek copyright protection. One of these courts, for example, refused to find originality in a flower corsage that duplicated an arrangement used for years in the flower industry.<sup>36</sup>

32. House Report, *supra* note 3, at 51; *see* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976); Dollcraft Indus. v. Well-Made Toy Mfg., 479 F. Supp. 1105 (E.D.N.Y. 1978).

33. *See* Sawyer v. Crowell Publishing Co., 46 F. Supp. 471, 474 (S.D.N.Y. 1942) (referring to public domain as "sources . . . available to anyone"), *aff'd*, 142 F.2d 497 (2d Cir. 1944). A work falls into the public domain when the statutory copyright period protecting it has terminated. Protection lasted for 28 years with a 28-year renewal term under the Copyright Act of 1909. 17 U.S.C. § 24 (1976) (1909 Act), *amended by* 17 U.S.C. § 302 (Supp. IV 1980). The current Act provides protection for a work, created after Jan. 1, 1978, during the life of its author plus 50 years. 17 U.S.C. § 302 (Supp. IV 1980). A work could also fall into the public domain under the 1909 Act if it were "published" before statutory copyright was procured for it. *See* Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n, 320 F. Supp. 1303, 1308 (N.D. Ill. 1970); 1 M. Nimmer, *supra* note 24, § 2.03[G]. *See infra* note 151 and accompanying text.

34. 17 U.S.C. § 103(a) (Supp. IV 1980). As a practical matter, permission is easy to obtain, especially if the copyrighted object will receive free publicity in a magazine.

35. 17 U.S.C. § 103(b) (Supp. IV 1980); *see* Roy Export Co. v. CBS, 672 F.2d 1095, 1103 (2d Cir. 1982). In *Roy Export* the court dealt with the copyrightability of the work performed by the compiler of a collective work: "[P]rotection is available only for that part of [a compiler's] product that is original with him—for what he has added to the component works, or for his skill and creativity in selecting and assembling an original arrangement of those works, even if no new material is added." *Id.* Securing permission to use another artist's work is a recurring task for artists who specialize in collage. Often they cut up, rearrange and paste over another artist's material. Interview with Gerald McConnell, Artist, New York City (Feb. 16, 1982).

36. *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776, 782 (S.D.N.Y. 1968).



In two other infringement cases, courts considered the arrangements of objects depicted in advertisements.<sup>37</sup> They did not specifically single out the arrangements for protection, because the arrangements in these cases were but component parts of a larger composition.<sup>38</sup> Nonetheless, each court did weigh the originality of the arrangements, finding one "attractive"<sup>39</sup> in the case in which the copyright was upheld and the other "familiar"<sup>40</sup> in the case in which it was not.

Most arrangements for which a stylist or her employer would seek copyright protection, however, would be sufficiently original to merit protection.<sup>41</sup> Although the *House Beautiful* stylist, for example, used a painting, vases and flower arrangement with the permission of the individual authors, her combination and juxtaposition of them are

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37. *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131 (8th Cir.), *cert. denied*, 287 U.S. 666 (1932); *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F. Supp. 429 (W.D.N.Y. 1978).

38. In *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131 (8th Cir.), *cert. denied*, 287 U.S. 666 (1932), plaintiff had composed a newspaper ad that featured a picture of an arrangement of eight toiletries. Defendant's ad, almost an exact duplicate, included 10 toilet articles "arranged in much the same fashion as those shown in the plaintiff's advertisement." *Id.* at 133. In holding that the defendant had infringed plaintiff's ad, the court stated that the defendants "could not appropriate the plaintiff's advertisement by copying his arrangement of material, his illustrations and language, and thereby create substantially the same composition in substantially the same manner, without subjecting themselves to liability for infringement." *Id.* at 138.

In *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F. Supp. 429 (W.D.N.Y. 1978), another infringement case, an arrangement of objects was filmed in a beer commercial, which featured beer drinkers arm wrestling. The court noted that the "camera immediately focus[ed] on a close-up of the familiar triumvirate of bottle, can and filled foamy-headed glass of beer . . ." *Id.* at 435. The court found no infringement, pointing out that beer drinkers arm wrestling in a tavern was an idea or theme, and therefore not copyrightable. *Id.* at 440.

39. *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 132 (8th Cir.), *cert. denied*, 287 U.S. 666 (1932).

40. *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F. Supp. 429, 435 (W.D.N.Y. 1978).

41. Were the stylist, however, to recreate exactly a still life depicted in a painting in the public domain, a court probably would not find her work sufficiently original for copyright protection. Courts apply stricter standards to *reproductions* of works in the public domain than to *adaptations* or *rearrangements* of preexisting works. *Durham Indus. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980) (mere reproduction, with permission, of Walt Disney characters in plastic does not constitute enough originality for copyright protection); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir.) (plaintiff's trivial variations on the original Uncle Sam bank in the public domain did not merit copyright protection), *cert. denied*, 429 U.S. 857 (1976). *But see Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Doran v. Sunset House Distrib. Corp.*, 197 F. Supp. 940 (S.D. Cal. 1961), *aff'd*, 304 F.2d 251 (9th Cir. 1962); *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (S.D.N.Y. 1959).

original enough to merit copyright protection. Similarly, when Diana Vreeland collects costumes on behalf of the Metropolitan Museum and arranges them on mannequins with proper lighting, accessories and music, the resulting arrangement is original enough to be copyrightable.<sup>42</sup>

### B. Authorship

Short-lived works of art fall readily into the statutory categories of protectible "works of authorship."<sup>43</sup> The courts, however, in determining what constitutes authorship, have developed their own criteria based on the purpose and terms of the copyright clause of the Constitution. Careful to protect the expression of an idea, and not the idea alone, they have resorted to two alternative principles in determining what qualifies as protectible expression: a selection-arrangement principle and an enterprise principle. These principles evolved from the courts' analysis of the term "writings" in the Constitution and because of the fact that written works were the only category of works protected by the first copyright statute.

#### 1. Statutory Categories of Authorship

The Act lists seven broad categories of protected works of authorship.<sup>44</sup> Both environmental works and arrangements of objects could be classified under category five: pictorial, graphic and sculptural works.<sup>45</sup> An environmental work falls clearly under the sculptural rubric.<sup>46</sup> An arrangement of objects could also be classified as a

42. The costumes themselves, however, would not be copyrightable. See *Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187 (S.D.N.Y. 1934); House Report, *supra* note 3, at 55.

43. Congress used the term "works of authorship" in the Act to circumvent a problem created by the term "all the writings of an author" appearing in the 1909 Act. 17 U.S.C. § 4 (1976), amended by 17 U.S.C. § 102 (Supp. IV 1980). Because the 1909 Act's term tracked the language of the Constitution, art. I, § 8, cl. 8 ("securing . . . to Authors . . . the exclusive Right to their . . . Writings"), it was thought that works protected by the 1909 Act represented the outer, constitutionally permitted, limit to protectible forms of expression. House Report, *supra* note 3, at 51. To avoid this interpretation, Congress approved prior court decisions that "all the writings of an author" constituted a smaller class of works than that envisioned by the Constitution. It gave the fresh label "works of authorship" to this smaller class of works, thereby leaving room for expansion of statutory coverage to future works. House Report, *supra* note 3, at 51.

44. 17 U.S.C. § 102(a) (Supp. IV 1980) ("(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings").

45. *Id.* § 102(a)(5).

46. See House Report, *supra* note 3, at 55 ("Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill . . .").

sculpture or, alternatively, as a compilation, a separate category protected by the Act.<sup>47</sup>

Moreover, the categories, according to the legislative history, are “‘illustrative and not limitative,’ and . . . do not necessarily exhaust the scope of ‘original works of authorship.’”<sup>48</sup> The legislative history cautions, however, that in spite of contemplated expansion, “there are unquestionably . . . areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.”<sup>49</sup> This language probably refers to subject matter to which Congress has refused to grant copyright protection over the years,<sup>50</sup> notably utilitarian works that are thought to be more appropriate candidates for patent protection.<sup>51</sup>

## 2. Case Law: The Idea and Expression in Authorship

Although historically Congress has established the categories of copyrightable works, the courts have determined which works within those categories have sufficient hallmarks of authorship to qualify as “writings” of an “author” under the Constitution.<sup>52</sup> One of the first Supreme Court cases to interpret the copyright clause said that writings must consist of “*the fruits of intellectual labor.*”<sup>53</sup> Building on that case, courts have held that authorship requires an idea and its expression.<sup>54</sup> Because a copyright in effect grants a monopoly<sup>55</sup> to an

47. 17 U.S.C. § 103(a) (Supp. IV 1980).

48. House Report, *supra* note 3, at 53.

49. *Id.* at 52.

50. See 1 M. Nimmer, *supra* note 24, § 2.03[A], at 2-26 n.10. Professor Nimmer notes that there was a footnote in a draft of § 102(a) of the Act which suggested that typography, slogans, interior decoration and other such works were not intended to be protected. He questions whether there is a “negative implication in the fact that this exclusionary footnote was deleted from the Senate and House Committee Reports for the bill as finally enacted, although this particular statutory language remained unchanged.” *Id.* Professor Nimmer concludes that since the concept of works of authorship is intentionally left vague, “[t]he courts are thereby permitted, but not required, to recognize as protectible, types of works not expressly included in the seven category enumeration.” *Id.* at 2-28.

51. House Report, *supra* note 3, at 55 (discussing “uncopyrighted works of industrial design,” such as typefaces and television sets); see *Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (discussing typeface designs); *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187, 190 (S.D.N.Y. 1934) (discussing dress designs).

52. See Ebenstein, *Introduction to S. Rothenberg, Copyright Law* at xxix (1956).

53. Trade-Mark Cases, 100 U.S. 82, 94 (1879) (emphasis in original).

54. See *Synercom Technology Inc. v. University Computing Co.*, 462 F. Supp. 1003, 1012-13 (N.D. Tex. 1978); *Long v. Jordan*, 29 F. Supp. 287, 288 (N.D. Cal. 1939); 1 M. Nimmer, *supra* note 24, §§ 1.08[D], 2.03[D].

55. 17 U.S.C. § 106 (Supp. IV 1980) (copyright grants an author the exclusive right to reproduce the copyrighted work, prepare derivative works based upon it, distribute copies or phonorecords of the copyrighted work, perform and display the work publicly and authorize others to do any of the above).

author, courts have refused to allow authors to copyright ideas alone.<sup>56</sup> It is the expression of ideas that merits copyright protection.<sup>57</sup>

The idea and its expression must be a two-step process.<sup>58</sup> In *Baker v. Selden*,<sup>59</sup> the Supreme Court made this important distinction in deciding that a blank double-entry bookkeeping account book was not eligible for copyright protection: "[T]here [must be] a clear distinction between the book, as such, and the art which it is intended to illustrate."<sup>60</sup> In other words, the court would not protect an expression that was the idea itself.

With these basic concepts in mind, courts have approached their analysis of what works constitute copyrightable expression. Because the first copyright statute explicitly protected "any map, chart, book

56. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 56 (1911) ("But it is the writing only, and not the idea, that is monopolized; the mode of expression and not the thought conveyed."); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971); see *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n*, 320 F. Supp. 1303, 1310 (N.D. Ill. 1970); *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 F. Supp. 518, 525 (E.D.N.Y. 1965); *O'Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13, 14 (S.D.N.Y. 1946); *Bowen v. Yankee Network, Inc.*, 46 F. Supp. 62, 63 (D. Mass. 1942); *Seltzer v. Sunbrock*, 22 F. Supp. 621, 627 (S.D. Cal. 1938).

57. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), cert. denied, 429 U.S. 980 (1976); *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir.), cert. denied, 389 U.S. 832 (1967); *Musto v. Meyer*, 434 F. Supp. 32, 34 (S.D.N.Y. 1977), aff'd, 598 F.2d 609 (1979).

58. See *Long v. Jordan*, 29 F. Supp. 287, 288 (N.D. Cal. 1939) (in literary and artistic works, in which the arrangement of ideas represents labor separate from that involved in developing the idea, copyright will protect that arrangement).

59. 101 U.S. 99 (1879).

60. *Id.* at 102. The Court's distinction has been codified by the Act, which states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (Supp. IV 1980); see 1 M. Nimmer, *supra* note 24, § 2.03[D]. The House Report, however makes it clear that computer data bases and programs that incorporate authorship in the programmer's expression of original ideas are copyrightable. House Report, *supra* note 3, at 54; see Patent Rights in Inventions Made with Federal Assistance, Pub. L. No. 96-517, § 10, 94 Stat. 3028 (1980) (codified at 17 U.S.C.A. §§ 101, 117 (1977 & West Supp. 1982)). Professor Nimmer points out that such an extension raises a *Baker* issue: "Is it possible to render protectible the 'expression' of a program without necessarily granting a monopoly in its 'idea,' i.e., in the methodology or processes adopted by the programmer." 1 M. Nimmer, *supra* note 24, § 2.18[J].

The court in *Synercom Technology, Inc. v. University Computing Co.*, 462 F. Supp. 1003 (N.D. Tex. 1978) addressed this problem as it applied to computer input formats. The court found that when the order and sequence represented by the formats were the expression, "the skilled effort is not separable, for the form, arrangement, and combination is itself the intellectual conception involved. It would follow that only to the extent the expressions involve stylistic creativity *above and beyond* the bare expression of sequence and arrangement, should they be protected." *Id.* at 1014 (emphasis in original).

or books,"<sup>61</sup> in the early years of copyright courts more readily accorded copyright protection to works they recognized as "writings."<sup>62</sup> As a result, courts have held that copyright covers many printed works, such as answer sheets<sup>63</sup> and telephone books,<sup>64</sup> which do not seem to be original works of authorship.

In finding that these printed works were entitled to copyright protection, courts have developed two alternative principles, which are still the touchstones of authorship. The first principle is that copyright protects the selection and arrangement of material.<sup>65</sup> The second principle is that copyright protects enterprise.<sup>66</sup>

61. Public Act of May 31, 1790, ch. 15, 1 Stat. 124.

62. One reason postulated for the courts' timid approach to three-dimensional works is that when the Constitution and the first copyright statute were written, no method existed for copying three-dimensional works to deposit with the Library of Congress. See Note, Copyright—Study of the Term "Writings" in the Copyright Clause of the Constitution, 31 N.Y.U. L. Rev. 1263, 1298 (1956). There have been so few cases dealing with three-dimensional objects that one court relied on fabric cases, which often involve flower designs, to find that a plastic flower was a work of art entitled to copyright protection. *Prestige Floral v. California Artificial Flower Co.*, 201 F. Supp. 287, 290 (S.D.N.Y. 1962). As recently as 1972, another court observed that the novelty presented by the case before it was that the work was not a literary work, but a three-dimensional artificial flower. *First Am. Artificial Flowers, Inc. v. Joseph Markovits, Inc.*, 342 F. Supp. 178, 181 (S.D.N.Y. 1972). The court noted, however, that "[t]he copyrightability of 'three-dimensional' works . . . cannot be challenged . . ." *Id.*

63. *Harcourt Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 511, 522-23 (S.D.N.Y. 1971) (discussing "writings" as used in the Constitution and in the 1909 Act).

64. *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); accord *Northwestern Bell Tel. Co. v. Bedco of Minn., Inc.*, 501 F. Supp. 299 (D. Minn. 1980); *Southwestern Bell Tel. Co. v. Nationwide Indep. Directory Serv.*, 371 F. Supp. 900 (W.D. Ark. 1974).

65. Courts have applied the selection-arrangement principle to a wide variety of works, including: the audio-visual display of a computer game, *Atari, Inc. v. Armenia, Ltd.*, 1981 Copyright L. Rep. (CCH) ¶ 25,328, at 16,845 (N.D. Ill. Nov. 3, 1981) ("The worms travel in the same manner. The shots were fired in the same manner. The whole arrangement was very similar."); a color matching chart, *Pantone, Inc. v. A.I. Friedman, Inc.*, 294 F. Supp. 545, 548 (S.D.N.Y. 1968) ("The originality . . . lay in the new arrangement employed to facilitate selection and matching of colors . . ."); a novel, *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 F. Supp. 518, 525 (E.D.N.Y. 1965) ("[T]he particular pattern employed in arranging and expressing [the] idea is entitled to protection."); a play, *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir.) (copyright protection confined to the "arrangement of words the author uses to express his ideas"), *cert. denied*, 389 U.S. 832 (1967); a physics textbook, *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219, 224 (E.D.N.Y. 1963) (copyright protects the "conception, organization and presentation of material whether new or old"); a newspaper article, *Inter-City Press, Inc. v. Siegfried*, 172 F. Supp. 37, 41 (W.D. Mo. 1958) (article recounting facts in the public domain entitled to copyright protection "if there is distinguishable variation in the arrangement and manner of presentation which bespeaks of expres-

a. *Selection-Arrangement Principle of Authorship*

Historically, copyrightable expression has been found in the author's selection and arrangement of material. As one court said in applying this principle, "[t]he originality was displayed in taking commonplace materials and acts and making them into a new combination and novel arrangement which is protectible by copyright."<sup>67</sup> Applying the selection-arrangement principle, courts have found authorship even in such seemingly unoriginal works as a commercial paper discount chart,<sup>68</sup> a compilation of freight tariffs,<sup>69</sup> and a French vocabulary list.<sup>70</sup>

The selection-arrangement principle may also be applied to the work of a stylist. Often she has to "scout" ten houses before finding one with the type of wall painting she likes. She selects her own "props" for a picture and then arranges all her material according to the rules of composition and the caprices of her imagination, thereby fulfilling the selection-arrangement criterion, which has been used to find a work copyrightable ever since the first copyright statute was passed in 1790.

Similarly, an environmental artist often takes commonplace materials such as building lights, and arranges them in an unusual composition. The artist in this case selects which buildings she wants to use, which lights to turn on and which windows to darken in order to come up with the arrangement that will best express her idea.

b. *Enterprise Principle of Authorship*

The 1909 Act extended explicit protection to "[b]ooks, including composite and cyclopedic works, directories, gazetteers, and other compilations."<sup>71</sup> In finding that such so-called "fact works"<sup>72</sup> were

sion peculiar to authorship"); seed packets, *Stecher Lithographic Co. v. Dunston Lithographic Co.*, 233 F. 601, 603 (W.D.N.Y. 1916) ("[D]etails, design and combination of lines and colors originated with the complainant . . ."); and a legal case reporter. *Callaghan v. Myers*, 128 U.S. 617, 649 (1888) (selection of cases, arrangement of them in a particular order, syntheses of other cases cited in them, and division of reports into volumes merits copyright protection).

66. See *infra* notes 71-80 and accompanying text.

67. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947).

68. *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35 (7th Cir.), *cert. denied*, 273 U.S. 738 (1926).

69. *Guthrie v. Curlett*, 36 F.2d 694 (2d Cir. 1929).

70. *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874, 876 (2d Cir. 1941).

71. 17 U.S.C. § 5(a) (1976), *amended by* 17 U.S.C. § 102(a) (Supp. IV 1980).

72. This is the term Professor Gorman has used to describe maps, news and historical accounts, directories, advertising art, photographs, and legal and business forms. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1570 (1963).

works of authorship, however, courts had to resort to an enterprise rationale:<sup>73</sup> “[T]he business of getting out a directory is an expensive, complicated, well-organized endeavor, requiring skill, ingenuity, and original research.”<sup>74</sup> Applying this principle, courts have found authorship in a news photo,<sup>75</sup> an index of names culled from the New York Times Index<sup>76</sup> and a gardening directory.<sup>77</sup>

Some authorities have questioned whether copyright should protect the enterprise that goes into creating “fact works.”<sup>78</sup> One commentator suggested that they more logically might be protected by the law of unfair competition.<sup>79</sup> He noted:

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73. The Second Circuit in particular has applied an enterprise rationale to protect fabric designs against infringement. When a textile company adapted a painting in the public domain, *Sopra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092 (2d Cir. 1974), or merely expanded a purchased design to fit the rollers that print the design on fabric, *Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F. Supp. 1366 (S.D.N.Y.), *aff'd*, 415 F.2d 1007 (2d Cir. 1969), the courts found these adaptations sufficiently original to qualify the fabric for copyright protection. 490 F.2d at 1094; 295 F. Supp. at 1368. On the other hand, when a fabric company sees the “adapted” fabric, makes a slight change in it and prints it, courts in the Second Circuit have been strict about finding infringement. *E.g.*, *Concord Fabrics, Inc. v. Marcus Bros. Textile*, 409 F.2d 1315, 1316 (2d Cir. 1969); *Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F. Supp. 1366, 1368 (S.D.N.Y.), *aff'd*, 415 F.2d 1007 (2d Cir. 1969). These courts seem to recognize the first company’s enterprise in detecting potential in the design and spending the money necessary to adapt it to textile printing techniques.

74. *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 485-86 (9th Cir. 1937).

75. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (originality found in the selection of camera, film, lens, site and time for the picture).

76. *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977). In *New York Times* the publisher of the New York Times Index brought an action for infringement against a publisher who was indexing names in the Times Index. In determining the extent of the protection accorded works covered by the enterprise rationale, the court said: “The nature of the Times Index does not require extensive comment, except to note that it is rather in the nature of a collection of facts than in the nature of a creative or imaginative work.” *Id.* at 221. See *infra* note 169.

77. *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977) (“[Plaintiff] had collected and categorized [flower sources publicly available] by her own individual effort.”).

78. See *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369-70 (5th Cir. 1981) (suggesting that directory cases be considered *sui generis*). One commentator has noted that what courts most frequently find protectible in “fact works” is the arrangement of data, because that does little violence to the arrangement principle of copyright protection. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516, 527-28 (1981). Denicola adds, however:

It is the effort of collecting that must be rewarded in order to preserve incentive and safeguard the author’s investment of time and money, not the act of placing Abbott before Baker. Unable to find authorship in the process of collecting, however, the courts continue to look to the act of arranging as the touchstone for protection.

*Id.* at 528.

79. Gorman, *supra* note 72, at 1571.

[T]he author's raw materials are objective data, and his unique contribution is to gather these facts and to express them in language or visual images so ordered as to be intelligible and useful to others. The pattern and expression are basically mechanical and do not reflect the personality of the author.<sup>80</sup>

Unlike arranging facts, arranging objects or lights in a building involves a pattern and expression, which are creative, not mechanical, and which do reflect the personality of the author. Although resort to the enterprise principle is not even necessary for nonfactual arrangements, if a court were to apply the principle, it would find that short-lived works qualify thereunder. Producing a ten-page feature on wall art or a costume exhibit requires extensive research to find appropriate homes or clothes to feature. The authors must find props and accessories, sometimes must commission other artists and craftsmen to produce necessary accoutrements and must coordinate everyone's schedules. Similarly, the task of just getting the permission required to turn on lights in twelve city skyscrapers is an enterprise requiring ingenuity and organization.

### 3. Objections to Finding Authorship in Short-Lived Works

Several objections to the finding of authorship in short-lived works of art are easily answered. One objection is that arrangements of objects are often created for the purpose of selling a product, be it a china service, a watch or a bottle of wine, and therefore should not be accorded copyright protection. The Supreme Court rejected this argument when it first addressed whether an advertisement was a proper subject of copyright.<sup>81</sup> The Court said that "[i]f there is a restriction [in the words of the copyright act] it is not to be found in the limited pretensions of these particular works."<sup>82</sup> What the Court found copyrightable in the advertisement, of course, was its arrangement of material.<sup>83</sup>

A second possible argument against copyright for short-lived works is that they may be created for useful purposes and therefore may be eligible for patent, rather than copyright, protection. In *Mazer v.*

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80. *Id.* at 1570.

81. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

82. *Id.* at 250.

83. *Id.* ("There is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines and colors, are the original work of the plaintiffs' designer." (emphasis in original)); cf. *Drop Dead Co. v. S.C. Johnson & Son*, 326 F.2d 87, 93 (9th Cir. 1963) (label on can of furniture polish copyrightable), *cert. denied*, 377 U.S. 907 (1964). In *S.C. Johnson* the Ninth Circuit held that the plaintiff had shown "beyond doubt the original creation . . . of a label particularly and peculiarly embodying the numerous commonplace elements contained in it." *Id.*



*Stein*,<sup>84</sup> however, the Supreme Court held that an artist could copyright a statue intended for reproduction as a lamp base, noting that it found "nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration."<sup>85</sup> The Act codified this extension of copyright protection, yet preserved the distinction that the design of a useful article shall be copyrightable only to the extent the pictorial, graphic or sculptural features can exist apart from the utilitarian aspects of the article.<sup>86</sup>

This liberalization answers the argument that an arrangement of lights in a building also serves to light the building.<sup>87</sup> The whole purpose of the light arrangement, however, is to make the building pleasing from the exterior, not to provide light to the interior, making the artistic features of the work at least conceptually separable from its utilitarian features. As one commentator observed about one of the most famous environmental works of art, Christo's "Running Fence," "[it] did not contain sculptural features that were physically separable from the utilitarian aspects of the fence, but the whole point of the work was that the artistic aspects of the work were conceptually separable."<sup>88</sup>

Short-lived works of art, therefore, readily meet both the selection-arrangement and enterprise criteria of authorship employed by the courts. Moreover, the courts have already rejected the argument that an otherwise copyrightable work is excluded because it was created for advertising use or because it fulfills some other useful function. While courts originally developed these guidelines for application to works that were in fact "writings," the Supreme Court has recently noted that the term has "not been construed in [its] narrow literal

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84. 347 U.S. 201 (1954).

85. *Id.* at 218. But in his dissenting opinion in the same case, Justice Douglas said:

The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, bookends, clocks, lamps, doorknockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays. Perhaps these are all 'writings' in the constitutional sense. But to me, at least, they are not obviously so. It is time that we came to the problem full face.

*Id.* at 220-21.

86. 17 U.S.C. § 101 (Supp. IV 1980); see House Report, *supra* note 3, at 54-55.

87. See *infra* note 127 (Copyright Office initially deemed a sculptural curtain a useful article).

88. 1 M. Nimmer, *supra* note 24, § 2.08[B], at 2-95; see Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) (belt buckle held copyrightable because its sculptural element was conceptually, if not physically, separable from its utilitarian purpose).

sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles."<sup>89</sup>

### C. Fixation in Tangible Form

The third statutory, and indeed, constitutional,<sup>90</sup> requirement for copyright protection is that a work must be "fixed in any tangible medium of expression."<sup>91</sup> According to the Act's legislative history,

a work would be considered "fixed in a tangible medium of expression" if there has been an authorized embodiment in a copy . . . and if that embodiment "is sufficiently permanent or stable" to permit the work "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>92</sup>

The problem with this definition of fixation arises from the Act's definition of its key word "copy," which largely repeats that of fixation:

"Copies" are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object . . . in which the work is first fixed.<sup>93</sup>

Despite this circumlocution in the legislative history, it can be said that the fixation requirement mandates, first, that the author create a copy of her intellectual conception, and second, that the copy be stable enough for other people to perceive it.

#### 1. Embodying the Expression in a Copy

Just as the authorship requirements for copyright in written works can be applied to short-lived works of art, the "copy" requirement as

89. *Goldstein v. California*, 412 U.S. 546, 561 (1973); see *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); Chafee, *Reflections on the Law of Copyright: II*, 45 Colum. L. Rev. 719, 735-36 (1945).

90. U.S. Const. art. 1, § 8, cl. 8. As Professor Nimmer has noted, although there are no cases holding that tangible form is a prerequisite to copyright protection, if the constitutional term "writings" is to have any meaning, it must at least suggest "some material form, capable of identification and having a more or less permanent endurance." 1 M. Nimmer, *supra* note 24, § 1.08[C][2] (quoting *Canadian Admiral Corp. v. Rediffusion, Inc.*, 1954 Can. Exch. 382, 383); see, e.g., *Goldstein v. California*, 412 U.S. 546, 561 (1973) (writings "include any *physical* rendering of the fruits of creative intellectual or aesthetic labor" (emphasis added)); *Trade-Mark Cases*, 100 U.S. 82, 94 (1879) ("The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like." (emphasis in original)).

91. 17 U.S.C. § 102(a) (Supp. IV 1980).

92. House Report, *supra* note 3, at 53 (quoting 17 U.S.C. § 101 (Supp. IV 1980)).

93. 17 U.S.C. § 101 (Supp. IV 1980).

it has been applied to written works can also be applied to short-lived works of art. Application of the "copy" requirement to a short-lived work, however, raises the question whether the expression of the idea—the display of vases, arrangement of lights or lines painted on a city street—is also a tangible medium of expression, or, in other words, the copy itself. One might argue that the arrangement has to be recorded before it is fixed in a tangible form. There is no reason, however, to require that the expression of the idea and its embodiment in tangible form be subject to the same two-step process as the idea and expression process.<sup>94</sup> Unlike the requirement that an idea and its expression be separable to protect against granting a monopoly over ideas,<sup>95</sup> no comparable policy exists to require the same separation between the expression of an idea and its embodiment in a copy, except for an incidental administrative one.<sup>96</sup> Indeed, the Act contains no such requirement.

When an author completes a short story, with all the dialogue, characters and events in place, her handwritten manuscript is a copy and her work is protected from the moment of its creation.<sup>97</sup> By analogy, when a stylist arranges a still-life, with vases, flowers and furniture all in place, that is her manuscript and it likewise should be considered a copy.<sup>98</sup> No additional "copy," such as a photograph, should be necessary for copyright purposes, just as the manuscript's embodiment in book form is not necessary in order to copyright a novel.<sup>99</sup> The same reasoning should apply to environmental works of art: The artist's first expression in a form the public can perceive should not have to be otherwise recorded to qualify for copyright protection.

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94. See *supra* note 58 and accompanying text.

95. See *supra* notes 55-56 and accompanying text.

96. The administrative requirement of depositing copies with the Copyright Office for the use of the Library of Congress, 17 U.S.C. § 407(b) (Supp. IV 1980), is not relevant. See *infra* text accompanying notes 103-107.

97. See 17 U.S.C. § 102 (Supp. IV 1980); *id.* § 408(a). Section 408 provides that a copyright owner may register her work at any time. Registration, however, must precede any infringement action. *Id.* § 411; Comment, *The Fine Art of Preemption: Section 301 and the Copyright Act of 1976*, 60 Or. L. Rev. 287, 287-88 n.8 (1981) [hereinafter cited as *Preemption*]; see also I M. Nimmer, *supra* note 24, § 5.05 [B][1].

98. See Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 New Eng. L. Rev. 227 (1981). Professor Traylor suggests that copyright protection for choreography should be recognized from the moment a dance is "set" in the body of a dancer, just as a painting is protected from the moment the last brush stroke is made. *Id.* at 234-35.

99. I M. Nimmer, *supra* note 24, § 2.04[D][2] (Even under the 1909 Act, "the fact that a work was in typewritten, mimeographed, or other form which might be regarded as a tentative rather than final form, did not derogate from its status as a book for copyright purposes.").

Language in the Act's legislative history is confusing on this point, however, in that it does seem to require a two-step expression-copy scenario. It states that "[t]he two essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute."<sup>100</sup> "Original work" in this context, however, does not mean "expression." As one commentator noted, "an 'original work' is not the first or the only physical representation of a work. An 'original work' exists in the artist's mind, and any embodiment of it, even in a unique representation, is a 'copy.'"<sup>101</sup> This analysis, in fact, comports with another portion of the legislative history: "It is possible to have 'an original work of authorship' without having a 'copy' . . . and it is also possible to have a 'copy' . . . embodying something that does not qualify as an 'original work of authorship.'"<sup>102</sup>

Confusion over the definition of "copy," which beset the courts before the Act became effective, persisted in part because of the administrative copyright requirement that two copies of the work be deposited with the Copyright Office for the use of the Library of Congress.<sup>103</sup> The Act, however, specifically notes that such a deposit is not a condition of copyright protection.<sup>104</sup> The requirement merely assures that once a work has been published with a copyright notice, two copies of the work will be deposited within three months; failure

100. House Report, *supra* note 3, at 53.

101. See Millinger, *Copyright and the Fine Artist*, 48 Geo. Wash. L. Rev. 354, 360 (1980).

102. House Report, *supra* note 3, at 53; see 1 M. Nimmer, *supra* note 24, § 1.08[C][2]. Professor Nimmer discusses the fact that a live television broadcast of a sports event is not a writing in the sense of a work of authorship, and he questions whether simultaneous videotaping, as provided by the Act, would make it one: "This extension of the simultaneous recordation concept may well be held unconstitutional . . ." *Id.* But in *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982), the court said that although the performance of a sport was not copyrightable at common law, "[a]nyone who has ever watched ABC's Monday Night Football, for example, knows that the commentary of the announcers and such effects as instant replay in slow motion add immensely to the quality of a sports telecast." *Id.* at 378. The court quoted the legislative history of the Act, which shows that Congress based its extension of copyright to a sports broadcast on an enterprise rationale:

When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order there is little doubt that what the cameramen and the director are doing is what constitutes "authorship."

*Id.* (quoting House Report, *supra* note 3, at 52). A live sports broadcast, however, is not analogous to an arrangement of objects or an environmental work of art because the content of the latter two works already satisfies the criteria for authorship. Short-lived works do not require the act of filming to turn them into "works of authorship."

103. 17 U.S.C. § 407(a), (b) (Supp. IV 1980).

104. *Id.* § 407(a).

to do so upon demand by the Register may result in a fine.<sup>105</sup> Neither deposit nor registration,<sup>106</sup> however, should be confused with the fixation requirement,<sup>107</sup> which is a statutory prerequisite to copyright protection.

Keeping in mind judicial confusion, Congress, in writing the Act, attempted to change the result in the only Supreme Court case<sup>108</sup> that has dealt with the issue of fixation.<sup>109</sup> In that case the Court found that a piano roll did not constitute a copy of a musical composition and therefore could be copied with impunity.<sup>110</sup> Defining a copy as " 'a written or printed record . . . in intelligible notation,' "<sup>111</sup> the Court decided that the rolls were not copies because even those skilled in making the perforations on them could not read the holes as musical notes without the aid of a machine.<sup>112</sup> The Act changes this result by permitting fixation by any method through which a work can ultimately be perceived, even if a machine is necessary to permit perception.<sup>113</sup>

A Second Circuit case, *Stern Electronics, Inc. v. Kaufman*,<sup>114</sup> abided by the change in the Act. In *Stern* the licensee of a video game

105. *Id.* § 407(d); House Report, *supra* note 3, at 150.

106. See *supra* note 97.

107. See *Atari, Inc. v. Amusement World*, 1982 Copyright Law Rep. (CCH) ¶ 25,347, at 16,955, 16,959 (D. Md. Nov. 27, 1981). In *Atari*, the defendants unsuccessfully argued that because the plaintiff had registered a videotape of their computer game, rather than the circuit board in which it was fixed, it was not entitled to copyright protection. Cf. *CBS v. DeCosta*, 377 F.2d 315, 320 (1st Cir.) (character of Paladin not copyrightable; "[W]e cannot say that it would be impracticable to incorporate into the copyright system a procedure for registering 'characters' by filing pictorial and narrative descriptions in an identifiable, durable, and material form."), *cert. denied*, 389 U.S. 1007 (1967).

108. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

109. According to the House Report:

This broad language [of the statute] is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co.* . . . under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures . . . whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

House Report, *supra* note 3, at 52.

110. 209 U.S. 1, 18 (1908).

111. *Id.* at 17.

112. *Id.* ("A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read.")

113. 17 U.S.C. § 102(a) (Supp. IV 1980).

114. 669 F.2d 852 (2d Cir. 1982).

called "Scramble" copyrighted the game as an audiovisual work rather than copyrighting the written computer program that determined the game's display.<sup>115</sup> The infringing company argued that the sights and sounds did not satisfy the statutory fixation requirement because their sequence on the screen varied, depending on the actions of each player.<sup>116</sup>

In holding that the audiovisual display was copyrightable, the court concluded that the computer's memory device satisfied the statutory requirement of a "copy" in which the work is fixed.<sup>117</sup> Such a copy was needed in this case because the videotape did not reflect the many possible renditions of the game.<sup>118</sup> In the case of a short-lived work of art, however, no comparable reason exists for requiring a separate copy.<sup>119</sup>

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115. *Id.* at 855. The reason the plaintiff copyrighted the audio-visual display rather than the computer program was to prevent "knock-offs" of the display by an infringer who had merely to write a new computer program to produce the same images and sounds on the screen. See also 1 M. Nimmer, *supra* 24, § 2.18[H][3][b].

116. 669 F.2d at 855; see *In re Certain Coin-Operated Audio-Visual Games and Components Thereof*, 1981 Copyright L. Rep. (CCH) ¶ 25,299, at 16,666 (U.S. Int'l Trade Comm'n June 25, 1981). The Commission noted that "for statistical reasons, it is virtually impossible for a performance of Galaxian ever to duplicate that performance fixed in the video tape." *Id.* at 16,680. The Commission also discussed, but declined to rule on, whether a player of a video game might be considered a coauthor of each performance of the play mode. *Id.*

117. 669 F.2d at 856; see *Atari, Inc. v. Amusement World*, 1982 Copyright L. Rep. (CCH) ¶ 25,347, at 16,955, 16,959 (D. Md. Nov. 27, 1981); *Midway Mfg. Co. v. Dirkschneider*, 1982 Copyright L. Rep. (CCH) ¶ 25,358, at 17,006, 17,015 (D. Neb. July 15, 1981); cf. *Tandy Corp. v. Personal Micro Computers, Inc.*, 524 F. Supp. 171, 173 (N.D. Cal. 1981) (applying the Act to find that a computer program imprinted on a silicon chip, which enabled the computer to read the program and act on its instructions, satisfied the fixation requirement). But see *Data Cash Sys., Inc. v. JS&A Group, Inc.*, 480 F. Supp. 1063, 1068-69 (N.D. Ill. 1979) (applying the 1909 Act to find that a "Read Only Memory" is not a copy of a computer program, and therefore, like a piano roll, could be copied with impunity), *aff'd on other grounds*, 628 F.2d 1038 (7th Cir. 1980). In dicta, the *Data Cash* court misinterpreted the Act to require the result it reached under the 1909 Act. *Id.* at 1068.

118. Arguably the copy was also needed because the entire "play mode" of a video game could neither be seen nor heard until a player inserted his money in the machine. See *Midway Mfg. Co. v. Artic Int'l, Inc.*, 211 U.S.P.Q. (BNA) 1152, 1153-54 (N.D. Ill. 1981) (distinguishing a video game's "attract mode," which entices a player, from its "play mode," which engages the player).

119. Similarly, in copyrighting choreography, it has been suggested that the dancer's body is the material object in which the work is fixed, and that no additional fixation is necessary. Traylor, *supra* note 98, at 238. In fact, Professor Traylor noted that a choreographer often employs one dancer whose task it is to remember the choreographer's works and, in effect, to be the company's living archive. *Id.* She argues that a videotape or film of a dance is an imperfect record because the camera only records from one angle and therefore does not create a perfect record of each step. *Id.* at 234. While several dance notation systems exist, very few dancers can write the notation and fewer still can perform from it. *Id.* at 233. See also Comment,

The Act would also presumably change the result in a case that hinged on the loss of statutory copyright protection when a work entered the public domain.<sup>120</sup> In that case the City of Chicago allowed a model of a monumental sculpture designed by Picasso to enter the public domain.<sup>121</sup> The city had permitted widespread reproduction of the uncopyrighted model before the sculpture was built.<sup>122</sup> Once it was built, the city obtained statutory protection for the sculpture. The court declared the city's copyright invalid in a suit brought by a publisher who wanted to market a copy of the sculpture. In relevant dicta, the court said:

The monumental sculpture did not exist at this point in time [when the model entered the public domain] and accordingly there could be no copyright in the monumental sculpture, either common law or statutory. It is settled that a copyright can exist only in a perceptible, tangible work. It can not exist in a vision.<sup>123</sup>

Had this case been decided under the Act, common-law copyright would not have been an issue. The court, therefore, would have had to determine whether the model was a copy. The Act recognizes the distinction between a work of authorship and the many kinds of copies that may embody it.<sup>124</sup> Thus, there should be no doubt under

*Moving to a New Beat: Copyright Protection for Choreographic Works*, 24 U.C.L.A. L. Rev. 1287, 1294 (1977), in which the author discusses the current laws protecting choreography. This Comment is interesting to read in conjunction with Traylor's article, *supra* note 98, which focuses more on the practical problems of copyrighting choreography.

120. *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n*, 320 F. Supp. 1303 (N.D. Ill. 1970).

121. *Id.* at 1309. See *infra* note 151 and accompanying text.

122. 320 F. Supp. at 1306-07.

123. *Id.* at 1310 (footnote omitted). Other courts in dicta have glossed over the tangibility requirement, treating it merely as a safeguard against copyrighting an idea. *E.g.*, *Uneeda Doll Co. v. P. & M. Doll Co.*, 353 F.2d 788, 789 (2d Cir. 1965) ("It is well settled that there can be no copyright on an 'idea' itself but only on the tangible 'expression' of the idea."); *Roy Export Co. v. CBS*, 503 F. Supp. 1137, 1148 (S.D.N.Y. 1980) ("The requirement of tangible form . . . establishes only that a mere idea is not copyrightable; only a tangible work is."), *aff'd*, 672 F.2d 1095 (2d Cir. 1982); *O'Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13, 14 (S.D.N.Y. 1946) ("[A]n author has no property right in his ideas unless . . . given embodiment in a tangible form."); *Bowen v. Yankee Network, Inc.*, 46 F. Supp. 62, 63 (D. Mass. 1942) ("Ideas not reduced to concrete form are not protected."); *cf.* Chafee, *supra* note 13, at 504 ("The word 'Writings' [under the 1909 Act] seems to exclude from copyright protection, not only ideas still in the author's head, but also transitory expressions of his ideas.").

124. House Report, *supra* note 3, at 53 ("Thus . . . a 'book' is not a work of authorship, but is a particular kind of 'copy.' Instead, the author may write a 'literary work,' which in turn can be embodied in a wide range of 'copies' . . . including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth."); Millinger, *supra* note 101, at 359; *accord* 1 M. Nimmer, *supra* note 24,

the Act that Picasso's work of authorship, his intellectual conception, was the monumental sculpture, and its model was merely a convenient means of reducing it to tangible form.

Although short-lived works of art *can* be embodied in a wide range of "copies," including artists' renderings, engineering drawings, photographs, films, magazine layouts and calendars, such works should be considered embodied in a copy, and therefore entitled to copyright protection, from the moment they are created.

## 2. The Stability of the Copy

The second fixation criterion under the Act is that the copy in which the work is embodied must be stable enough for it "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>125</sup> Because Congress' goal was to make the Act broad enough to cover as yet unforeseen forms of expression,<sup>126</sup> it did not address the narrower, more fundamental issue of how long the work must be fixed in tangible form in order to be considered stable. As a result, artists do not know whether a one-month window display, a three-month arrangement of paintings on the wall of a museum or a light show performed every night during the summer is fixed long enough for copyright purposes.<sup>127</sup>

The legislative history does note that fixation would exclude "purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer."<sup>128</sup> The history also suggests some examples of unfixed works: "[C]horeography that has never been filmed or notated, an extemporaneous speech, 'original works of authorship' communicated solely through

§ 2.03[C] ("There is but a single work of authorship, no matter how numerous and diverse the copies.").

125. House Report, *supra* note 3, at 53.

126. *Id.* at 52. See *supra* note 8 and accompanying text.

127. One commentator has suggested that the work of a conceptual artist such as Christo would not meet the fixation requirement because his "Running Fence" and "Wrapped Buildings" last too short a time. Millinger, *supra* note 101, at 359. Christo's lawyer, however, said he did not attempt to copyright the "Running Fence" because of the problem of putting proper copyright notice on its 24.5-mile span. Telephone interview with Scott Hodes of Arvey, Hodes, Costello & Burman, Chicago, Ill. (Aug. 6, 1982). See *infra* notes 162-64 and accompanying text. When he attempted to register Christo's "Valley Curtain" with the Copyright Office in 1972, the Office initially rejected the application because it deemed a curtain a useful article. Hodes convinced the Office, however, that the 200,000 square-foot bright orange curtain, which was hung outdoors, was a work of art, rather than a useful item. Hodes registered a sketch of the proposed curtain with the Copyright Office, which raised no objection about the length of time the curtain would stay in place. The curtain stood for less than 27 hours before it was blown down by the wind.

128. House Report, *supra* note 3, at 53.



conversations or live broadcasts, and a dramatic sketch or musical composition improvised . . . without being recorded or written down."<sup>129</sup> Obviously, an arrangement of objects or of lights in a building is more permanent than any of the works in this list.

The courts, like Congress, have not addressed the question of how long a work must be fixed in a copy for it to be stable. Even the *Stern* court, in deciding that the audiovisual display of a video game was sufficiently "fixed," emphasized the sights and sounds that remained constant during each play of the game, rather than the duration of time in which they were seen and heard.<sup>130</sup>

Both an arrangement of objects and a pattern of lights in a building last longer than a transient image on a screen. The argument that is raised about an arrangement of objects in particular, however, is that someone can move the objects in the arrangement around, defeating the fixation requirement. Yet, the same argument can be applied to almost any three-dimensional work of art. An arrangement of objects is not physically, but visually, held together. It is the tension between the objects that lets the eye know where the arrangement begins and ends. This is true of many sculptural works, such as Henry Moore's "Reclining Figure," comprised of two separate masses of stone which must be placed in proper juxtaposition to each other, and Alexander Calder's mobiles, which take on different configurations when their metal pieces are moved by a breeze. Just as moving one of Moore's sculptural pieces two inches or swinging Calder's masses of metal in the breeze does not destroy the respective works, moving one of the objects in an arrangement would not destroy it as a work of art. In fact, it is the selection of elements that are juxtaposed with each other as much as their actual juxtaposition, that makes Moore's and Calder's sculptures so effective. Similarly, the selection of objects that makes up an arrangement largely determines how effective the arrangement will be. If these items are always present in the arrangement, like the sights and sounds in a video game, a slight rearrangement will not destroy the work. Indeed, copyright has often protected the enterprise involved in selecting materials, such as the names for a telephone book, even when no art has been required in their arrangement.<sup>131</sup>

The proliferation of computer games may cause other courts to liberalize the fixation requirement. Just as the term "writings" has been liberally interpreted by the courts to further the constitutional purpose of protecting artists' property rights in their work and promoting artistic progress, so should the tangibility requirement of the statute be liberally construed.

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129. *Id.* at 131.

130. *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856-57 (2d Cir. 1982).

131. See *supra* notes 73-80 and accompanying text.

### III. THE INADEQUACY OF COMMON-LAW COPYRIGHT

If a court were to find that neither an arrangement of objects nor a pattern of lights in a building are sufficiently fixed for statutory copyright protection, such short-lived works would be left to the protection of state law.<sup>132</sup> The Act, while preempting state laws that protect the same rights as the statute does, specifically provides that it does not limit or annul state laws or statutes covering works of authorship not fixed in any tangible medium of expression.<sup>133</sup> State copyright law is generally referred to as "common-law copyright,"<sup>134</sup> although it is more accurately termed "right of first publication."<sup>135</sup>

Common-law copyright has been defined as "an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely . . . ."<sup>136</sup> Thus, for example, when the stylist found a newspaper photographer recording her work, she could have asserted a common-law copyright in her arrangement. She had the right, on behalf of the magazine that employed her, to protect the magazine's right to publish her work first.

The extent of legal protection provided unfixed works by the preemption loophole, however, is negligible. Since common-law copyright is a state-law doctrine, each state would look to its own laws in deciding whether to extend protection to unfixed works.<sup>137</sup> According to Professor Nimmer, "[t]here have been no cases squarely ruling

132. The Act provides:

On and after January 1, 1978, 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 are *fixed in a tangible medium of expression* and come within the subject matter of copyright . . . are governed exclusively by this title.

17 U.S.C. § 301(a) (Supp. IV 1980) (emphasis added). Professor Nimmer has interpreted this language to mean that "any work which is not 'fixed in a tangible medium of expression' is indisputably immune from federal preemption." 1 M. Nimmer, *supra* note 24, § 2.02.

133. 17 U.S.C. § 301(b) (Supp. IV 1980); *Preemption*, *supra* note 97, at 288.

134. 1 M. Nimmer, *supra* note 24, § 2.02.

135. *E.g.*, *Birnbaum v. United States*, 588 F.2d 319, 326 (2d Cir. 1978); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 346, 244 N.E.2d 250, 254, 296 N.Y.S.2d 771, 776 (1968).

136. *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 345-46, 244 N.E.2d 250, 254, 296 N.Y.S.2d 771, 776 (1968).

137. *See* 1 M. Nimmer, *supra* note 24, § 2.02. New York has a statute protecting an "unpublished, undedicated or copyrighted dramatic composition, or musical composition known as an opera." N.Y. Gen. Bus. Law § 338 (McKinney 1968). The statute makes it a misdemeanor for anyone to perform publicly such a work without the consent of the owner. *Id.*

on the question of whether common law copyright may be claimed in a non-tangible oral or visual expression."<sup>138</sup>

New York common law to date, however, seems to require that a work be in a tangible form before it may be accorded common-law copyright protection.<sup>139</sup> The New York Court of Appeals, in lengthy dicta, once entertained the idea of common-law copyright protection for conversation.<sup>140</sup> Ernest Hemingway's widow sued Random House, the publisher of A.E. Hotchner's conversations with her husband, for infringement. She argued that Hemingway's conversation one day became his written manuscript the next.<sup>141</sup> The court acknowledged that New York law required a work to be in tangible form for common-law protection,<sup>142</sup> but quoted Nimmer's contention that the underlying rationale for common-law copyright applied whether a work was tangible or not.<sup>143</sup> The court, in any event, merely entertained the problem of copyright for conversation, deciding that Hemingway had approved of Hotchner's use of his conversations.<sup>144</sup>

138. 1 M. Nimmer, *supra* note 24, § 2.02.

139. *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 346, 244 N.E.2d 250, 254, 296 N.Y.S.2d 771, 776 (1968); *Palmer v. De Witt*, 47 N.Y. 532 (1872); *accord Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1207-08 (W.D. Va. 1981); *see Roy Export co. v. CBS*, 503 F. Supp. 1137, 1148 (S.D.N.Y. 1980) ("[O]nce that idea had been embodied in tangible form, as it was in the Compilation, then the skill and talent of the producer is entitled to common law copyright protection . . ."), *aff'd*, 672 F.2d 1095 (2d Cir. 1982). *But see CBS v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964); *Jenkins v. News Syndicate Co.*, 128 Misc. 284, 219 N.Y.S. 196 (Sup. Ct. 1926). In *Documentaries Unlimited* the court granted summary judgment to Allan Jackson for defendant's infringement of his common-law copyright in his broadcast coverage of President Kennedy's death. "A broadcaster's voice and style of talking is, to all intents and purposes, his personality, a form of art expression, and his distinctive and valuable property." 42 Misc. 2d at 725, 248 N.Y.S.2d at 811. In *Jenkins* a freelance writer "talked" her whole story to an editor, but then decided not to write it. The editor printed her opinions in the form of a purported interview, using her very words. The court said the writer had produced a literary work in which she had a common-law property right. 128 Misc. at 286, 219 N.Y.S. at 199.

140. *Estate of Hemingway v. Random House, Inc.* 23 N.Y.2d 341, 349, 244 N.E.2d 250, 256, 296 N.Y.S.2d 771, 779 (1968).

141. *Id.* at 345, 244 N.E.2d at 253-54, 296 N.Y.S.2d at 776.

142. *Id.* at 346, 244 N.E.2d at 254, 296 N.Y.S.2d at 776.

143. "However, as a noted scholar in the field has observed, 'the underlying rationale for common law copyright (i.e., the recognition that a property status should attach to the fruits of intellectual labor) is applicable regardless of whether such labor assumes tangible form' (Nimmer, Copyright, § 11.1, at 40)." *Id.* at 346, 244 N.E.2d at 254, 296 N.Y.S.2d at 777. Professor Nimmer argues that if a writer made an oral submission of a manuscript to a motion picture studio, there should be no reason to give the author less of a property right in the oral submission than in a written submission under common-law copyright. 1 M. Nimmer, *supra* note 24, § 2.02.

144. 23 N.Y.2d at 349-50, 244 N.E.2d at 255-56, 296 N.Y.S.2d at 778-79.

Even if unfixed works were accorded common-law copyright protection by the state courts, the common-law doctrine raises the problem of "publication,"<sup>145</sup> a concept that the legislative history of the Act terms "increasingly artificial and obscure,"<sup>146</sup> and a concept which the Act was designed to eliminate.<sup>147</sup> Under the common-law copyright doctrine, an author's right to first publication is extinguished, by definition, when the work is first published.<sup>148</sup> To avoid harsh results, courts have distinguished between a limited publication,<sup>149</sup> which will not divest an author of her common-law copyright,<sup>150</sup> and a general publication, which will.<sup>151</sup> An author "can distribute or show [her work] to a limited class of persons for a limited purpose . . . . A general publication occurs when a work is made

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145. *Preemption*, *supra* note 97, at 287 n.7 (under the 1909 Act "the word 'publication' was a legal word of art fixing the moment at which works were divested of common law protection and subject to statutory copyright").

146. House Report, *supra* note 3, at 130.

147. *Id.* at 129-30.

148. *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n*, 320 F. Supp. 1303, 1308 (N.D. Ill. 1970) ("The common law copyright is terminated by publication of the work by the proprietor of the copyright." (footnotes omitted)); *see Roy Export Co. v. CBS*, 672 F.2d 1095, 1101 (2d Cir. 1982); *Palmer v. De Witt*, 47 N.Y. 532, 536 (1872).

149. In *White v. Kimmell*, 193 F.2d 744 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952), the court defined a limited publication as one in which a work is communicated "to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale." *Id.* at 746-47.

150. *E.g.*, *Ferris v. Frohman*, 223 U.S. 424 (1912) (public performance of a play does not result in abandonment to the public use); *American Tobacco C. v. Werckmeister*, 207 U.S. 284 (1907) (admission of public to gallery with tacit understanding that no visitor is permitted to copy the works on display does not result in loss of copyright); *Roy Export Co. v. CBS*, 672 F.2d 1095 (2d Cir. 1982) (one-time showing of compilation of Charlie Chaplin movie clips as part of Academy Awards not publication sufficient for loss of common-law copyright); *Patterson v. Century Prods., Inc.*, 93 F.2d 489 (2d Cir. 1937) (motion picture of African safari shown to many thousands of people without charge and without permission to copy was limited publication), *cert. denied*, 303 U.S. 655 (1938); *King v. Mister Maestro*, 224 F. Supp. 101 (S.D.N.Y. 1963) (Dr. King's oral delivery of his "I have a dream" speech was not a dedication to the public); *accord CBS v. Documentaries Unlimited*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964).

151. *E.g.*, *White v. Kimmell*, 193 F.2d 744 (9th Cir.) (manuscript, which author sent to anyone requesting one, fell into the public domain), *cert. denied*, 343 U.S. 957 (1952); *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n* 320 F. Supp. 1303 (N.D. Ill. 1970) (extensive press campaign to publicize the "Chicago Picasso" resulted in a general publication); *see National Comics Publications, Inc. v. Fawcett Publications*, 191 F.2d 594 (2d Cir. 1951) (absence of copyright notice on one Superman comic strip published in syndicated newspapers resulted in loss of copyright in those strips but not in subsequent ones in which notice was proper).

available to members of the public at large without regard to who they are or what they propose to do with it."<sup>152</sup>

The Act, for purposes of defining legal relationships only, defines publication as occurring when the author offers or distributes her work to the public by sale or in such a way as to suggest transfer of ownership.<sup>153</sup> Because this codification is not binding on the states,<sup>154</sup> however, and because publication is decided on a case-by-case basis, an artist is provided with little certainty.<sup>155</sup> Since the courts themselves have not yet explored what protection they may still afford artists as a result of the preemption loophole, lawyers cannot predict when a court will uphold a common-law copyright. It would be unrealistic, therefore, to expect an artist to assert a common-law copyright in her work when a newspaper photographer attempts to record it before she can.<sup>156</sup>

#### IV. PRACTICAL CONSIDERATIONS OF EXTENDING COPYRIGHT PROTECTION TO SHORT-LIVED WORKS OF ART

##### A. Notice

The Act provides that whenever a work is published by authority of the copyright owner, it must bear a copyright notice,<sup>157</sup> which "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright."<sup>158</sup> Congress left it to the

152. *Burke v. NBC*, 598 F.2d 688, 691 (1st Cir.), *cert. denied*, 444 U.S. 869 (1979).

153. 17 U.S.C. § 101 (Supp. IV 1980); *see Goldstein v. California*, 412 U.S. 546, 570 n.28 (1973).

154. *See supra* note 137 and accompanying text.

155. One commentator, concerned about the continued problem of publication for intangible works, suggested that the "copyright power, supplemented by the 'necessary and proper' clause permits federal regulation of a work anticipating its fixation." Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 *Colum. L. Rev.* 831, 841 (1966).

156. Many artists have been slow to copyright their works, even when such works are clearly protected by statute. *See generally* Sheehan, *Why Don't Fine Artists Use Statutory Copyright?*, 22 *Bull. Copyright Soc'y* 242 (1975). Sheehan's survey of artists turned up three reasons why artists do not use copyright: 1) They do not know enough about it; 2) they feel a copyright notice will deface their work; and 3) they fear influential collectors will shun works bearing copyright notice. Another commentator has concluded that artists also fear alerting purchasers to the fact they retain rights in their work. Millinger, *supra* note 101, at 372.

157. 17 U.S.C. § 401(a) (Supp. IV 1980). The form of notice shall consist of the letter "C" within a circle or the word "Copyright" or the abbreviation "Copr.," as well as the year of first publication (with certain exceptions) and the name of the copyright owner of the work or a recognizable abbreviation. 17 U.S.C. § 401(b)(1)-(3) (Supp. IV 1980). Lack of notice will prevent the artist from recovering actual or statutory damages from an innocent infringer who relied on the lack of notice in copying the work. *Id.* § 405(b).

158. 17 U.S.C. § 401(c) (Supp. IV 1980); *see Scherr v. Universal Match Corp.*, 297 F. Supp. 107, 111 (S.D.N.Y. 1967) (notice on a backpack on a statue of a man

Register of Copyrights to prescribe the specific methods of fixing notice on various works.<sup>159</sup> The latter's rules are flexible.<sup>160</sup> The Act has liberalized the notice requirements so that errors or omissions will not result in copyright forfeiture.<sup>161</sup> While attaching notice of copyright requires ingenuity in the case of some environmental works,<sup>162</sup> the problem is not insurmountable. For example, the artist who created an arrangement of lights in the buildings could have worked proper notice into her design.<sup>163</sup>

Also, in the case of three-dimensional works, notice is proper if it is cemented or permanently secured to a visible portion of the work or to any base or framing to which the work is permanently attached.<sup>164</sup> For example, if a stylist created a window display, notice on the base of the arrangement or on the window itself would be sufficient.<sup>165</sup> As for a stylist who creates an arrangement for use in a magazine, and who does not sign a work-for-hire agreement, notice in the magazine's table of contents or other listing of acknowledgements would be sufficient to protect her copyright.<sup>166</sup>

### B. Fair Use

Both the photographer who photographs a magazine editor at work for her local newspaper, and the photographer who photographs an

standing twenty-two feet above the ground was not sufficient notice of copyright), *aff'd on other grounds*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); Sheehan, *supra* note 156, at 258-60.

159. 17 U.S.C. § 401(c) (Supp. IV 1980).

160. 42 Fed. Reg. 64,377-78 (1977) (to be codified at 37 C.F.R. § 201.20(i) (proposed Dec. 23, 1977), *reprinted in* 17 U.S.C.A. app. at 107 (West Supp. 1982)) provides a number of alternative placements for copyright notice in pictorial, graphic and sculptural works, such as notice on a tag or on the container in which a work is housed.

161. 17 U.S.C. § 405(a) (Supp. IV 1980); House Report, *supra* note 3, at 146-48; *see* Coventry Ware, Inc. v. Reliance Picture Frame Co., 288 F.2d 193 (2d Cir.) (1962) (Act liberal enough to allow notice on the back, as opposed to the front, of a three-dimensional wall plaque), *cert denied*, 368 U.S. 818 (1961).

162. The Register of Copyrights, in promulgating rules, should be cognizant of the special problems that arise for authors of environmental works. A provision that the copyright notice appear at the beginning and end of a 24.5-mile "Running Fence," for example, would afford some certainty to both authors and "innocent" infringers.

163. The artist would have had to work only five characters or symbols into her design to fulfill the statutory requirement of notice. Those would have been a "C" within a circle, the last two digits of the year and her initials. *See* 17 U.S.C. § 401(b)(1)-(3) (Supp. IV 1980).

164. 42 Fed. Reg. 64,377-78 (1977) (to be codified at 37 C.F.R. § 201.20(i)(2) (proposed Dec. 23, 1977), *reprinted in* 17 U.S.C.A. app. at 69 (West Supp. 1982)).

165. *Id.*

166. 17 U.S.C. § 404(a) (Supp. IV 1980) provides that a separate contribution to a collective work bearing its own notice of copyright or a single notice applicable to the collective work as a whole is sufficient to give notice of the copyright with respect to the separate contributions.

arrangement of lights in a building for a city newspaper, may raise the defense of "fair use" in a copyright infringement action. Fair use has been defined as "a 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner.'" <sup>167</sup> Courts apply the fair use doctrine when it is necessary to "subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."<sup>168</sup> In general, creative or imaginative works are more protected from fair use than factual works.<sup>169</sup>

The courts consider four factors, codified by the Act,<sup>170</sup> to determine whether fair use will be found: the nature and character of the use;<sup>171</sup> the nature of the copyrighted work;<sup>172</sup> the amount and sub-

167. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966) (quoting Ball, *Copyright and Literary Property* 260 (1944)), *cert. denied*, 385 U.S. 1009 (1967); see *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp., 957, 960 (D.N.H. 1978) ("[T]he exclusive right of a copyright holder must be weighed against the public's interest in dissemination of information affecting areas of universal concern.").

168. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); see *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Wainwright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 249 (W.D.N.Y. 1978), *appeal docketed*, No. 82-7557 (2d Cir. July 19, 1982) (appeal from permanent injunction issued in No. 77-560 (W.D.N.Y. June 21, 1982) (available July 28, 1982, on LEXIS, Genfed library, Dist file)).

169. *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977) ("Since the Times Index is a work more of diligence than of originality or inventiveness, defendants have greater license to use portions of the Times Index under the fair use doctrine than they would have if a creative work had been involved.").

170. 17 U.S.C. § 107 (Supp. IV 1980).

171. *Id.* § 107(1); see *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306-07 (2d Cir. 1966) (use of information from magazine in popular biography promotes public interest in encouraging the development of historical and biographical works); *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 38 (S.D. Tex 1978) (defendants' use of maps was fair because it was for the legitimate, reasonable purpose of coordinating fire prevention activities); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 961 (D.N.H. 1978) (use of song in advertisement for political campaign implicated first amendment issues). *But see* *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 252 (W.D.N.Y. 1978) ("This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale."), *appeal docketed*, No. 82-7557 (2d Cir. July 19, 1982) (appeal from permanent injunction issued in No. 77-560 (W.D.N.Y. June 21, 1982) (available July 28, 1982, on LEXIS, Genfed library, Dist file)).

172. 17 U.S.C. § 107(2) (Supp. IV 1980); see *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) ("The principle has most often been

stantiality of material used in relation to the copyrighted work as a whole;<sup>173</sup> and, most important,<sup>174</sup> the effect of the use on the copyright holder's potential market for the work.<sup>175</sup>

If a photographer published a photograph of the arrangement of lights in a city newspaper, that one-time use of the photograph for its public interest value would be permissible under the fair use doctrine, but the photographer's sale of the picture to a calendar company would not. The latter would be a wholesale taking of the artist's work which would diminish the artist's market for the work.

Applied to the *House Beautiful* arrangement of vases, if the newspaper photographer photographed the arrangement only for use by a small-circulation newspaper, she would probably win on a fair use defense. But if she were to photograph all of the stylist's arrangements in the house and publish them, effectively decreasing the market value of the work, such actions would not constitute fair use.

A newspaper's right to publish in these two hypotheticals seemed clear-cut under the fair use doctrine until the Supreme Court decided a right of publicity case, making repeated analogies to copyright law.

applied to works in the field of science, law, medicine, history and biography."), *cert. denied*, 434 U.S. 1014 (1978); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (same).

173. 17 U.S.C. § 107(3) (Supp. IV 1980); *see* *Iowa State Univ. Research Found., Inc. v. ABC*, 621 F.2d 57, 61-62 (2d Cir. 1980) (broadcast of eight percent of a film on three occasions was not fair use); *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94-96 (2d Cir. 1977) (transcript's publication of abstracts of Wainwright's research was a taking substantial in quality and quantity), *cert. denied*, 434 U.S. 1014 (1978); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964) (use of song lyrics for parody fell far short of a "substantial" taking); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 252 (W.D.N.Y. 1978) (videotapes of plaintiff's television broadcasts, which were reproduced and sold to schools, amounted to more than fair use), *appeal docketed*, No. 82-7557 (2d Cir. July 19, 1982) (appeal from permanent injunction issued in No. 77-560 (W.D.N.Y. June 21, 1982) (available July 28, 1982, on LEXIS, Genfed library, Dist file)).

174. Courts have put the greatest emphasis on the fourth factor when determining whether use was fair. *Triangle Publications v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980); *see* *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968); 3 M. Nimmer, *supra* note 24, § 13.05[a][4].

175. 17 U.S.C. § 107(4) (Supp. IV 1980); *see* *Triangle Publications v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 (5th Cir. 1980) (harm to *TV Guide* of displaying it on television next to newspaper TV supplement for comparison purposes was "at most de minimus"); *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 38 (S.D. Tex. 1978) (defendant's internal use of map for fire department was not commercial and not in competition with plaintiff but for purposes related to the public interest); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 961 (D.N.H. 1978) (use of 15 seconds of a song in a 60-second political commercial had no effect on the potential market for the record of the song); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (considering plaintiff had no plans for use of photographs, effect of defendant's use of them to create sketches was speculative).



In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>176</sup> the Court upheld a state statute that recognized the "right of publicity." The Court found that the state's interest was "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."<sup>177</sup> The Court held that a photographer who filmed Zacchini's 15-second "human cannonball" act and televised it against the actor's wishes violated his right of publicity.

The first amendment, the Court said, did not give the media the right to broadcast Zacchini's entire act without consent,<sup>178</sup> particularly when "[he] does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it."<sup>179</sup> Similarly, for an artist who has created an environmental work, publicity satisfies a need for recognition, but pay, particularly given the cost of some of these creations, satisfies the artist's more immediate financial needs. The Court pointed out that the protection it afforded Zacchini, like the copyright law, "provide[d] an economic incentive for him to make the investment required to produce a performance of interest to the public."<sup>180</sup> Society, the Court said, in the long run is the primary beneficiary.<sup>181</sup> Obviously, the performer's act was not akin to hard news, which would not be copyrightable.<sup>182</sup> Zacchini's act, in fact, was more like that of an environmental artist. Although the news media should be free to record any newsworthy "acts," the boundaries of fair use, and certainly the analogy to *Zacchini*, should at minimum prevent the photographer from reselling the photograph to a calendar company without paying the environmental artist a royalty.

### C. Infringement

To bring an infringement suit,<sup>183</sup> *House Beautiful* or the environmental artist would first have to register their work with the Copyright Office.<sup>184</sup> This is a simple procedure; in some instances, even a sketch of the artist's work would suffice.<sup>185</sup>

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176. 433 U.S. 562 (1977).

177. *Id.* at 573.

178. *Id.* at 574-76.

179. *Id.* at 578.

180. *Id.* at 576.

181. *Id.* at 577.

182. *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

183. To infringe, the second author has to do more than merely use the first creation for inspiration. See *Franklin Mint Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir.) ("[A]n artist is free to consult the same source for another original painting."), *cert. denied*, 439 U.S. 880 (1978); *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938) ("The defendant authors were as free to read [plaintiff's book] as anyone else and to acquire from it such information as they could.")

184. See 17 U.S.C. § 410(c) (Supp. IV 1980).

185. See *id.* §§ 408(b)(1), 409. See *supra* note 127.

To prove infringement, the respective plaintiffs first must show that defendant photographers had access to their work.<sup>186</sup> Access is defined as a reasonable opportunity to view a plaintiff's work<sup>187</sup> and is proven circumstantially.<sup>188</sup> In the case of the *House Beautiful* arrangement, the homeowner's testimony that she permitted the newspaper photographer to enter her home would be strong circumstantial evidence of access. In the case of the building lights, the photographer might argue that it was not, in fact, the artist's work that she photographed. Testimony of the building managers, however, that the lights were illuminated in that particular configuration for only one night, would be strong circumstantial evidence that it was only the artist's work the photographer could have photographed.

As a precaution, however, it would be helpful in all situations if the stylist or artist made and saved sketches or memoranda of their projects. Artists often make sketches, but they do not think to date and file them in anticipation of an infringement action. Such evidence would prove useful if a defendant tried to assert, for example, that her creation predated that of the plaintiff's.<sup>189</sup>

In addition to access, a plaintiff must also show that there is substantial similarity in the ideas of both works,<sup>190</sup> and that the expression of those ideas<sup>191</sup> would appear to be substantially similar in the eyes of the ordinary lay observer.<sup>192</sup> Sketches or a snapshot would be neces-

186. *Overman v. Loesser*, 205 F.2d 521, 524 (9th Cir.), *cert. denied*, 346 U.S. 910 (1953). *But see Williams v. Kaag Mfg., Inc.*, 338 F.2d 949, 951 (9th Cir. 1964) ("Access is important, and should be given due weight by the trier of fact, but is not decisive."); *Burnett v. Lambino*, 204 F. Supp. 327, 335 (S.D.N.Y. 1962) ("Access alone without copying is insufficient to find infringement.").

187. *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F. Supp. 429, 438 (W.D.N.Y. 1978); *Musto v. Meyer*, 434 F. Supp. 32, 34 (S.D.N.Y. 1977), *aff'd*, 598 F.2d 609 (2d Cir. 1979); *Bevan v. CBS*, 329 F. Supp. 601, 604 (S.D.N.Y. 1971). If plaintiff's product, for example, were on the market for a number of years, defendant would be presumed to have seen it. *Goldman-Morgen, Inc. v. Dan Brechner & Co.*, 411 F. Supp. 382, 389 (S.D.N.Y. 1976); *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F. Supp. 416, 422 (S.D.N.Y. 1965).

188. *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F. Supp. 429, 438 (W.D.N.Y. 1978); *Goldman-Morgen, Inc. v. Dan Brechner & Co.*, 411 F. Supp. 382, 389 (S.D.N.Y. 1976).

189. *See Overman v. Loesser*, 205 F.2d 521, 524 (9th Cir.), *cert. denied*, 346 U.S. 910 (1953).

190. *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981).

191. *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert denied*, 282 U.S. 902 (1931); *see Bevan v. CBS*, 329 F. Supp. 601, 604-05 (S.D.N.Y. 1971).

192. *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981); *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F. Supp. 429, 439 (W.D.N.Y. 1978).

sary, if the short-lived work of art were not still standing, for a plaintiff to prove that the photographer appropriated her idea and its expression. *House Beautiful*, of course, could use its freelance photographer's photograph of the arrangement to prove such appropriation.

#### D. Coauthorship

Photographers, because they have long been covered by copyright, are among the best-protected artists in the marketplace. Generally, photographers assume they own all rights to a photograph, unless they have contracted them away on a work-for-hire basis.<sup>193</sup> If the work of a stylist is given copyright protection, the photographer will then have to ask the stylist to sign a work-for-hire agreement<sup>194</sup> in order to cut off her copyright in the work. Should the stylist not want to give up her copyright, the photographer can bargain with her for coauthorship status.<sup>195</sup> Similarly, an environmental artist may grant a photographer the right to reproduce her work.<sup>196</sup> The resulting photograph would be considered a derivative work<sup>197</sup> and, assuming the agreement permitted it, the photographer would then be free to sell her photograph to a newspaper, calendar company or T-shirt manufacturer.

Copyright protection of the stylist's work will not wrongfully diminish the rights of photographers; rather, it will help to clarify their rights. In fact, in the first Supreme Court case to consider copyright protection for a work other than a literal writing, the Court recognized authorship in the work that today is done by a stylist.<sup>198</sup> In holding that a photograph of Oscar Wilde was an original work of art, the Court found authorship in "selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression."<sup>199</sup>

The photographer himself did the arranging in that case, but today it is the photographic stylist who selects and arranges clothes in a

193. See *supra* note 20 and accompanying text.

194. *Id.*

195. 17 U.S.C. § 201(a) (Supp. IV 1980) ("Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work."). A joint work is defined in 17 U.S.C. § 101 (Supp. IV 1980) as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 570 (2d Cir.), *opinion revised per curiam on rehearing*, 223 F.2d 252 (2d Cir. 1955).

196. 17 U.S.C. § 106(1) (Supp. IV 1980).

197. See 17 U.S.C. §§ 101, 103 (Supp. IV 1980); 1 M. Nimmer, *supra* note 24, § 2.01[A].

198. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

199. *Id.*

fashion photograph, and it is she who often directs the photographer's lighting of the subject, evoking the desired mood.<sup>200</sup> After concluding that the photograph was a work of authorship, the Court attempted to identify its author. It quoted an English case that described the author as one

"who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be — the man who is the effective cause of that."<sup>201</sup>

Today that person is often the stylist, and she merits coauthorship status when a photographer records her work.

Another early court case also recognized the arrangement of material as the critical component of authorship in a photograph, rather than any expertise the photographer brought to his art.<sup>202</sup> In that case a photographer positioned a nude woman against a backdrop and photographed her with her face in repose.<sup>203</sup> He sold and assigned all rights in the photograph to the plaintiff.<sup>204</sup> Two years later, the same

<sup>200</sup>. It is much more true of fashion photography or portraiture than of architectural photography, however, that the interaction between photographer and model often results in the characteristic expression recognizable as the stamp of a particular photographer. One court recognized this interaction in an early photography case, *Falk v. Donaldson*, 57 F. 32 (C.C.S.D.N.Y. 1893). Defendant infringers argued that the photographer was a mere mechanic and that the true author of the photograph of an actress, Julia Marlowe, was the actress herself. The court said: "How far the artistic contributions are to be attributed to the talent of Miss Marlowe, it is impossible to say." *Id.* at 33. The court noted, however, that the photograph showed Miss Marlowe in a side view in which "she could not have judged, by herself, how far to turn the body, and raise the hands, or how to incline the head, so that the lights and shadows might best reveal the beauties of face and figure." *Id.*

<sup>201</sup>. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (quoting *Nottage v. Jackson*, 11 Q.B.D. 627, 635 (1883)).

<sup>202</sup>. *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914). Some courts, however, have recognized the art a photographer brings to his work. *E.g.*, *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) ("Zapruder selected the kind of camera . . . the kind of film . . . the kind of lens . . . the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated."); *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) ("[N]o photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike."), *aff'd*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922); *Pagano v. Chas. Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916) ("It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc."). See generally *Gorman*, *supra* note 72, at 1594-98.

<sup>203</sup>. *Gross v. Seligman*, 212 F. 930, 930 (2d Cir. 1914).

<sup>204</sup>. *Id.*

photographer posed the same nude woman against a slightly different backdrop and photographed her smiling, with a cherry stem in her mouth.<sup>205</sup> The court noted some changes in the model's figure in the two-year interval but said:

It seems to us, however, that we have no . . . new photograph of the same model. The identity of the artist and the many close identities of pose, light, and shade, etc., indicate very strongly that the first picture was used to produce the second . . . . The one thing, viz., the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original.<sup>206</sup>

### CONCLUSION

Congress and the courts should explicitly recognize that short-lived works of art deserve copyright protection. Such protection, which is designed to give an author a fair return for her creative effort in order to encourage additional effort, should benefit all artists who want to take advantage of it.

Copyright protection for an arrangement of objects would give stylists greater recognition for their work. For example, freelance stylists often receive credit only when their work is first published. Some stylists would be happy merely to receive a credit line each time their work is reproduced.

Recognizing an arrangement of objects under the Act would also put a stylist in a more equitable position when bargaining with magazine editors and photographers for royalties. A stylist who freelances, for example, is paid by the day at a fraction of what a photographer is paid, although the resulting photograph depicts her work. The photographer may be paid depending upon her contract with the magazine, not only when the photograph is originally printed, but also whenever it appears in a spin-off of the magazine, in a book or in magazines abroad. Normally, the stylist is paid once. Surely work that is so repeatedly exploited by the marketplace deserves explicit copyright protection by Congress and the courts.

Similarly, an environmental artist, who often expends not only a great deal of time creating her works, but also a great deal of money,

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205. *Id.*

206. *Id.* at 931. *But see* Franklin Mint Corp. v. National Wildlife Art Exch., Inc., 575 F.2d 62 (3d Cir.) (artist did not infringe his own work when he used different source materials for each painting and similarities resulted from anatomical correctness of the renderings), *cert. denied*, 439 U.S. 880 (1978); Esquire, Inc. v. Varga Enters., 81 F. Supp. 306, 309 (N.D. Ill. 1948) (while "Varga girls" were all Alberto Vargas ever drew, "all of the distinguishing elements, considered in the aggregate, undeniably constitute a new creative work of art"), *modified*, 185 F.2d 14 (7th Cir. 1950).

should have her creative and cash investments explicitly protected by Congress and the courts. Environmental artists should feel secure in their right to copyright protection and to pursue infringers who can almost instantly turn out T-shirts commemorating their work or who can find ready markets for photographs in the calendar and poster industries.

Only when the work of all artists is accorded copyright protection will Congress truly have fulfilled its constitutional mandate of promoting "the Progress of Science and the useful Arts."

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