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## Copyright "Deja Vu": A New Definition of "Publication" Under the Copyright Act of 1909

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# NOTES

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## I. INTRODUCTION

"I have a dream," Dr. Martin Luther King, Jr., declared from the steps of the Lincoln Memorial during the March on Washington in 1963.<sup>1</sup> About 200,000 people had gathered to listen to Dr. King's famous speech and to participate in the events of the day.<sup>2</sup> Millions more witnessed the live broadcast on major television and radio stations.<sup>3</sup> Others read the text of the speech in newspapers across the country.<sup>4</sup>

Just over a month later, Dr. King applied for federal copyright protection for the speech.<sup>5</sup> Under federal copyright law at the time, an owner who published a work prior to complying with statutory formalities lost his ownership rights.<sup>6</sup> Thus, the question arose: did Dr. King's delivery of the speech coupled with its extensive reproduction and dissemination constitute a publication of the speech, thereby forfeiting his ownership rights?<sup>7</sup>

Although the speech was delivered over forty years ago, litigation concerning the existence of this copyright has persisted into the twenty-first century.<sup>8</sup> Others continue to litigate their own copyright disputes regarding musical compositions and other works

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1. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1213 (11th Cir. 1999).

2. *Id.*

3. *Id.*; *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1348 (N.D. Ga. 1998), *rev'd*, 194 F.3d 1211 (11th Cir. 1999).

4. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1213; *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 104 (S.D.N.Y. 1963).

5. *Estate of Martin Luther King, Jr., Inc.*, 13 F. Supp. 2d at 1349; *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1213.

6. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1214.

7. *Id.*

8. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353 (N.D. Ga. 2002).

created decades ago.<sup>9</sup> The problem stems from an almost one-hundred-year-old statute with a glaring gap. The statute, the Copyright Act of 1909 (“1909 Act”), which governs disputes of whether a work was published before 1978, fails to provide the definition of its key term—“publication.”<sup>10</sup> Accordingly, for nearly a century, courts and scholars have disputed the definition of publication under the 1909 Act and the application of that definition to cases.<sup>11</sup> Discrepancies exist not only between jurisdictions, but also within them, as manifested by the Eleventh Circuit’s decision in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, in which each member of the three-judge panel disagreed either on the appropriate definition of publication or on its application to the facts of the case.<sup>12</sup>

This Note proposes a new definition that is simple, complete, and consistent with the 1909 Act as written and with the Act’s dual purposes of promoting the free dissemination of ideas through a reward of a limited monopoly to authors. Part II presents a background of the 1909 Act by examining its continued relevance, its dual policies, some of its methods for implementing those policies, and the significance of publication to the 1909 Act. Part III analyzes leading definitions of publication, areas of consensus and disagreement in their application, and exploitations of works not generally considered publication. Part IV offers a new definition of publication under the 1909 Act: subject to three exceptions,<sup>13</sup> publication is the exploitation of a work authorized by the author and/or owner of the work. Part V applies this definition to the facts of several notable cases and demonstrates how it serves the purposes of the 1909 Act.

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9. See *infra* notes 15-17.

10. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.04 (2004) [hereinafter NIMMER ON COPYRIGHT].

11. See *id.* § 4.01 (discussing the significance of publication); see also Part III.A.

12. See *infra* notes 122-138 and accompanying text. The majority and the concurring judge disagreed on the proper definition of publication. Compare *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1215, with *id.* at 1221 (Cook, J., concurring in part, dissenting in part). The dissent implicitly agreed with the concurrence’s definition by endorsing the lower court’s adoption of the same definition but, ultimately, disagreed with the concurrence’s application of that definition. *Id.* at 1227 (Roney, J., dissenting); *id.* at 1221 (Cook, J., concurring in part, dissenting in part).

13. The three exceptions (limited publication, performance, and distribution of a phonorecord embodying a musical composition) are discussed *infra* Part III.B.

## II. BACKGROUND: THE COPYRIGHT ACT OF 1909 &amp; PUBLICATION

A. *The 1909 Act: Still Relevant After All These Years*

Today, courts must look back almost a century to the 1909 Act to resolve certain copyright disputes involving some of the most influential people, artists, and works in U.S. history. For example, in the last six years, the 1909 Act has governed litigation involving Dr. King's "I Have a Dream" speech,<sup>14</sup> two Rolling Stones songs,<sup>15</sup> several songs by country music legend George Jones,<sup>16</sup> and various works by renowned graphic artist M.C. Escher.<sup>17</sup> These cases arise when parties dispute whether a work acquired statutory copyright protection prior to January 1, 1978, the effective date of the current Copyright Act of 1976 ("the 1976 Act").<sup>18</sup> In these cases, the stakes are high because, if the work received copyright protection, the author and/or owner is entitled to the potentially large financial and other benefits of the copyright.<sup>19</sup> However, if the work failed to acquire such protection, the author and/or owner forfeits his copyright to the work and, consequentially, any benefits from owning the copyright.

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14. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1214; *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353 (N.D. Ga. 2002).

15. *ABKCO Music, Inc. v. Lavere*, 217 F.3d 684 (9th Cir. 2000); *see also infra* text accompanying notes 278-287.

16. *King Records, Inc. v. Daily*, No. 3:00-0300 (M.D. Tenn. Sept. 22, 2003); *see also infra* text accompanying notes 288-308.

17. *Cordon Holding B.V. v. Northwest Publ'g Corp.*, 98 Civ. 4797, 2002 U.S. Dist. LEXIS 6111, at \*15 (S.D.N.Y. Apr. 8, 2002). Other recently litigated works involving publication and the 1909 Act include dances and photographs. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624, 644-45 (2d Cir. 2004) (dances); *Milton H. Greene Archives, Inc. v. BPI Communications, Inc.*, 378 F. Supp. 2d 1189, 1197-99 (C.D. Cal. 2005) (photographs of Marilyn Monroe).

18. *See Brown v. Tabb*, 714 F.2d 1088, 1090 (11th Cir. 1983) ("[T]he determination of whether a work entered the public domain prior to the effective date of the 1976 Act must be made according to the copyright law as it existed before that date."); NIMMER ON COPYRIGHT, *supra* note 10, § 4.01[B] ("The act of publication may have resulted in a work being injected into the public domain under the law as it existed prior to January 1, 1978."). Congress substantially revised U.S. copyright law in enacting the 1976 Act. The 1976 Act governs disputes concerning whether a work obtained statutory copyright protection on or after January 1, 1978 and affords the concept of publication less importance than the 1909 Act does. NIMMER ON COPYRIGHT, *supra* note 10, § 4.01.

19. NIMMER ON COPYRIGHT, *supra* note 10, § 4.01[B]. The consequences of nonobservance of statutory formalities are less severe under the 1976 Act than under the 1909 Act. *Id.* at 7.01[A].

*B. Dual Policies of the 1909 Act*

The dual policies of the 1909 Act are the free dissemination of ideas and the reward of a limited monopoly to authors.<sup>20</sup> The legislative history of the 1909 Act demonstrates Congress's effort to further these dual purposes:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.<sup>21</sup>

Additionally, according to the House Judiciary Committee, the 1909 Act was intended primarily to benefit the public, not authors:

Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given . . . . In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.<sup>22</sup>

These dual purposes are rooted in the Patents and Copyright Clause of the U.S. Constitution, which gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>23</sup> The U.S. Supreme Court has concluded that authors' monopoly privileges are limited and are not the primary purpose of the Clause.<sup>24</sup> Instead, the limited monopoly “makes reward to the owner a secondary consideration.”<sup>25</sup> Thus, “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”<sup>26</sup>

20. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (The limited monopoly grant “is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); see also NIMMER ON COPYRIGHT, *supra* note 10, §1.05[D] (The “limited times” provision strikes “a balance between two competing interests: the interest of authors in the fruits of their labor on the one hand, and on the other, the interest of the public in ultimately claiming free access to the materials essential to the development of society.”).

21. H.R. REP. No. 2222, at 7 (1909).

22. *Id.*

23. U.S. CONST. art. I, § 8, cl. 8.

24. *Sony Corp. of Am.*, 464 U.S. at 429 (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit.”).

25. *Id.*

26. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932), *quoted in Sony Corp. of Am.*, 464 U.S. at 429 and in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

### C. Implementing the Dual Policies

The 1909 Act promotes its dual policies of the free dissemination of ideas and the incentive of a limited monopoly to authors in several ways, including through the concepts of limited monopoly, the public domain, and fair use.

#### 1. Limited Monopoly & the Public Domain

The 1909 Act implements its dual policies in part by establishing a limited monopoly in the work of authorship for the copyright owner.<sup>27</sup> Upon securing a copyright in a work, the copyright owner obtains several exclusive rights including the right to print, reprint, publish, copy, vend, and perform.<sup>28</sup> As initially enacted, the 1909 Act secured a limited monopoly for twenty-eight years plus a renewal term of twenty-eight years.<sup>29</sup> Since then, Congress repeatedly has extended the duration of the copyright term.<sup>30</sup> However, Congress may not create a perpetual copyright.<sup>31</sup>

The 1909 Act provides for a work to enter the public domain if copyright protection is never achieved or after the limited monopoly expires.<sup>32</sup> The public domain is “[t]he realm of publications, inventions, and processes that are not protected by copyright or patent. Things in the public domain can be appropriated by anyone without liability or infringement.”<sup>33</sup> Works in the public domain are “free as the air to common use.”<sup>34</sup> Once a work enters the public

27. 17 U.S.C. § 23 (1909), reprinted in NIMMER ON COPYRIGHT, *supra* note 10, app. 6 [hereinafter all citations to the 1909 Act refer to the reprinted source in NIMMER ON COPYRIGHT]; NIMMER ON COPYRIGHT, *supra* note 10, § 4.01[B].

28. 17 U.S.C. § 1 (1909).

29. 17 U.S.C. §§ 24, 26 (1909); *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003).

30. In 1976, Congress changed the statutory scheme to a “life plus” measure of copyright term, which lasted until fifty years after the author’s death. *Eldred*, 537 U.S. at 194-95. In 1998, Congress again extended the duration of the limited monopoly to seventy years after the death of the author. *Id.* at 195. Additionally, the duration of the copyright term now depends on factors such as whether the work was anonymous, pseudonymous, or a work made for hire. *Id.*; 17 U.S.C. §§ 302-04 (2004). Moreover, under current law, copyrights secured prior to 1978 that did not expire before 1978 extend ninety-five years from the date of publication. 17 U.S.C. § 304(a)-(b).

31. *Dastar Corp. v. Twentieth Century Fox Film*, 539 U.S. 23, 37 (2003).

32. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 (11th Cir. 1999).

33. BLACK’S LAW DICTIONARY 1243 (7th ed. 1999); see also 17 U.S.C. § 8 (1909) (“No copyright shall subsist in the original text of any work which is in the public domain . . .”). See generally Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2002) (providing extended discussion of the public domain).

34. Cf. *Goldstein v. California*, 412 U.S. 546, 570 (1973) (quoting *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

domain, a former owner cannot reclaim copyright protection.<sup>35</sup> A large number of works are in the public domain,<sup>36</sup> including Shakespeare's plays and poems,<sup>37</sup> Carroll's ALICE IN WONDERLAND,<sup>38</sup> and the music of Beethoven.<sup>39</sup> Today, the rise of the internet and digital archives promotes access to such works.<sup>40</sup> One of the primary legitimate uses of internet file-swapping technology like Kazaa is the sharing of public domain works.<sup>41</sup>

The Supreme Court has recognized the role of the public domain and the limited monopoly in fulfilling the dual policies of the Patent and Copyright Clause, concluding that the limited monopoly "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."<sup>42</sup> After all, the public domain is a place where ideas can be disseminated free from the "evils" of the limited monopoly.<sup>43</sup>

## 2. Fair Use

Another means of implementing the dual policies of the 1909 Act is the public's right to the "fair use" of a copyright owner's work. Fair use traditionally has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."<sup>44</sup> In 1976, Congress, intending to restate the common law doctrine of fair use, provided that

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35. See *Graham v. John Deere & Co.*, 383 U.S. 1, 6 (1966) ("Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available."). However, certain works of a foreign origin can be restored from the public domain. 17 U.S.C. § 104(A) (2004); NIMMER ON COPYRIGHT, *supra* note 10, § 9A.04[A][4].

36. For example, Project Gutenberg provides an online database of over 13,000 public domain works. Project Gutenberg, home page, at <http://www.gutenberg.org> (last visited Jan. 5, 2005).

37. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004).

38. *Walt Disney Prods., Inc. v. Souvaine Selective Pictures, Inc.*, 98 F. Supp. 774, 775 (S.D.N.Y. 1951).

39. See *Lownebach v. Commissioner*, 54 T.C.M. (CCH) 715 (1987) (business venture involving recording of a Beethoven symphony that was in the public domain).

40. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161-62 (9th Cir. 2004) (discussing the sharing of public domain works through internet file-swapping technology).

41. *Id.* Kazaa offers internet file-swapping technology that allows works to be exchanged for free, regardless of whether the works are copyrighted or not. See, e.g., *Kazaa*, P2P Software User Advisories, at <http://www.kazaa.com> (last visited Feb. 2, 2005).

42. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

43. See *supra* text accompanying note 22.

44. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 549 (1985).



fair use includes "such use by reproduction in copies or phonorecords or by any other means specified by [another section of the 1976 Copyright Act], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."<sup>45</sup> For example, the use of home videocassette recorders to record television programs for later viewing is a fair use of the copied program.<sup>46</sup>

The public's right of fair use, which predates the 1909 Act, has been considered necessary to fulfilling the constitutional goal of promoting "the Progress of Science and useful Arts."<sup>47</sup> After all, "[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."<sup>48</sup> The Supreme Court's analysis of the fair use doctrine largely involves consideration of copyright's dual purposes. In such cases, the Court evaluates four factors: the purpose of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the potential harm to the demand or potential demand for the copyrighted work.<sup>49</sup> The Court has concluded that the most important factor is the fourth factor—the potential harm to the demand or potential demand for the copyrighted work.<sup>50</sup> This factor involves the balancing of the economic incentive of the limited monopoly with the free dissemination of ideas.<sup>51</sup> Thus, the fair use doctrine is a means of implementing the dual policies of the 1909 Act.

#### *D. Significance of Publication Under the 1909 Act*

The concept of publication also had a crucial role in the promotion of the 1909 Act's dual policies due to its immense importance to the Act.<sup>52</sup> Under the 1909 Act, at the time of a work's

45. 17 U.S.C. § 107 (2004); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

46. *Sony Corp. of Am.*, 464 U.S. at 456.

47. *Campbell*, 510 U.S. at 575.

48. *Id.* (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C. Mass. 1845) (No. 4,436)).

49. *Id.* at 578-90; see also 17 U.S.C. § 107 (2004) (listing these four nonexclusive factors).

50. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 566 (1985) (The effect on the market "is undoubtedly the single most important element of fair use . . .").

51. See *Sony Corp. of Am.*, 464 U.S. at 450-51:

[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit . . . [E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . .

52. Cf. NIMMER ON COPYRIGHT, *supra* note 10, § 4.01 ("The concept of publication was of immense importance under the 1909 Act.").

creation, an author acquired common law copyright protection.<sup>53</sup> Common law copyright offered owners various rights, including the right to the privacy of the work<sup>54</sup> and the right of first publication,<sup>55</sup> and numerous forms of relief from infringement,<sup>56</sup> including unfair competition,<sup>57</sup> unjust enrichment,<sup>58</sup> and conversion.<sup>59</sup> This common law protection continued until the work was published.<sup>60</sup> Upon publication, a work either entered the public domain, or, if the author and/or owner complied with the 1909 Act's formalities,<sup>61</sup> its common law protection converted into a federal statutory copyright.<sup>62</sup>

Thus, publication is "generally a condition precedent to obtaining statutory protection under the 1909 Act."<sup>63</sup> Certain rights

53. 17 U.S.C. § 2 (1909); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 (11th Cir. 1999). The current 1976 Act largely preempts state common law copyright. NIMMER ON COPYRIGHT, *supra* note 10, § 8C.02. However, most states continue to recognize state common law copyright, at least with respect to sound recordings created prior to February 15, 1972, which are not protected by federal copyright law. *Id.* at § 8C.03; *see also infra* notes 57-59. *But see* *Corporate Catering, Inc. v. Corporate Catering, Etc.*, No. M1997-00230-COA-R3-CV, 2001 Tenn. App. LEXIS 186, at \*15 (Tenn. Ct. App. Mar. 20, 2001) (holding that state common law copyright actions no longer exist in Tennessee).

54. NIMMER ON COPYRIGHT, *supra* note 10, § 4.03. In the context of property, the right of privacy is the right of a "person's property to be free from unwarranted public scrutiny and exposure." BLACK'S LAW DICTIONARY 1325 (7th ed. 1999).

55. "[C]ommon law copyright was often referred to as the right of first publication" because publication divested the owner's common law copyright under the 1909 Act. NIMMER ON COPYRIGHT, *supra* note 10, § 4.01[B].

56. For a general discussion of the role of common law copyright under the 1909 Act, see *Goldstein v. California*, 412 U.S. 546, 552-71 (1973).

57. *A & M Records, Inc. v. M.V.C. Distrib. Corp.*, 574 F.2d 312, 313-14 (6th Cir. 1978), *superceded by statute*, 17 U.S.C. § 301 (2004); *see also* NIMMER ON COPYRIGHT, *supra* note 10, § 8C.03 n.7 (listing additional cases).

58. *Rodgers v. Roulette Records, Inc.*, 677 F. Supp. 731, 740 (S.D.N.Y. 1988).

59. *CBS, Inc. v. Garrod*, 622 F. Supp. 532, 536 (M.D. Fla. 1985); *Schafer v. RMS Realty*, 741 N.E.2d 155, 182-86 (Ohio Ct. App. 2000); *Wellington Sys., Inc. v. Redding Group, Inc.*, 714 A.2d 21, 31 (Conn. App. Ct. 1998); *Conant v. Karris*, 520 N.E.2d 757, 763 (Ill. Ct. App. 1987); *In re Corbin*, 391 So. 2d 731, 732-33 (Fla. Ct. App. 1980). *But see* *B & L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674, 679-81 (Tenn. Ct. App. 1995) (not recognizing conversion as a cause of action for intangible property rights).

60. NIMMER ON COPYRIGHT, *supra* note 10, § 4.01[B].

61. The statutory formalities of the 1909 Act are "fairly simple," requiring essentially the application of a notice of copyright on the tangible embodiments of a work and the deposit of two copies of the work in the U.S. Copyright Office. 17 U.S.C. §§ 10, 13 (1909); NIMMER ON COPYRIGHT, *supra* note 10, § 7.01[A]; Herman F. Selvin, *Should Performance Dedicate?*, 42 CAL. L. REV. 40, 40 (1954).

62. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 (11th Cir. 1999); *see also* 17 U.S.C. § 10 (1909) ("Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title . . .").

63. NIMMER ON COPYRIGHT, *supra* note 10, § 4.01[B]. Registration, not publication, was a condition precedent to statutory copyright for unpublished works under section 12 of the 1909 Act. NIMMER ON COPYRIGHT, *supra* note 10, § 7.16 [c][i].

and responsibilities mentioned above<sup>64</sup> accompanied publication for works in compliance with the statutory formalities, including the rights to perform and to copy and the requirements to provide a notice of copyright and to deposit two copies of the work.<sup>65</sup> Publication also started the clock on the limited monopoly.<sup>66</sup> Publication, therefore, had to occur simultaneously with an author's receiving the statutory benefit of his limited monopoly.

A key determinant of the significance of publication in a given case depends on whether the 1909 Act or the 1976 Act governs.<sup>67</sup> Deciding which of the two Acts to apply turns on the date of publication of the work at issue. If a work was published before January 1, 1978, the 1909 Act governs.<sup>68</sup> On the other hand, if a work was published on or after January 1, 1978, the 1976 Act governs.<sup>69</sup> Works created before January 1, 1978, but not published before that date are governed by the 1976 Act.<sup>70</sup>

### III. ANALYSIS: THE UNSETTLED DEFINITION OF PUBLICATION

The concept of publication maintains great significance under the 1909 Act partly because the 1909 Act does not define publication.<sup>71</sup> The definition of publication remains an unsettled area of law that has been labeled "arcane"<sup>72</sup> and "clouded by semantic confusion."<sup>73</sup> Melville B. Nimmer's almost fifty-year-old observation that publication is "a legal word of art, denoting a process much more esoteric than is suggested by the lay definition of the term" remains

64. See *supra* text accompanying note 28.

65. 17 U.S.C. §§ 9-10, 13 (1909).

66. See 17 U.S.C. §§ 24, 26 (1909) (measuring the copyright term based on the date of publication).

67. See *supra* text accompanying notes 18-28.

68. *Id.*; see also 17 U.S.C. § 304 (2004) (providing terms of copyrights subsisting on January 1, 1978).

69. 17 U.S.C. § 303(a) (2004).

70. *Id.* On the other hand, some courts have determined that "[w]orks created before January 1, 1978 . . . are governed by the Copyright Act of 1909." *E.g.*, *Archie Comic Publ'n, Inc. v. DeCarlo*, 258 F. Supp. 2d 315, 328 (S.D.N.Y. 2003); *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 13 (M.D. Tenn. Sept. 22, 2003). This conclusion is inaccurate in some cases because, under section 303(a), works created before January 1, 1978, "but not theretofore in the public domain or copyrighted" are governed by the 1976 Act. 17 U.S.C. § 303(a).

71. See NIMMER ON COPYRIGHT, *supra* note 10, § 4.04 (noting that Congress intentionally omitted the definition of publication under the 1909 Act). Congress apparently omitted the definition due to "the difficulty of defining the term with respect to works of art where no copies are reproduced." *Id.* at n.5.

72. *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1026 (9th Cir. 1981).

73. *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946 n.5 (2d Cir. 1975).

just as true today.<sup>74</sup> In fact, courts and scholars have offered numerous definitions, often with significant differences. The following subsection discusses leading definitions of publication.

### A. *Leading Definitions of Publication*

The closest that the 1909 Act comes to defining publication is its definition of the “date of publication” in section 26 as “the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright under his authority.”<sup>75</sup> However, construing section 26 as the definition of publication has several problems. First, relying on section 26 as the definition of publication ignores Congress’s decision not to include a definition of publication in the 1909 Act.<sup>76</sup> Moreover, courts have held repeatedly that this phrase does not define publication but only marks the date that a limited monopoly begins to run.<sup>77</sup> Additionally, the list of types of exploitations in section 26 is under-inclusive because section 26 does not include various acts that courts regularly consider a publication, such as leasing a work or offering to sell or to distribute the work, even if the sale or distribution does not occur.<sup>78</sup> Furthermore, this definition does not allow for the exploitation of the original work, as opposed to copies of the work, to constitute publication, a result at odds with the dual policies of the 1909 Act and the general consensus among courts and scholarship.<sup>79</sup> For example, the sale of an original painting should constitute publication in the same way that the sale of copies of the original constitutes publication.<sup>80</sup> This result is consistent with the 1909 Act’s dual policies because the sale of a painting generates an economic incentive for the artist to create the work.

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74. Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 185 (1956). The “lay” definition of publication is: “(1) The act or process of publishing printed matter. (2) An issue of printed material offered for sale or distribution. (3) Communication of information to the public.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 1106 (3d ed. 1997).

75. 17 U.S.C. § 26 (1909).

76. See *supra* note 71.

77. NIMMER ON COPYRIGHT, *supra* note 10, § 4.04; e.g., *Pub. Affairs Assoc., Inc. v. Rickover*, 284 F.2d 262, 269-70 (D.C. Cir. 1960); *Cardinal Film Corp. v. Beck*, 248 F. 368, 368 (S.D.N.Y. 1918).

78. See *infra* text accompanying note 82.

79. See *infra* discussion at notes 80, 82.

80. See *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 F. 54, 56 (1st Cir. 1896) (“In the case of a book, map, engraving, or photograph, it is commonly published in multiple form; in the case of a painting or statue, it may or may not be published in multiple form.”); see also *infra* note 82.

A second option is an often-cited definition coined in Melville Nimmer's classic 1956 article "Copyright Publication."<sup>81</sup> Nimmer stated that "publication occurs when by consent of the copyright owner the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur."<sup>82</sup> This definition has many strengths, including its more expansive list of acts of exploitation that constitute publication than those provided in section 26 and its determination that, before publication may occur, the copyright owner must consent to the acts of exploitation. This definition allows, for instance, the authorized placement of "film prints in regional distribution offices for rental to anyone" to constitute publication.<sup>83</sup> Additionally, the authorized and unrestricted distribution of photographs of a sculpture would be a publication of the work.<sup>84</sup>

Nimmer's definition, however, limits publication to situations involving the original or tangible copies of a work.<sup>85</sup> Thus, under this

81. Courts that have quoted this definition or a variation of it include the following: *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1027 (9th Cir. 1981); *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 945 (2d Cir. 1975); *Kramer v. Newman*, 749 F. Supp. 542, 549 (S.D.N.Y. 1990); *Testa v. Janssen*, 492 F. Supp. 198, 201-02 (W.D. Pa. 1980); *Dowdey v. Phoenix Films, Inc.*, 199 U.S.P.Q. (BNA) 579, at \*13 (S.D.N.Y. 1978); *Bell v. Combined Registry Co.*, 397 F. Supp. 1241, 1248 (N.D. Ill. 1975), *aff'd*, 536 F.2d 164 (7th Cir. 1976), *cert. denied*, 429 U.S. 1001 (1976).

82. Nimmer, *supra* note 74, at 187; *see also* NIMMER ON COPYRIGHT, *supra* note 10, § 4.04 (quoting same).

83. *Paramount Pictures Corp. v. Rubinowitz*, No. CV 81 0925, 1981 U.S. Dist. LEXIS 17553, at \*12 (E.D.N.Y. June 26, 1981) (quoting NIMMER ON COPYRIGHT, *supra* note 10, § 4.11[B] (1978)).

84. NIMMER ON COPYRIGHT, *supra* note 10, § 4.09 n.7.

85. For courts that appear to have adopted the tangible-intangible distinction, *see supra* note 81. Courts that have not adhered to this distinction include: *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1215 (11th Cir. 1999) (determining that "a general publication may occur if the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public"); *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm'n of Chicago*, 320 F. Supp. 1303, 1311 (N.D. Ill. 1970) (holding that "the display of [a model of a sculpture] constituted general publication"); *Mayhew v. Allsup*, No. 3:96-1081, slip op. at 14 (M.D. Tenn. July 24, 2001) (determining that "[p]laying a song on the radio, so long as it is not merely a performance, would constitute 'publication' . . ."); *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 18 (M.D. Tenn. Sept. 22, 2003) (holding that radio play constitutes publication); *see also* *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 300 (1907) ("We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication . . ."); *Burke v. Nat'l Broad. Co., Inc.*, 598 F.2d 688, 691 (1st Cir. 1979) ("A general publication occurs when a work is made available to members of the public at large without regard to who they are or what they propose to do with it."); *Patterson v. Century Prods., Inc.*, 93 F.2d 489, 492 (2d Cir. 1937) ("The test of general publication is whether the exhibition of the work to the public is under such conditions as to show dedication without reservation of rights or only the right to view or inspect it without more."); *Logicom Inclusive, Inc. v. Stewart & Co.*, 04 Civ. 0604, 2004 U.S. Dist. LEXIS 15668, at \*17 n.5 (S.D.N.Y. Aug. 10,

definition, neither the broadcast of a film on television,<sup>86</sup> the radio play of a song,<sup>87</sup> the unrestricted public display of a sculpture,<sup>88</sup> nor the licensing of a work for exploitation<sup>89</sup> would constitute publication because none involves the distribution of the original or a tangible embodiment of a work. Nimmer cited two rationales for this tangible-intangible distinction, each of which is questionable. First, he wrote that the distinction is:

[C]onsistent with the principle that publication is the act of rendering the work common property. Only a dissemination of a work which permits members of the public to obtain the right of physical control and enjoyment of the work justifies the legal conclusion that the work (as distinguished from the tangible copy embodying the work) is common property.<sup>90</sup>

This principle as stated is somewhat inaccurate. Publication can render a work common property if publication dedicates the work to the public domain.<sup>91</sup> However, when a work is copyrighted, publication merely allows the public access to the work, subject to certain restrictions, such as payment for the use of the work and a prohibition on copying the work for resale.<sup>92</sup> Moreover, when a work is protected, the copyright owner still maintains unique rights that the public does not share, such as the right to receive royalties from

2004) (“Under the 1909 Act, a general publication was ‘such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property . . .’” (quoting *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1027 (9th Cir. 1981))); Michael B. Landau, “*Publication, Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*,” 2 VAND. J. ENT. L. & PRAC. 29, 31-32 (Winter 2000) (“A general publication could occur when the work was made available to indiscriminate members of the public, without regard for what they intended to do with it.”); *cf.* *ABKCO Music, Inc. v. Stellar Records, Inc.* 96 F.3d 60, 64 (2d Cir. 1996) (“While projecting lyrics on a screen and producing printed copies of the lyrics, of course, have their differences, there is no reason to treat them differently for purposes of the Copyright Act [of 1976].”).

86. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A]. Instead, the broadcast of a film on television would constitute a non-divesting performance. For a discussion of performance and publication in the context of film, *see infra* notes 167-195, 321-345.

87. *Silverman v. CBS, Inc.*, 632 F. Supp. 1344, 1350 (1986) (asserting that radio broadcasts of the Amos ‘n’ Andy Show did not constitute publication), *vacated*, 870 F.2d 40 (2d Cir. 1989).

88. *See* NIMMER ON COPYRIGHT, *supra* note 10, § 4.09 (“[T]he better view under the 1909 Act may have been that public display of a work of art does not constitute a publication thereof . . .”).

89. *See* *Paramount Pictures Corp. v. Rubinowitz*, No. CV 81 0925, 1981 U.S. Dist. LEXIS 17553, at \*12 (E.D.N.Y. June 26, 1981) (holding that the exploitation of the Star Trek series pursuant to a license did not constitute publication).

90. Nimmer, *supra* note 74, at 197; *see also* *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299-300 (1907) (“It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property.” (quoting SLATER ON THE LAW OF COPYRIGHT AND TRADE MARK 92)).

91. *See supra* text accompanying notes 32-35.

92. 17 U.S.C. § 1(a) (1909).

its exploitation.<sup>93</sup> Thus, absent forfeiture into the public domain, a work is not "common property."

Nimmer's second rationale is that the distinction provides "a relatively clear and unequivocal standard which, if consistently applied, would do much to bring a certainty and predictability to a difficult phase of copyright law."<sup>94</sup> Although bright-line rules do have merit to the extent that they provide legal certainty, adherence to this bright-line rule has four primary problems. First, the rule has little, if any, utility. Any utility of the tangible-intangible distinction breaks down in the context of fair use of authorized broadcasts of a work on television or radio. When a person views a movie on television, an *intangible* "embodiment of the copyrighted work has found its way into third-parties' hands."<sup>95</sup> The viewer may legally render that intangible embodiment tangible by recording it onto a video cassette for the purpose of "home time-shifting," however, which is the practice of recording a program that one cannot view at the time it is televised in order to watch it at a later time.<sup>96</sup> Likewise, members of the public should be permitted to listen to recordings broadcast on the radio and to copy them for home time-shifting,<sup>97</sup> so long as the audio taping is not done for "librarying purposes" that have a "harmful impact upon the potential market for the sale of those sound recordings."<sup>98</sup> Following the same rationale, a viewer should be able to watch a film and transcribe the screenplay onto a piece of paper, so long as she does

93. *Id.*

94. Nimmer, *supra* note 74, at 197.

95. David Nimmer, *The Continuing Significance of Publication*, in 1 NIMMER REP. ON COPYRIGHT 2 (2001).

96. The Supreme Court has held that "home time-shifting" is a permissible fair use. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421, 455 (1984). The court reasoned that "time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge . . ." *Id.* at 449. Moreover, "the time-shifter no more steals the program by watching it once than does the live viewer." *Id.* at 450 n.33.

97. The Tenth Circuit has concluded that the public's right to record songs off the radio extends beyond home time-shifting to general personal use. *United States v. Brown*, 925 F.2d 1301, 1307 (10th Cir. 1991) ("Members of the public are allowed to listen to [recordings of songs taken off the radio] when broadcast and to make a copy for their own personal use, but not to make numerous copies and sell them commercially . . ."). The legislative history of a 1971 amendment to the 1909 Act supports the 10<sup>th</sup> Circuit's determination:

[I]t is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

H.R. REP. NO. 92-487, at 7 (1971).

98. See NIMMER ON COPYRIGHT, *supra* note 10, § 8B.01[D][2] (arguing that audio taping for "librarying" purposes would not be a fair use).

so only for a personal use that does not adversely impact the potential market for the screenplay. Similarly, even inexperienced musicians can listen to a song on the radio and transcribe the words and music onto sheet music.<sup>99</sup>

Although the technology for rendering intangible embodiments tangible was not as widespread before 1978 as it is today,<sup>100</sup> many people possessed the capability.<sup>101</sup> For example, those who recorded music to make phonograph records for commercial distribution could have also recorded music off the radio. Likewise, those who viewed a film or listened to a song could have transcribed the screenplay or music onto paper in 1965 like they can in 2005. Moreover, the number of people who receive access to the work is not significant.<sup>102</sup> Instead, what matters is that “such copies as are available must be offered to all members of the public who are interested.”<sup>103</sup>

Second, the tangible-intangible distinction upsets the Congressional balance between the dual policies of the 1909 Act. On the one hand, the revenue generated from broadcasting a song on the radio or a film on television is precisely the type of economic incentive contemplated by the 1909 Act for authors to create their works.<sup>104</sup> Authors and copyright owners can reap huge financial rewards from such broadcasts,<sup>105</sup> and, therefore, those acts of exploitation should

99. This phenomenon is manifested by the existence of websites such as [www.olga.net](http://www.olga.net), which is an online archive of sheet music for guitars compiled by individuals, including “amateur contributors,” who listened to songs, wrote down the chords or tablatures, and submitted them to the online archive. OLGA (On-Line Guitar Archive), About Olga, at <http://www.olga.net/about/> (last visited Aug. 27, 2004).

100. For instance, the relatively recent widespread use of audio and video recorders has facilitated the ease with which individuals can render intangible embodiments of works tangible.

101. In 1971, a House Report, for example, concluded that home recording of songs off the radio is “common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.” H.R. REP. NO. 92-487, at 7 (1971). Thus, by 1971, the public apparently had the ability to record songs off the radio, did so, and possessed that capability during the prior twenty years.

102. Nimmer, *supra* note 74, at 187 (Publication “may be effected by sale or other distribution of a single copy” of a work).

103. *Id.*

104. *See supra* discussion at notes 20-26.

105. *See* J.A.M., All About Copyright, Music and Money: Performing Rights Payments, at [http://www.ascap.com/jam/read\\_about/mm\\_performing.cfm](http://www.ascap.com/jam/read_about/mm_performing.cfm) (last visited Aug. 26, 2004):

One of the greatest sources of income for songwriters and publishers is the money in royalty payments received from performing rights societies around the world. . . . When a song is played on the radio, on television, in a stadium, in a restaurant, over the Internet, etc., that is a “performance,” and the radio or television station, stadium, etc., owes a royalty to the writer and publisher of the music.

Of the \$3-billion-plus generated worldwide each year, the U.S. performing right organizations account for approximately \$1 billion in collections . . . .



constitute publication in the same way that a distribution of a video or audio cassette constitutes publication.<sup>106</sup> On the other hand, an author who authorized the broadcast of a song on the radio or a movie on television without distributing tangible copies of the work could have avoided triggering the commencement of the federal copyright term because the dissemination of intangible copies of a work would not have constituted publication. Therefore, this author could have obtained a monopoly in the work of a potentially much longer duration than he would have received by complying immediately with the 1909 Act.

For example, if an author released a song for radio-play in 1920 but did not otherwise exploit it, that song “would have been protected by common law copyright until the 1976 Act took effect on January 1, 1978. On that date, pursuant to § 303(a) of the new 1976 Act, federal protection would have started,”<sup>107</sup> and the song would be protected at least until December 2002.<sup>108</sup> If the work were published between January 1, 1978 and December 31, 2002, the work would have achieved copyright protection at least until December 2047.<sup>109</sup> This regime provides the song copyright protection for a term of at least eighty-two years in the former situation and at least one hundred and twenty-seven years in the latter circumstance.<sup>110</sup> “Had the [song] been ‘published’ in the year it was first written and [broadcast on the radio], however, the maximum protection would have been for 56 years.”<sup>111</sup> Thus, in this instance, adhering to the tangible-intangible distinction can more than double the term of copyright protection. Such a result upsets Congress’s balance of the dual policies of the 1909

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106. See *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1029 (9th Cir. 1981) (holding that the publication of a motion picture occurs “when copies of a film are placed in the regional exchanges for distribution to theatre operators”).

107. This illustration is based on an example developed in Professor Landau’s article *supra* note 85, at 33. Prior to the 1976 Act, noncompliance with the statutory formalities would have led to owners having perpetual monopolies in their works under the common law. *Id.* at 30-31. However, the 1976 Act converted common law copyrights into statutory copyrights. NIMMER ON COPYRIGHT, *supra* note 10, § 4.01. Thus, a copyright owner may no longer obtain a perpetual monopoly in a work, but may still receive a monopoly of a much longer duration than an author would have if he had complied immediately with the 1909 Act’s formalities. See *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995), *superseded by* 17 U.S.C. § 303(b) (2004) (describing a circumstance where an author may “receive ‘longer’ copyright protection”).

108. See 17 U.S.C. § 303(a) (2004) (“In no case, however, shall the term of copyright in [a work created before January 1, 1978, but not theretofore in the public domain or copyrighted] expire before December 31, 2002 . . .”).

109. See *id.* (“[I]f the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.”).

110. Landau, *supra* note 85, at 33.

111. *Id.*

Act by greatly increasing the author's incentive to create at the expense of the public's ability to gain full access to the work.

This example illustrates the third and fourth problems of the tangible-intangible distinction. The distinction rewards those who did not comply with the formalities of the 1909 Act, while essentially penalizing those who did.<sup>112</sup> Moreover, the distinction allows courts to circumvent the explicit statutory limit of copyright protection under the 1909 Act. Doubling the statutory term of copyright protection amounts to judicial overreaching on a substantial scale.

A possible point of debate is the value of this type of extended monopoly. Under the current 1976 Act, an author and/or owner must register a work prior to any infringement in order to recover statutory damages from such an infringement.<sup>113</sup> Based on this rule, the inability to recover statutory damages could significantly decrease the value of this type of extended monopoly. The 1909 Act, however, has a different rule that allows statutory damages to be "obtained if registration occurred prior to the filing of the action, *even if no registration existed at the time of infringement.*"<sup>114</sup> Thus, the author in the above example could generate revenue from radio play without registering the work. In the event that someone infringed on the work, the author could then register the song and recover damages in a lawsuit under the 1909 Act. This author would get the dual benefits of statutory damages and an extended monopoly.

In addition, under the 1909 Act, the author of an unpublished work retained the protection of common law copyright.<sup>115</sup> Instead of complying with statutory formalities and thereby starting the clock on the limited monopoly, the author could have relied upon common law protection, for example, by filing a suit against the infringer for unfair competition or unjust enrichment.<sup>116</sup> If the author obtained relief under common law, he could have continued to postpone registration and could have obtained an additional extension on the limited monopoly. In the event that he failed to obtain such relief, he could

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112. See *La Cienega*, 53 F.3d at 953 (determining that the rule that the sale of phonorecords does not constitute publication "reduces the incentive to immediate compliance with the 1909 Act" by encouraging "artists to delay compliance with the Copyright Act's requirements and thereby receive 'longer' copyright protection").

113. NIMMER ON COPYRIGHT, *supra* note 10, § 14.04[D].

114. *Id.* (emphasis added).

115. Section 2 of the 1909 Act provides that "[n]othing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, *at common law or in equity*, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefore." 17 U.S.C. § 2 (1909) (emphasis added); see also NIMMER ON COPYRIGHT, *supra* note 10, § 7.16[c][ii] (discussing same).

116. See *supra* text accompanying notes 53-60.

have simply registered the work and pursued damages under the 1909 Act, so long as *res judicata* did not bar the subsequent action, thus potentially gaining both statutory damages and an extended monopoly (albeit a shorter monopoly than he could have gained without registering altogether).

A third definition espoused by David Nimmer is that publication "means that a tangible embodiment of the copyrighted work has found its way into third-parties' hands."<sup>117</sup> This definition suffers from the problems discussed above pertaining to the tangible-intangible distinction.<sup>118</sup> For example, the broadcast of a song on radio or a film on television would not constitute publication under David Nimmer's definition, even though such acts of exploitation generate the type of economic incentive for authors envisioned in the 1909 Act.<sup>119</sup> Another flaw of this definition is that it does not explicitly require the author's authorization of the work's exploitation. Although authorization is implied in Nimmer's interpretation of the definition,<sup>120</sup> under the definition's plain language, an unauthorized use of the composition could constitute publication. Such a result is at odds with the policy of the 1909 Act of rewarding authors with a limited monopoly that gives them control of the work's exploitation for a limited time.<sup>121</sup> After all, if a copyright owner had no control over the exploitation of his work, the copyright would be virtually worthless, and would provide authors with little incentive to create additional works.

A fourth definition stems from the Eleventh Circuit's decision in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, where the majority opinion established two tests for determining when publication occurs.<sup>122</sup> First, "publication occurs if tangible copies of the work are distributed to the general public in such a manner as allows the public to exercise dominion and control over the work."<sup>123</sup> This prong of the test has the problem analyzed above of adhering to the tangible-intangible distinction.<sup>124</sup> It also does not expressly require the copyright owner's authorization of the work. Moreover,

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117. Nimmer, *supra* note 95, at 2.

118. See *supra* text accompanying notes 85-116.

119. See *supra* text accompanying notes 20-26; see also note 105.

120. David Nimmer described, for instance, an artist who offers to sell his paintings as an example of publication. Nimmer, *supra* note 95, at 3. In this example, the artist's authorization is clearly implied. *Id.*

121. For a discussion of the dual policies of the 1909 Act, see *supra* text accompanying notes 20-26.

122. 194 F.3d 1211, 1215 (11th Cir. 1999).

123. *Id.*

124. See *supra* text accompanying notes 85-116.

under this definition, the exploitation of the original does not constitute publication.<sup>125</sup>

Second, “publication may occur if the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public.”<sup>126</sup> This second test has the benefit of evading the tangible-intangible distinction. Accordingly, in applying this definition, one district court has twice held that “[p]laying a song on the radio, so long as it is not merely a performance, would constitute ‘publication’ because the song would have been ‘exhibited or displayed in such a manner as to permit unrestricted copying by the general public.’”<sup>127</sup> However, the primary problem with this test is that it fails to take into account the intent of the author and/or owner of the work and, apparently, would allow an unauthorized use of the work to constitute publication.

In his concurrence in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, Judge Julian Cook applied a fifth definition of publication, which is provided in the 1976 Act:<sup>128</sup>

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. *A public performance . . . of a work does not of itself constitute publication.*<sup>129</sup>

This definition is generally considered a codification of the common law.<sup>130</sup> However, applying the 1976 Act’s definition to the 1909 Act is manifestly erroneous. Congress never intended for the 1976 Act’s definition to be applied to the 1909 Act but, instead, formulated the 1976 definition as part of its revamping of U.S. copyright law.<sup>131</sup> Moreover, the 1976 Act’s definition has several

125. See *supra* text accompanying notes 79-80.

126. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1215.

127. *King Records, Inc. v. Daily*, No. 3:00-0300, slip. op. at 16-17 (M.D. Tenn. Sept. 22, 2003); *Mayhew v. Allsup*, No. 3:96-1081, slip. op. at 14 (M.D. Tenn. July 24, 2001).

128. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1221 (Cook, J., concurring in part, dissenting in part). The dissent implicitly agreed with this definition by endorsing the lower court’s adoption of this definition. *Id.* at 1227 (Roney, J., dissenting); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1350 (N.D. Ga. 1998), *rev’d*, 194 F.3d 1211 (11th Cir. 1999).

129. 17 U.S.C. § 101 (2004); *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1221 (Cook, J., concurring in part, dissenting in part) (emphasis in original).

130. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1221 (Cook, J., concurring in part, dissenting in part); see also NIMMER ON COPYRIGHT, *supra* note 10, § 4.04 (concluding that the 1976 Act’s definition of publication “in general constitutes a codification of the definition evolved by case law prior to adoption of” the 1976 Act).

131. See generally NIMMER ON COPYRIGHT, *supra* note 10, § 4.01 (discussing the differences between the definitions of publication under the 1976 and 1909 Acts).

differences with pre-1978 case law<sup>132</sup> and, when applied to the 1909 Act, shares many problems with the above-discussed proposals. For example, the 1976 definition does not refer to the owner's authorization of the work's exploitation, although the owner's authorization is implied.<sup>133</sup> Moreover, the 1976 Act's definition draws a distinction between tangible and intangible embodiments of a work that presents the problems discussed above.<sup>134</sup> Thus, under this definition, the broadcast of a song on radio or film on television is not publication.<sup>135</sup> Also, the definition of publication under the 1976 Act allows the distribution of phonorecords<sup>136</sup> to constitute publication, a result that is clearly precluded under the 1909 Act due to Congressional action in 1997.<sup>137</sup> The sale of phonograph records, for instance, constitutes publication under the 1976 Act's definition, but does not under the 1909 Act.<sup>138</sup>

In the fall of 2003, a district court in Tennessee established a sixth definition.<sup>139</sup> The court held that "[t]he key to determining that publication of a work has occurred under the 1909 Act is a finding that the owner of the copyright authorized the distribution and/or exhibition of the work for unlimited use, enjoyment, or copying by the general public."<sup>140</sup> This formulation has the benefits of avoiding Nimmer's tangible-intangible limitation and of requiring the owner's authorization for publication. However, this definition appears to read the limited publication doctrine extremely broadly because there

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132. *Id.*

133. *Id.* § 4.04 ("Congress could not have intended that the various legal consequences of publication under the current Act would be triggered by the unauthorized act of an infringer or other stranger to the copyright.").

134. 17 U.S.C. § 101 defines, in pertinent part, copies and phonorecords as "material objects" in which a work is "fixed." Section 101 further provides that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable . . ." Thus, the 1976 definition adheres to the tangible-intangible distinction, providing that publication can occur only upon the exploitation of a tangible embodiment of the work. See also *infra* text accompanying notes 231-236 on distribution of phonorecords. In addition, for the problems associated with the tangible-intangible distinction, see *supra* text accompanying notes 85-116.

135. See *supra* text accompanying notes 85-116.

136. For the definition of "phonorecords," see *infra* text accompanying note 226.

137. The 1997 amendment provides that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein." 17 U.S.C. § 303(b) (2004). For an analysis of section 303(b), see *infra* text accompanying notes 196-236, 270-287.

138. 17 U.S.C. § 101 (2004) (providing that the distribution of phonorecords constitutes publication under the 1976 Act); *ABKCO Music, Inc. v. Lavere*, 217 F.3d 684, 692 (9th Cir. 2000) (holding that the distribution of phonorecords does not constitute publication under the 1909 Act).

139. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 17 (M.D. Tenn. Sept. 22, 2003).

140. *Id.*

would seem to be no publication if the distribution or exhibition is limited in any way.<sup>141</sup> Moreover, in providing that the distribution of a work constitutes publication, this definition may run afoul of Congress's provision that the distribution of musical works embodied in phonorecords does not constitute publication.<sup>142</sup>

### *B. Exploitations of a Work not Constituting Publication*

Although courts have failed to reach a consensus on a single definition of publication, courts generally agree that some acts of exploitation do not constitute publication.

#### 1. Limited Publication

In order to soften the occasional harshness of publication destroying common law rights, courts created a distinction between "general publication"<sup>143</sup> and "limited publication."<sup>144</sup> Limited publication does not destroy common law copyright, whereas general publication does.<sup>145</sup> A limited publication is "one that communicated the contents of a work to a select group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale."<sup>146</sup> The limited purpose can be express or implied from the circumstances.<sup>147</sup>

The key elements in determining whether a particular exploitation constitutes a general or limited publication hinge on distribution to a "select group" for a "limited purpose."<sup>148</sup> For example, a restricted list of parties who may negotiate to exploit a work

141. For a discussion of the limited publication doctrine, see *infra* text accompanying notes 143-152.

142. See 17 U.S.C. § 303(b) (2004) (providing that the distribution of phonorecords embodying musical compositions does not constitute publication). The *King Records* court quoted section 303(b) but did not incorporate the statutory limitation into its definition of publication. *King Records, Inc.*, No. 3:00-0300, slip op. at 17.

143. This Note is primarily concerned with general publication and, accordingly, predominantly refers to "general publication" simply as "publication."

144. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 (11th Cir. 1999); NIMMER ON COPYRIGHT, *supra* note 10, § 4.13[A].

145. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1214 ("Only a general publication divested a common law copyright.").

146. *Id.* at 1214-15; see also NIMMER ON COPYRIGHT, *supra* note 10, § 4.13[A] (defining limited publication as a publication "which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, without the right of diffusion, reproduction, distribution or sale."); *Acad. of Motion Picture Arts and Sci. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451-54 (9th Cir. 1991) (providing extended discussion of limited publication).

147. NIMMER ON COPYRIGHT, *supra* note 10, § 4.13[A][2].

148. See *supra* note 146.

constitutes a select group,<sup>149</sup> whereas negotiating with any interested party for exploitation rights would not.<sup>150</sup> Moreover, a limited publication occurs "if an author distributes copies of his work to a circle of immediate friends with the express or implied understanding that such copies will not be duplicated or circulated . . ." <sup>151</sup> Likewise, a limited publication occurs during a private screening of a movie where the owner's intent to restrict its exhibition was communicated to the viewers.<sup>152</sup>

Some courts further distinguished between "divestive" and "investive" publication.<sup>153</sup> A divestive publication is exploitation that forfeited common law copyright, while an investive publication refers to exploitation that secured a federal copyright.<sup>154</sup> To prevent the harsh result of forfeiture, courts were more likely to find the latter than the former:

[C]ourts apply different tests of publication depending on whether plaintiff is claiming protection because he did not publish and hence has a common law claim of infringement—in which case the distribution must be quite large to constitute 'publication'—or whether he is claiming under the copyright statute—in which case the requirements for publication are quite narrow. In each case the courts appear so to treat the concept of 'publication' as to prevent piracy.<sup>155</sup>

This distinction has very rarely been "invoked as the basis of a ruling, rather than dicta," however, and it suffers from the "inherent vagueness" of determining how large is "quite large" and how narrow is "quite narrow."<sup>156</sup>

## 2. Performance

Although the 1909 Act is silent as to whether performance of a work constitutes publication, the great weight of case law stands for the proposition that performance is not a publication.<sup>157</sup> However,

149. NIMMER ON COPYRIGHT, *supra* note 10, § 4.13 [A][1].

150. *Id.*

151. *Id.* § 4.13[A].

152. *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1027-28 (9th Cir. 1981) (holding that one week screening of a film to the public was a limited publication).

153. NIMMER ON COPYRIGHT, *supra* note 10, § 4.13[C]. With the exception of this discussion of divestive and investive publication, this paper exclusively uses the term "publication" to refer to "divestive" publication.

154. *Id.*

155. *Am. Visuals Corp. v. Holland*, 239 F.2d 740, 744 (2d Cir. 1956).

156. NIMMER ON COPYRIGHT, *supra* note 10, § 4.13[C].

157. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 (11th Cir. 1999) ("Numerous cases stand for the proposition that the performance of a work is not a general publication."); *see also* NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A] (noting that the prevailing rule is that performance is not publication); *Ferris v. Frohman*, 223 U.S. 424, 435 (1912) ("The public representation of a dramatic composition, not printed and published, does not

exactly what the “performance” exception under the 1909 Act encompasses has been subject to some debate.<sup>158</sup> On the one hand, it is well established that the “oral dissemination” of a musical, literary, or dramatic work constitutes performance and not publication.<sup>159</sup> Thus, publication does not occur upon the delivery of a sermon or lecture<sup>160</sup> or the live rendition of a dramatic work<sup>161</sup> or a musical composition.<sup>162</sup>

On the other hand, there is some disagreement whether a phonorecord<sup>163</sup> is a performance of the underlying work or is itself a copy.<sup>164</sup> As discussed below,<sup>165</sup> most courts have held that a phonorecord is a copy of the underlying work and not merely a “captured performance.”<sup>166</sup> After all, “equating phonograph records and public performance is analytically questionable.”<sup>167</sup>

deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use.”). Very few modern cases have held the contrary. These include: *Loew’s, Inc. v. Superior Court*, 115 P.2d 983, 985-87 (Cal. 1941); *Blanc v. Lantz*, 83 U.S.P.Q. 137, 142 (Cal. App. Dep’t Super. Ct. 1949). For a strong argument that performance should constitute publication, see generally Selvin, *supra* note 61. Under the 1976 Act, “public performance” is explicitly excluded from the definition of “publication.” 17 U.S.C. § 101 (2004).

158. The term “performance” is broader under the 1976 Act than under the 1909 Act. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 469 n.17 (1984). “To perform” is defined in the 1976 Act as “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101 (2004). Section 101 defines performing “publicly” as follows:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;

or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

159. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A].

160. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1215; *Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 347 (N.Y. 1969); NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A].

161. *McCarthy & Fischer v. White*, 259 F. 364, 364 (S.D.N.Y. 1919); NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A].

162. *Nutt v. Nat’l Inst.*, 31 F.2d 236, 238 (2d Cir. 1929); NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A].

163. For the definition of “phonorecord,” see *infra* text accompanying note 226.

164. See *infra* notes 199, 208.

165. For a discussion on the distribution of musical work embodied in phonorecords, see *infra* text accompanying notes 196-236.

166. See *infra* note 199.

167. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[B].



Likewise, courts have split as to whether the broadcasting of a work on the radio or television constitutes performance or publication. In a decision vacated by the Second Circuit, a New York district court concluded that radio broadcasts of Amos 'n' Andy shows were not publications because "the rendering of the performance before the microphone cannot be held to be an abandonment of ownership to it by the proprietors or a dedication of it to the public at large."<sup>168</sup> Similarly, according to some courts and *Nimmer on Copyright*, publication does not occur upon the projection of a movie<sup>169</sup> or the broadcasting of a script on radio<sup>170</sup> or television.<sup>171</sup> Yet a district court in Tennessee held that the radio broadcasts of previously made studio recordings constitute publications of the works based on the principle that publication "may occur if the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public."<sup>172</sup>

A basis for extending the performance exception to broadcasting a previously made studio recording of a work over the radio or television is found in judicial interpretation of section 1 of the 1909 Act. Section 1 gives a copyright owner the exclusive right to perform a work publicly for profit.<sup>173</sup> A line of cases developed where a party would broadcast a work over the radio or television without the authorization of the copyright owner.<sup>174</sup> The copyright owner would then sue, arguing that the broadcast violated his exclusive right to perform the work publicly for profit.<sup>175</sup> Courts held that such

168. *Silverman v. CBS, Inc.*, 632 F. Supp. 1344, 1350 (S.D.N.Y. 1986), *vacated*, 870 F.2d 40, 1989 (2d Cir. 1989) (quoting *Uproar Co. v. Nat'l Broad. Co.*, 8 F. Supp. 358, 362 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir. 1935)).

169. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A].

170. *Silverman*, 632 F. Supp. at 1350.

171. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[A].

172. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 16-18 (M.D. Tenn. Sept. 22, 2003) (quoting *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1215 (11th Cir. 1999)); *Mayhew v. Allsup*, No. 3:96-1081, slip op. at 14 (M.D. Tenn. July 24, 2001); *cf.* *Columbia Broad. Sys., Inc. v. Spies*, 167 U.S.P.Q. (BNA) 492, 499 (Ill. Cir. Ct. 1970):

In the giving of a speech or the rendering of a musical performance before large audiences or via electronic media which transmit the sounds of voice or musical instruments throughout the length and breadth of the land, it defies reason and tortures the English language to say that under any circumstances such a knowing transmittal by the performer or by the creator of the words and/or music is not a publication.

173. Section 1 of the 1909 Act gives the copyright owner the exclusive right to perform publicly for profit various types of works, including musical compositions, speeches, and dramatic works. 17 U.S.C. § 1(c)-(e) (1909).

174. *E.g.* *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391-92 (1968); *Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411, 411 (6th Cir. 1925).

175. *Fortnightly Corp.*, 392 U.S. at 393.

broadcasts were public performances of the work for profit under the following rationale:

A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.<sup>176</sup>

Accordingly, in interpreting section 1, the Supreme Court has repeatedly held that broadcasters perform but viewers do not.<sup>177</sup>

The better view, however, is not importing judicial interpretation of “public performance for profit” from section 1 into the performance exception to the doctrine of publication. The rationales behind the two performance doctrines are completely different. The ability to perform publicly for profit is, by definition, a money-making enterprise.<sup>178</sup> Having the exclusive right to do so is a significant part of the economic incentive provided by the 1909 Act to authors.<sup>179</sup> On the other hand, the performance exception to the doctrine of publication is meant to alleviate the burden of complying with statutory formalities prior to live performance.<sup>180</sup> Such a burden does not exist where a previously made studio recording is broadcast on radio or television.

Furthermore, language from a Supreme Court case addressing public performance for profit under section 1 suggests that television broadcast does, in fact, constitute publication:

Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by *those who ultimately enjoy the publication of the material—that is, the television viewers*—but by advertisers who use the drawing power of the copyrighted material to promote their goods and services.<sup>181</sup>

Equating “television viewers” with “those who ultimately enjoy the publication of the material” implies that a television broadcast of a work constitutes publication, even though the television viewer does

176. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158-59 (1975) (quoting *Remick & Co.*, 5 F.2d at 412).

177. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 403 (1974); *Fortnightly Corp.*, 392 U.S. at 398.

178. See 17 U.S.C. § 1(c)-(e) (1909) (describing right to perform publicly for profit); see also *supra* note 105.

179. See *supra* text accompanying notes 20-26.

180. See *infra* text accompanying notes 182-185.

181. *Teleprompter Corp.*, 415 U.S. at 411 (emphasis added).

not receive a tangible embodiment of the work, such as a script or video cassette.

Courts should determine whether a type of exploitation constitutes performance based on a balancing of the practical benefits of the performance exception and the dual policies of the 1909 Act. The rule that performance does not constitute publication has practical benefits in certain circumstances. For example, depositing a copy of a work with the Copyright Office before live performance can be burdensome.<sup>182</sup> This is especially true with respect to certain television, radio, and dramatic performances where last minute changes are common.<sup>183</sup> For example, “[t]o require a deposit in the Copyright Office before permitting a revision to be performed in the pre-Broadway runs or even thereafter would obviously seriously hamper the development of the play.”<sup>184</sup> On the other hand, depositing a copy of musical work embodied on phonorecords presents no great burden.<sup>185</sup>

Some scholars have criticized the rule that performance does not result in publication.<sup>186</sup> In theory, performance should constitute publication for the same reasons that any other act of exploitation generally constitutes publication.<sup>187</sup> After all, the revenues generated from public performance of a work fulfill the 1909 Act’s policy of economically motivating the creativity of artists.<sup>188</sup> For example, in 2002, a year of great economic uncertainty, Paul McCartney grossed the year’s highest sum of performance earnings of \$126.2 million from his live performances on his world tour.<sup>189</sup> “If acts of exploitation of a work constitute publication, and if the indicia of exploitation is the realization of significant economic benefits, then it would seem that

182. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[B].

183. *Id.*

184. *Id.*

185. *Id.*

186. For instance, Herman F. Selvin attacked the rule as wrong for several reasons:

Wrong because it is opposed to the policy to which the Constitution of this country has committed us; because it makes out of the Copyright Act, insofar as it provides for copyright of works not reproduced in copies for sale, not only a useless statute but a positive detriment to the author who avails himself of its provisions; wrong because it proceeds on a premise as to the common law which cannot be fully accepted as an accurate statement of that law.

Selvin, *supra* note 61, at 51; see also NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[B] (arguing that the rationale “for the basic doctrine of publication . . . does not justify the rule that performance is not a publication”); Landau, *supra* note 85, at 33 (asserting that application of the performance exception “can lead to some strange and counterintuitive results”).

187. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[B].

188. See *supra* text accompanying notes 20-26.

189. Ray Waddell, *The Top Tours of 2002*, available at <http://www.billboard.com/bb/yearend/2002/touring.jsp> (Aug. 27, 2004).

performance should constitute publication.”<sup>190</sup> Perhaps the rule’s greatest problem is that it allows an owner an unauthorized extension of the limited monopoly where the work is performed but never otherwise exploited in a way that divests common law rights.<sup>191</sup> One commenter described this phenomenon based on a hypothetical play written in 1910 and performed every year since then:

If the script itself were never published, it would have been protected by common law copyright until the 1976 Act took effect on January 1, 1978. On that date, pursuant to § 303(a) of the new 1976 Act, federal protection would have started, and the play would be protected at least until December 31, 2002, and if published after 1978, at least until December 2047. This scheme gives the playwright protection for a term of at least 137 years. Had the play been “published” in the year it was first written and performed, however, the maximum protection would have been for 56 years.<sup>192</sup>

The net effect of delayed compliance in this scenario is performance revenues accompanied by a copyright lasting almost three times longer than a copyright under the applicable statutory period.<sup>193</sup>

Thus, because the rule upsets the balance of the 1909 Act’s dual policies, it should be limited to those situations in which either a live performance is involved or situations in which practical considerations warrant a broader interpretation of the term “performance.” For example, the live performance of a song before an audience or over the radio should be considered a non-publishing performance,<sup>194</sup> whereas the radio broadcast of a previously made studio recording of a song should be considered a publication, not a performance.<sup>195</sup>

### 3. Distribution of Musical Work Embodied in Phonorecords

In 1997, Congress provided that “[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.”<sup>196</sup> This amendment to the 1909 Act put to rest years of litigation concerning

190. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[B].

191. See Selvin, *supra* note 61, at 40-41 (describing the extended monopoly an owner may obtain because of the performance exception); see also *supra* notes 106-111.

192. Landau, *supra* note 85, at 33.

193. The value of this extended monopoly is protected by the ability of the owner to obtain statutory damages even if he complied with the statutory formalities after the infringement. See *supra* text accompanying notes 113-114. If the author decided not to comply, he could have pursued his remedies under the doctrine of common law copyright. See *supra* text accompanying notes 115-116.

194. See, e.g., *Ferris v. Froham*, 223 U.S. 424, 435 (1912) (holding that the live performance of a play is not a publication).

195. See, e.g., *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 17 (M.D. Tenn. Sept. 22, 2003) (holding that radio play constitutes publication).

196. 17 U.S.C. § 303(b) (2004).

the question of whether the sale or distribution of a phonorecord constitutes publication of the underlying musical work.<sup>197</sup> The basis for Congress's amendment is relevant, however, to the broader question of whether any exploitations of musical work, in addition to the distribution of sheet music,<sup>198</sup> can ever constitute publication.

Until the enactment of section 303(b), courts "were almost unanimous in determining that public sale or other distribution of phonorecords *does* constitute a publication . . ." <sup>199</sup> The most notable exception is the Second Circuit's 1976 decision in *Rosette v. Rainbo Record Manufacturing Corp.*, which held that the sale of phonograph records does not constitute publication because a phonograph record is not a copy of the underlying composition.<sup>200</sup> *Rosette* relied heavily on the Supreme Court's 1907 decision in *White-Smith Music Publishing Co. v. Apollo Co.*,<sup>201</sup> which held that a piano roll was not a copy of the musical composition it embodied.<sup>202</sup> However, *Rosette* ignored the Supreme Court's conclusion in its 1973 decision *Goldstein v. California* that the 1909 Act effectively overruled *White-Smith*.<sup>203</sup> *Goldstein* concluded that "[h]enceforth, under § 1(e), records and piano

197. *E.g.*, *ABKCO Music, Inc. v. Lavere*, 217 F.3d 684 (9th Cir. 2000); *Mayhew v. Allsup*, 166 F.3d 821 (6th Cir. 1999); *La Cienega v. ZZ Top*, 53 F.3d 950 (9th Cir. 1995), *superceded by* 17 U.S.C. § 303(b); *Brown v. Tabb*, 714 F.2d 1088 (11th Cir. 1983); *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976) (affirmed on basis of the district court's opinion).

198. The notion that the distribution of sheet music constitutes publication is uncontroversial. See NIMMER ON COPYRIGHT, *supra* note 10, § 4.05[B][7] (discussing a situation where publication would not occur if sheet music were not released).

199. NIMMER ON COPYRIGHT, *supra* note 10, § 4.05[B][2]. The following cases that predate the enactment of 17 U.S.C. § 303(b) hold that the sale or distribution of phonorecords constitutes publication of the underlying musical composition. *La Cienega*, 53 F.3d at 953; *Brown v. Tabb*, 714 F.2d 1088, 1092 (11th Cir. 1983); *Mayhew v. Gusto Records, Inc.*, 960 F. Supp. 1302, 1308 (M.D. Tenn. 1997); *Mills Music v. Cromwell Music*, 126 F. Supp. 54, 69-70 (S.D.N.Y. 1954); *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 683 (S.D. Cal. 1958); *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473, 475 (N.D. Ill. 1950); see also NIMMER ON COPYRIGHT, *supra* note 10, § 4.05[B][2] n.30 (listing additional cases). *Contra* *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183, 1189-92 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976) (affirmed on basis of the district court's opinion); *Nom Music, Inc. v. Kaslin*, 227 F. Supp. 922, 926 (S.D.N.Y. 1964), *aff'd on other grounds*, 343 F.2d 198 (2d Cir. 1965). Thus, the conclusion that "for more than half a century, it was generally accepted in a number of contexts that . . . the sale of records of a song did not oust common-law copyright" is inaccurate. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 385 (6th ed. 2002) (espousing the quoted position).

200. *Rosette*, 354 F. Supp. at 1191-92.

201. *Id.* at 1189-92; *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

202. *White-Smith Publ'g Co.*, 209 U.S. at 17-18.

203. *Goldstein v. California*, 412 U.S. 546, 565 (1973) (superceded by statute on other grounds) ("After pointedly waiting for the Court's decision in *White-Smith Music Publishing Co.*, Congress determined that the copyright statutes should be amended to insure that composers of original musical works received adequate protection to encourage further artistic and creative effort.").

rolls were to be considered as 'copies' of the original composition they were capable of reproducing, and could not be manufactured unless payment was made to the proprietor of the composition copyright."<sup>204</sup>

Accordingly, courts and scholarship have roundly criticized *Rosette*.<sup>205</sup> NIMMER ON COPYRIGHT argues that *Rosette* is inconsistent with the rationale of the 1909 Act because "an author in permitting records of his work to be publicly marketed is certainly engaging in a form of exploitation of his work and should therefore be required to seek protection, if at all, only under the limited monopoly concept of the federal Copyright Act."<sup>206</sup> In its unpublished decision in *Leeds Music Corp. v. Gusto Records, Inc.*,<sup>207</sup> the Sixth Circuit "expressly repudiated" *Rosette* by determining that a recording of a monologue could constitute a copy of the underlying composition.<sup>208</sup> Likewise, in its 1995 decision *La Cienega Music Co. v. ZZ Top*, the Ninth Circuit refused to follow *Rosette* because "*Rosette* reduces the incentive to immediate compliance with the 1909 Act" by encouraging "artists to delay compliance with the Copyright Act's requirements and thereby receive 'longer' copyright protection."<sup>209</sup> In *La Cienega*, the Ninth Circuit held that selling records constitutes publication of the underlying compositions.<sup>210</sup>

*Rosette* experienced somewhat of a resurrection due to Congress's reaction to *La Cienega*. That decision provoked a flurry of activity in Congress, sparking the view that *La Cienega* "placed a cloud over the legal status of a large number of musical works."<sup>211</sup> The legislative history suggests that Congress viewed *La Cienega* as an aberration and out of step with the longstanding view of the Copyright Office and the music industry. For instance, the Register of Copyrights testified before Congress:

204. *Id.* at 565-66.

205. *E.g.*, *La Cienega v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995), *superceded by* 17 U.S.C. § 303(b) (2004) (concluding that "*Rosette* is the minority rule; our research fails to reveal any other circuit which has followed it"); NIMMER ON COPYRIGHT, *supra* note 10, § 4.05[B][2] (determining that *Rosette* is not "the prevailing view under the 1909 Act").

206. *La Cienega*, 53 F.3d at 953 (quoting 1 NIMMER ON COPYRIGHT (1992) § 4.05[B]).

207. *Leeds Music Corp. v. Gusto Records, Inc.*, 601 F.2d 589, 589 (6th Cir. 1979).

208. *Mayhew v. Gusto Records, Inc.*, 960 F. Supp. 1302, 1308 (M.D. Tenn. 1997); *see also* NIMMER ON COPYRIGHT, *supra* note 10, § 4.05[B][2] (noting that "[t]he courts in applying the 1909 Act, were in most instances unpersuaded by the argument that no publication occurs by virtue of the sale of a phonorecord because the record is not a 'copy' of the work recorded."). The position that a phonorecord is a copy of the work recorded is implied in the cases listed *supra* note 199 holding that the sale or distribution of a phonorecord constitutes publication of the underlying work.

209. *La Cienega*, 53 F.3d at 953.

210. *Id.*

211. 143 CONG. REC. E1260-03 (June 19, 1997) (statement of Hon. Coble).

For many years, the Copyright Office has espoused the view that recordings sold before January 1, 1978 . . . were not copies of the musical compositions embodied on them, and therefore the distribution of recordings did not constitute publication under the federal copyright statute. Moreover, if by chance a recording bore an appropriate copyright notice for the musical composition embodied on it and registration for the music was sought on this basis, registration was refused. The Office would state that copies had to be visually perceptible, e.g. sheet music copies, and that unless such copies had been sold, placed on sale or offered to the public, registration for the music as a published work was not possible.<sup>212</sup>

Likewise, the legislative history cites *Rosette* approvingly.<sup>213</sup> However, Congress never explicitly adopted *Rosette's* view that a phonorecord is not a copy of the underlying musical composition.<sup>214</sup> In 1997, attempting to "restore the law to what it was before [*La Cienega*],"<sup>215</sup> Congress enacted 17 U.S.C. § 303(b), which provides that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein."<sup>216</sup>

Although section 303(b) greatly restricts many acts of exploitation of a musical work from constituting publication of the underlying composition, section 303(b) does not preclude that result in all instances. Section 303(b) prevents the distribution of a phonorecord from constituting publication of the underlying musical work.<sup>217</sup> Although Congress did not define "distribution" for purposes of section 303(b), the legislative history suggests a broad interpretation of the term. As mentioned earlier, Congress enacted

212. H.R. REP. NO. 104-554, at 21 (1996) (testimony before Congress of Marybeth Peters, Register of Copyrights).

213. *E.g.*, H.R. REP. NO. 105-325, at 2 (1997); 143 CONG. REC. S11541-03 (Oct. 31, 1997) (statement of Sen. Hatch); 143 CONG. REC. E1260-03 (June 19, 1997) (statement of Hon. Coble); 143 CONG. REC. S2654-01 (Mar. 20, 1997) (statement of Sen. Sarbanes).

214. The legislative history indicates discussion of the view of *Rosette* and the Copyright Office that "the release of a phonorecord was not a 'copy' for purposes of the Act." H.R. REP. NO. 105-325, at 2 (1997); *see also* Jonathan C. Stewart & Daniel E. Wanat, *Entertainment and Copyright Law: Section 303 of the Copyright Act is Amended and a Pre-1978 Phonorecord Distribution of a Musical Work Is Not a Divestitive Publication*, 19 LOY. L.A. ENT. L.J. 23, 48 (1998) (quoting same). Nonetheless, Congress did not provide that "a phonorecord embodying a musical composition is not a copy of that composition." Instead, Congress's primary rationale in enacting section 303(b) appears to have been its concern that *La Cienega* "placed a cloud over the legal status of a large number of works." *See* H.R. REP. NO. 105-325, at 5 (1997) (discussing the legal status of musical compositions under the 1909 Act).

215. H.R. REP. NO. 104-554, at 20 (1996).

216. 17 U.S.C. § 303(b) (2004).

217. *Id.*

section 303(b) to overturn *La Cienega* and to “restore” the law to what it was under *Rosette*.<sup>218</sup> Both *La Cienega* and *Rosette* involved whether the sale of a phonograph record constitutes publication - in the words of one Senator, whether a composition is published “immediately upon the first sale.”<sup>219</sup> Thus, construing section 303(b) as constrained to the facts of *La Cienega* leads to the conclusion that “distribution” means simply “sale.” Equating distribution and sale, however, would not be faithful to Congressional intent because Congresspersons repeatedly distinguished between the distribution and sale of phonorecords.<sup>220</sup> Moreover, some Congressmen viewed the sale of phonorecords simply as one type of distribution.<sup>221</sup> In addition, had Congress intended to preclude only the sale of phonorecords from constituting publication, it could have simply said so, instead of using the term “distribution.” Thus, a broad interpretation of “distribution” to include virtually any exploitation of phonorecords is probably most consistent with Congressional intent. Accordingly, courts have held that the distribution of phonorecords encompasses the sale,<sup>222</sup> distribution for sale,<sup>223</sup> distribution for radio play,<sup>224</sup> and distribution for jukebox play.<sup>225</sup>

On the other hand, the phrase “distribution of phonorecords” does not encompass various other types of exploitations, including distribution of sheet music, licensing a song for exploitation, radio

218. See *supra* text accompanying note 215.

219. *La Cienega v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995), *superseded by* 17 U.S.C. § 303(b) (2004); *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183, 1193 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976) (affirmed on basis of the district court’s opinion); 143 CONG. REC. S2654 (Mar. 20, 1997) (statement of Sen. Sarbanes).

220. 143 CONG. REC. E1260-03 (June 19, 1997) (statement of Hon. Coble) (arguing that the view of the Copyright Office and the music industry was that “the sale or distribution of recordings to the public” did not constitute publication); 142 CONG. REC. H5781-01 (June 4, 1996) (statement of Hon. Schroeder) (asserting that the view of the Copyright Office is “that the sale or distribution of recordings to the public” does not constitute publication).

221. See, e.g., 143 CONG. REC. S2654 (March 20, 1997) (statement of Sen. Sarbanes) (concluding that “*La Cienega* held that distributing a sound recording to the public - for example by sale - is a ‘publication’ of the music recorded on it”); 143 CONG. REC. S11301-01 (Oct. 28, 1997) (statement of Sen. Hatch) (determining that “*La Cienega* held that distributing a sound recording to the public - by sale for example - is a publication of the music recorded on it”). On the other hand, this is an imprecise characterization of *La Cienega*’s holding, which was that “selling recordings constitutes ‘publication’ under the Copyright Act of 1909.” *La Cienega*, 53 F.3d at 953 (emphasis added). In fact, the only time the *La Cienega* court used the term “distribution” occurred when it quoted NIMMER ON COPYRIGHT, *supra* note 10. *Id.*

222. *ABKCO Music, Inc. v. Lavere*, 217 F.3d 684, 692 (9th Cir. 2000).

223. *Mayhew v. Allsup*, 166 F.3d 821, 822 (6th Cir. 1999).

224. *Id.*

225. *Id.*



play, or jukebox play. Section 303(b) is restricted to the distribution of phonorecords. Congress defined "phonorecords" as:

[M]aterial objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.<sup>226</sup>

Sheet music obviously does not fit this definition. One definition of sheet music is "[c]ompositions printed on unbound sheets of paper."<sup>227</sup> No sounds are fixed in sheet music because sheet music is simply a written document. Thus, the term "distribution of phonorecords" does not encompass the distribution of sheet music. Accordingly, no controversy surrounds the notion that the distribution of sheet music constitutes a publication of the underlying musical composition.<sup>228</sup>

Likewise, licensing a musical composition for exploitation does not necessarily involve distributing phonorecords. In general, a license allows the licensee to exploit a work in exchange for a royalty.<sup>229</sup> Licensing a musical composition generally involves drafting a written document that specifies various items, including "the manner in which the work may be exploited."<sup>230</sup> If, for example, a licensor issues a license that allows the licensee the right only to distribute sheet music, no phonorecord would be distributed pursuant to the license. Thus, to the extent that licensing a work for exploitation does not involve the distribution of a phonorecord, section 303(b) does not encompass that exploitation.

Similarly, the term "phonorecord" does not encompass every form of sound recording.<sup>231</sup> "Sound recordings" are not "material objects" but, under the 1909 Act, are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture."<sup>232</sup> Thus, a

226. 17 U.S.C. § 101 (2004).

227. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1255 (3d ed. 1997).

228. See *supra* note 198.

229. See BLACK'S LAW DICTIONARY 931 (7th ed. 1999) (defining "compulsory license" as "[a] statutorily created license that allows certain parties to use copyrighted material without the explicit permission of the copyright owner in exchange for a specified royalty").

230. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW §§ 5.12-5.13[A] (3d ed. 1999).

231. On the other hand, Professor Landau apparently uses the terms "phonorecords" and "sound recordings" interchangeably. See Landau, *supra* note 85, at 29-30 (equating "phonograph records" and "sound recordings"). Equating phonorecords and sound recordings is incorrect, as manifested by differing definitions of the two terms under section 101 of the 1976 Act. See also text accompanying notes 231-236.

232. 17 U.S.C. § 26 (1909). The 1976 Act similarly defines sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the

sound recording is the intangible fixation of sounds, while a phonorecord is the tangible embodiment of one or more sound recordings.<sup>233</sup> For example, a cassette tape is a phonorecord, but the sounds fixed on that cassette tape are fixed in one or more sound recordings. Moreover, selling a cassette tape involves the distribution of a phonorecord and a sound recording. However, playing a song on the radio or on a jukebox involves the dissemination of a sound recording, not a phonorecord, because no “material object” is distributed. Thus, in interpreting the current 1976 Copyright Act, the Second Circuit concluded that “transmitting a sound recording to the public on the airwaves” is not a distribution of a material object.<sup>234</sup> This interpretation also makes sense for the 1909 Act because a person listening to a song on the radio does not have immediate tangible access to the song but may convert the intangible sound recording into a material object by, for instance, recording it onto a cassette. Accordingly, in interpreting section 303(b), one district court has held that playing a song on the radio constitutes publication of the musical composition.<sup>235</sup> Because the exploitation of a sound recording does not necessarily involve the distribution of a phonorecord, section 303(b) does not always preclude the exploitation of a sound recording from constituting publication of the underlying work.<sup>236</sup>

#### IV. THE NEW DEFINITION: AUTHORIZED EXPLOITATION OF A WORK BY THE AUTHOR AND/OR OWNER

The dual policies of the 1909 Act, pertinent case law, and scholarship all point to one appropriate definition of publication under the 1909 Act: subject to the exceptions of limited publication, performance, and distribution of phonorecords embodying musical

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sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” 17 U.S.C. § 101 (2004).

233. See NIMMER ON COPYRIGHT, *supra* note 10, § 2.10[A] (“[A] sound recording copyright may be claimed in the aggregate of sounds embodied in any tangible medium, including phonograph discs . . . and other material objects in which sounds are fixed and can be communicated either directly or with the aid of machine or device.”).

234. *Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995).

235. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 18 (M.D. Tenn. Sept. 22, 2003).

236. Professor Landau argues to the contrary, asserting that “[a]s a result of . . . § 303(b) and the interpretation in *Mayhew* . . . [t]he release of a sound recording is not a ‘publication’ of the underlying musical compositions.” Landau, *supra* note 85, at 43. Professor Landau’s analysis, however, appears to be based on the incorrect assumption that “sound recordings” and “phonorecords” are synonyms. See *supra* note 231. Landau’s analysis does not take into account section 303(b)’s use of the term “phonorecord,” which is limited to material objects, as opposed to “sound recording,” which is not limited to material objects. See *supra* text accompanying notes 231-236.

work,<sup>237</sup> publication is the exploitation of a work authorized by the author and/or owner of the work. This definition, which is consistent with the 1909 Act as written, was first proposed in a version tailored to musical compositions in *King Records, Inc. v. Daily*.<sup>238</sup> Although the *King Records* court did not explicitly adopt this definition, the court praised it as “consistent with the principles of general publication.”<sup>239</sup> This definition has four elements: (1) author and/or owner, (2) authorization, (3) exploitation, and (4) work.

### A. Author and/or Owner

This new definition recognizes that the author and owner might not be the same person but that both have an “exclusive right” to their work for “limited times” under the Constitution’s Copyright and Patent Clause.<sup>240</sup> Upon creation of the composition, the author has the exclusive right to his own work for “limited times.”<sup>241</sup> If, as is common, however, the author sells his rights to the work to a third party, the third party becomes the owner of the work and thereby obtains the “exclusive right” for “limited times.”<sup>242</sup>

### B. Authorization

Under the 1909 Act, the use of a work must be authorized before it can be published. The concept of “authorization” is like the notion of “consent” that Melville Nimmer employs in his definition of publication<sup>243</sup> and recognizes the importance of the copyright owner’s intent under the 1909 Act.<sup>244</sup> As discussed above, the dual purposes of the 1909 Act are to promote the reward of a limited monopoly to

237. For a discussion of these three exceptions, see *supra* Part III.B.

238. The plaintiffs proposed the definition that publication is “the exploitation of a musical composition authorized by the author and/or owner of the musical composition.” *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 17 (M.D. Tenn. Sept. 22, 2003).

239. *Id.*

240. The U.S. Constitution refers to “securing for limited Times to *Authors* and Inventors the exclusive Right to . . .” U.S. CONST. art. I, § 8., cl. 8 (emphasis added). On the other hand, NIMMER ON COPYRIGHT, *supra* note 10, refers to the owner’s copyright. See *supra* note 82 (“publication occurs when by consent of the copyright *owner*. . .”) (emphasis added).

241. U.S. CONST. art. I, § 8., cl. 8.

242. See, e.g., NIMMER ON COPYRIGHT, *supra* note 10, § 2.10[A][3] (discussing ownership of sound recordings).

243. See *supra* text accompanying note 82 (“publication occurs when by *consent* of the copyright owner. . .”).

244. See generally NIMMER ON COPYRIGHT, *supra* note 10, § 4.04 (discussing unauthorized exploitation of a work).

authors and the free dissemination of ideas.<sup>245</sup> These policies would be greatly undermined if the author and/or owner were unable to control the use of his composition because the limited monopoly would be worthless. If an author were unable to control his work's exploitation, he would be less inclined to produce it because, for instance, potential purchasers would be discouraged from buying such extremely limited rights. Consequently, the new definition restricts publication only to exploitation that is authorized by the author and/or owner.

### C. *Exploitation*

A work's publication also requires its exploitation. The Supreme Court has repeatedly used the term "exploitation" to describe an owner's utilization of his work.<sup>246</sup> *Nimmer on Copyright* has also employed this term for similar purposes.<sup>247</sup> *Black's Law Dictionary* defines exploitation as "the act or process of making use of."<sup>248</sup> The concept of exploitation is intrinsically linked with the 1909 Act's policy of providing an incentive for authors to create works. Thus, exploitation means the use of a work for a purpose that provides an incentive for an author to create a work. Generally, this incentive is economic, such as royalty payments, but includes any other motivation to generate the work like fame or bringing attention to a particular cause (e.g., the civil rights movement).

Subject to the three exceptions discussed above,<sup>249</sup> exploitation encompasses the many uses of works provided for in other definitions of publication. As in Melville Nimmer's definition, exploitation includes situations where a work is "sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur."<sup>250</sup> Exploitation also encompasses exhibiting or displaying a work "in such a manner as to permit unrestricted copying by the general public."<sup>251</sup> Similarly, a copyright owner would exploit a work upon "the distribution and/or exhibition of the work for unlimited use,

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245. See *supra* text accompanying notes 20-26.

246. *Eldred v. Ashcroft*, 537 U.S. 186, 213, 219 (2003).

247. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08[B].

248. BLACK'S LAW DICTIONARY 519 (5th ed. 1979).

249. See *supra* Part III.B.

250. Nimmer, *supra* note 74, at 187; NIMMER ON COPYRIGHT, *supra* note 10, § 4.04.

251. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1215 (11th Cir. 1999).

enjoyment, or copying by the general public.”<sup>252</sup> Thus, the term “exploitation” draws no distinction between tangible and intangible exploitations of a work and, accordingly, encompasses the playing of a previously made studio recording on the radio<sup>253</sup> and the public display of a painting or sculpture.<sup>254</sup>

On the other hand, common law and statutory developments prevent three types of exploitation from constituting publication. First, exploitations of a work constituting only a limited publication would not be requisite acts of exploitation to constitute a general publication.<sup>255</sup> As discussed earlier, a limited publication would occur, for instance, “if an author distributes copies of his work to a circle of immediate friends with the express or implied understanding that such copies will not be duplicated or circulated . . . .”<sup>256</sup>

Second, in accordance with applicable case law and the dual policies of the 1909 Act, exploitation does not encompass live performances or situations where practical considerations warrant a broader interpretation of the term “performance.”<sup>257</sup> Accordingly, the “oral dissemination” of a musical, literary, or dramatic work constitutes performance,<sup>258</sup> whereas radio play of a previously made studio recording would constitute publication.<sup>259</sup>

Third, exploitation does not include the distribution of musical compositions embodied on phonorecords because 17 U.S.C. § 303(b) provides that “[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.”<sup>260</sup> Pursuant to this Note’s earlier analysis, section 303(b) precludes publication from occurring upon the following exploitations of phonorecords: sale, distribution for sale, distribution for radio play, and distribution for jukebox play.<sup>261</sup> Section 303(b) does not encompass radio play or jukebox play,

252. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 17 (M.D. Tenn. Sept. 22, 2003).

253. *See id.* at 18 (holding that radio play of a musical composition constitutes publication); *see also Mayhew v. Allsup*, No. 3:96-1081, slip op. at 14 (M.D. Tenn. July 24, 2001) (determining that “[p]laying a song on the radio, so long as it is not merely a performance, would constitute ‘publication’”).

254. *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm’n of Chicago*, 320 F. Supp. 1303, 1311 (N.D. Ill. 1970).

255. *See analysis of limited publication supra notes 143-152.*

256. *See supra* note 151.

257. *See supra* text accompanying notes 157-195.

258. NIMMER ON COPYRIGHT, *supra* note 10, § 4.08.

259. *See supra* note 253.

260. 17 U.S.C. § 303(b) (2004).

261. *See supra* text accompanying notes 196-236.

however, because these types of exploitations do not involve the distribution of a phonorecord.<sup>262</sup>

#### D. Work

As used in this Note's definition, the term "work" encompasses the original and any tangible or intangible<sup>263</sup> embodiments of the work. Exploitation of the original could, for example, involve the display of a sculpture, the sale of a painting, or the licensing of a musical composition. Moreover, requisite embodiments of a work include, for instance, sheet music, phonorecords, sound recordings, a script of a speech, an audio or video recording of a speech, film prints, and photographs of a sculpture or painting.

The benefits of including intangible embodiments within the meaning of the term "work" can be illustrated in the context of musical compositions. Preventing the exploitation of a sound recording, an intangible embodiment of a work, from constituting publication of the underlying work would guarantee many authors an extended monopoly in their musical compositions. This result occurs because authors or copyright owners never transcribed many, if not most, compositions to sheet music.<sup>264</sup> Under the 1909 Act as originally enacted, an artist who wrote a song and complied immediately with the statutory requirements received twenty-eight years of copyright protection plus a renewal term of twenty-eight years from the time of publication with notice.<sup>265</sup> But, if exploitation of a sound recording does not constitute publication, an artist who did not immediately comply could have repeatedly performed the song, sold multitudes of records, and received extensive radio play of the song, while relying on common law copyright protection before complying with the statutory formalities.<sup>266</sup> "From that late point of compliance on, the statutory

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262. An argument that radio play is merely incidental to the distribution of a phonorecord is not persuasive. After all, the radio play itself, not the presence of a phonorecord at a radio station, generates the revenue for the copyright owner. See *supra* note 105 (describing royalties generated from radio play).

263. The position that the exploitation of an intangible embodiment of a work constitutes publication has various adherents. See *supra* note 85.

264. See NIMMER ON COPYRIGHT, *supra* note 10, § 4.05[B][4]:

When the 1909 Act was adopted, the sale of sheet music constituted the major source of revenue. Today such sales are minimal, and the significant aspect of the business lies in the sale of phonorecords (as well as in performance fees). For this reason, it is a common practice to market records of a musical work without publishing the work in sheet music form.

265. See *supra* note 29.

266. See *La Cienega v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995), *superceded by* 17 U.S.C. § 303(b) (2004) ("[U]nder *Rosette*, an artist who does not so comply can sell any number of

copyright owner receive[d] [the statutorily provided term] of federal protection.”<sup>267</sup> This result encouraged artists “to delay compliance with the Copyright Act’s requirements and thereby receive ‘longer’ copyright protection” than those who complied promptly.<sup>268</sup> Moreover, in the event that the owner chose to seek damages through federal copyright law, he could have done so, even if the infringement occurred prior to his obtaining of a federal copyright.<sup>269</sup> Thus, including intangible embodiments within the term “work” adheres to the Congressional balance between the 1909 Act’s dual policies and prevents the judicial overreaching of extending the copyright term beyond the statutorily mandated period.

## V. APPLICATION OF THE NEW DEFINITION TO KEY CASES

Applying this new definition to the facts of notable cases demonstrates that it effectively serves the dual purposes of the 1909 Act, while avoiding the shortcomings of other leading definitions.

### A. Music

#### 1. *ABKCO & La Cienega*: Sale & Distribution for Sale

Both before and after Congress’s enactment of 17 U.S.C. § 303(b) in 1997, the Ninth Circuit addressed whether the sale or distribution of a phonorecord constitutes publication of the underlying musical composition. In its 1995 decision in *La Cienega Music Co. v. ZZ Top*, the Ninth Circuit held that the sale of a phonorecord constitutes publication.<sup>270</sup> *La Cienega Music Co.* (“*La Cienega*”) sued the musical group *ZZ Top* and others, claiming that *ZZ Top*’s song “*La Grange*” infringed on its copyright of blues great John Lee Hooker’s “*Boogie Chillen*.”<sup>271</sup> Both “*Boogie Chillen*” and “*La Grange*” have enjoyed enormous popularity. Between 1948 and 1970, John Lee Hooker wrote and recorded various versions of “*Boogie Chillen*,” one of which sold up to one million copies.<sup>272</sup> “*La Grange*” was released in

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recordings for several years, receiving common law copyright protection all the while, before copyrighting the work with the Copyright Office.”)

267. *Id.*

268. *Id.*

269. See *supra* text accompanying notes 113-114.

270. *La Cienega*, 53 F.3d at 953.

271. *Id.* at 952.

272. *Id.*

1973 and is ZZ Top's "signature song."<sup>273</sup> It "has had global circulation as a phonorecord, has been recorded by other prominent artists, has been prominently featured in a national television advertising campaign, and has been performed at thousands of ZZ Top concerts."<sup>274</sup>

ZZ Top argued that, even if "La Grange" plagiarized "Boogie Chillen," La Cienega was not entitled to damages because "Boogie Chillen" had been injected into the public domain when federal statutory requirements were not followed and the song had been distributed for sale and had been sold.<sup>275</sup> The Ninth Circuit agreed in part, holding that the sale of a phonorecord constitutes publication.<sup>276</sup> It remanded the case regarding the issue of compliance with federal statutory requirements, however.<sup>277</sup>

Five years later, in *ABKCO Music, Inc. v. Lavere*, the Ninth Circuit addressed a similar issue.<sup>278</sup> ABKCO Music, Inc. ("ABKCO") owned the copyrights to two Rolling Stones songs—"Love in Vain," released in 1969, and "Stop Breakin' Down," released in 1972.<sup>279</sup> Both songs were featured on hugely successful albums, both of which ROLLING STONE MAGAZINE ranked among the "greatest albums of all time."<sup>280</sup> These songs were adapted versions of songs by the same titles written by Robert Johnson, a prominent blues artist.<sup>281</sup> Johnson's versions of the songs had been released on phonorecords and distributed in the late 1930s.<sup>282</sup> No copyright registration for Johnson's songs was ever filed.<sup>283</sup> In response to the threat of a lawsuit by the alleged owners of the Johnson songs, ABKCO sought a declaratory judgment that the two Johnson compositions were in the public domain.<sup>284</sup>

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273. *Id.*

274. *Id.*

275. *Id.* at 953-54.

276. *Id.* at 953.

277. *Id.* at 954.

278. *ABKCO Music, Inc. v. Lavere*, 217 F.3d 684 (9th Cir. 2000).

279. *Id.* at 685.

280. *Rolling Stone* magazine ranked *Exile on Main Street*, the album that features "Stop Breakin' Down," as the seventh greatest album of all time. *The 500 Greatest Albums of All Time*, ROLLING STONE, Dec. 11, 2003, at 90. Likewise, *Let it Bleed*, the album that contains "Love in Vain," is listed as the thirty-second greatest album of all time. *Id.* at 106.

281. *ABKCO Music, Inc.*, 217 F.3d at 685-87.

282. *Id.* at 685.

283. *Id.* at 687.

284. *Id.*



The *ABKCO* court held that the distribution of phonorecords embodying Johnson's songs did not constitute publication.<sup>285</sup> It reasoned that Congress effectively overruled *La Cienega* in 1997 by providing that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein."<sup>286</sup> Thus, the *ABKCO* court concluded that "distribution" under section 303(b) encompassed the distribution for sale of phonorecords embodying Johnson's songs.<sup>287</sup>

Under this Note's definition, the result in *ABKCO*, but not in *La Cienega*, would have been the same. The authorized sale or distribution of phonorecords constitutes an authorized exploitation of the musical compositions at issue. The sale and distribution of phonorecords, however, fall within the exception carved out by Congress in section 303(b) for the distribution of phonorecords. Thus, the authorized sale or distribution of phonorecords embodying a musical composition would not constitute publication under this Note's definition.

## 2. *King Records*: Licensing, Distribution for Radio Play & Radio Play

In *King Records, Inc. v. Daily*, the plaintiffs, two record companies, (collectively "King Records") entered agreements in 1984 and 1995 with one of the defendants, a music publisher, (hereinafter "Daily") to exploit three songs written by George Jones.<sup>288</sup> At that time, King Records believed that Daily owned the compositions and was therefore entitled to license them for royalties.<sup>289</sup> One of the record companies paid Daily royalties for almost twenty years for the right to exploit the songs, while the other paid for that right for about eight years.<sup>290</sup> King Records later sued Daily to reclaim those royalty payments, claiming that Daily did not own the songs because the songs had been forfeited to the public domain through publication without compliance with the 1909 Act's requirements.<sup>291</sup>

In the mid-to-late 1950s, Daily licensed the three songs to record companies for commercial exploitation.<sup>292</sup> Also during that time, Daily "allowed recorded performances of the songs to be played

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285. *Id.* at 692.

286. *Id.* at 690 (determining that section 303(b) "is intended to restore the law to what it was before [*La Cienega*]"); 17 U.S.C. § 303(b) (2004).

287. *ABKCO Music, Inc.*, 217 F.3d at 690-92.

288. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 6 (M.D. Tenn. Sept. 22, 2003).

289. *Id.*

290. *Id.* at 23.

291. *Id.* at 2, 22.

292. *Id.* at 18.

on the radio to a broad audience, without limitation, for which it received royalties.”<sup>293</sup> Additionally, one of the songs was performed and recorded by musicians of the licensed record companies, received regular airplay so that it remained on the Billboard charts for twelve weeks, and generated royalties for Daily.<sup>294</sup> Roughly twenty years later, in 1979, Daily deposited copies of the songs with the U.S. Copyright Office.<sup>295</sup>

The *King Records* court held that the songs had been published.<sup>296</sup> The court was unsure “whether distributing phonorecords would encompass a situation where the owner of a copyrighted work licenses the work to record companies for exploitation.”<sup>297</sup> It concluded, however, that allowing “the songs to be played on the radio to a broad audience, without limitation, for which it received royalties” constituted publication.<sup>298</sup> Addressing Daily’s subsequent motion to alter or amend, the *King Records* court affirmed its prior ruling as effectuating “the public interest in protecting copyrights.”<sup>299</sup>

Under this Note’s definition of publication, the result would have been the same but for slightly different reasons. *King Records* involved three acts of authorized exploitation of the composition: issuing licenses to record companies to exploit the work, distributing the sound recordings to radio stations, and playing at least one song on the radio.<sup>300</sup> The key question then is whether the exceptions for limited publication, performance or distribution of phonorecords encompass any of these acts of exploitation. Issuing a license to a record company would have constituted the requisite exploitation, so long as it involved a distinct act of exploitation apart from the distribution of a phonorecord.<sup>301</sup> Moreover, licensing the work for exploitation would not have constituted a limited publication because there is no evidence that Daily limited to a select group those who

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293. *Id.*

294. *Id.* at 7-8.

295. *Id.* at 21.

296. *Id.* at 18.

297. *Id.* at 18 n.12.

298. *Id.* at 18.

299. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 4 (M.D. Tenn. July 9, 2004).

300. *King Records* proved that the George Jones song *Accidentally on Purpose* had been played on the radio. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 8, 18 (M.D. Tenn. Sept. 22, 2003).

301. *See supra* text accompanying notes 228-231.

could have negotiated to become licensees.<sup>302</sup> Thus, Daily's issuance of a license for the purpose of exploiting a musical composition would have constituted publication.

On the other hand, Daily's allowance of sound recordings to be distributed to radio stations would not have constituted publication. Since section 303(b) provides that the distribution of phonorecords "shall not for any purpose constitute a publication of the musical work embodied therein,"<sup>303</sup> and Congress appears to construe the term "distribution" broadly,<sup>304</sup> section 303(b) probably encompasses the distribution of phonorecords for the purpose of playing the songs on the radio.

Radio play of each song at issue would have constituted publication under my definition, however, because each was a previously made studio recording. Section 303(b) does not encompass playing a song on the radio. As discussed above, radio play is not a form of distribution of a phonorecord because broadcasting a song does not involve the distribution of a material object.<sup>305</sup> Likewise, radio play of a previously made studio recording does not constitute mere performance because compliance with statutory formalities before broadcast is not particularly burdensome.<sup>306</sup> After all, no special burden in complying with the statutory formalities accompanies radio play of a previously recorded track.

In sum, the songs in *King Records* were published to the extent that they had been played on the radio or had been licensed for exploitation in a way that did not involve simply the distribution of phonorecords. However, those that were only distributed for radio play but not actually played on the radio would not have been published. This result is consistent with the dual purposes of the 1909 Act. As manifested by King Record's payment of royalties to Daily, Daily's exploitation of the songs generated economic benefits of the type envisioned by the 1909 Act. Moreover, a contrary outcome would have provided a disincentive to comply with the 1909 Act's formalities because Daily could have obtained a much longer monopoly by delaying compliance.<sup>307</sup> Furthermore, this result prevents the

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302. See NIMMER ON COPYRIGHT, *supra* note 10, § 4.13 n.16 ("Unless the stations that might engage in such negotiations were limited in some manner, it would seem that there was no limitation as to persons.").

303. 17 U.S.C. § 303(b) (2004).

304. See *supra* text accompanying notes 217-225.

305. See *supra* text accompanying notes at 231-236.

306. For a discussion of situations where compliance with statutory formalities is or is not particularly burdensome, see *supra* text accompanying notes 182-185.

307. For example, the song *Accidentally on Purpose* received radio play in 1960. *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 8 (M.D. Tenn. Sept. 22, 2003). Had the song

overreaching that results from a judicially-generated twenty-plus-year extension on the limited monopoly.<sup>308</sup>

### 3. *Mayhew*: Jukeboxes

In *Mayhew v. Allsup*, the Sixth Circuit held that a musical composition was not published when a “recording was offered for sale, placed in jukeboxes, and distributed for radio airplay.”<sup>309</sup> As previously discussed, distribution of phonorecords under section 303(b) encompasses the offering for sale and distribution for radio airplay of phonorecords. Likewise, placing recordings in jukeboxes would be another form of distribution of phonorecords.

A question not addressed in *Mayhew* is whether the jukebox play of a recording constitutes publication. Jukebox play constitutes publication because it is an authorized exploitation of the work that does not fall within the exceptions to publication. Because it is exploitation of a musical composition that generates economic benefits to the copyright owner,<sup>310</sup> it is the type of exploitation that should amount to publication of the work. It does not involve the distribution of phonorecords because no “material” object is distributed.<sup>311</sup> Similarly, the jukebox play at issue does not involve a limited publication because there is no evidence that the copyright owner restricted to a “select group” the parties who could play the songs.<sup>312</sup>

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obtained a federal copyright in 1960, under current law, the copyright would expire in 2055. See 17 U.S.C. § 304(a) (2004) (extending copyright for ninety-five years from date of publication for works in their first copyright term on January 1, 1978). On the other hand, if the exploitation in 1960 did not constitute publication, Daily’s common law copyright in the song would have converted into a federal copyright in 1978. See 17 U.S.C. § 303(a) (providing for conversion of common law copyright into federal copyright for works created but not published or copyrighted prior to 1978). The federal copyright would then last during the life of the author plus seventy years. 17 U.S.C. §§ 303(a), 302(a) (2004). In this scenario (which Daily advocated), the federal copyright would expire no earlier than 2075 because George Jones, the author of *Accidentally on Purpose*, is still living as of the time of this Note’s writing. See Nationmaster.com, Encyclopedia: George Jones, at <http://www.nationmaster.com/encyclopedia/George-Jones> (last visited Sept. 15, 2004) (“George Jones continues to make albums and play to his loyal fans.”). In the event that Mr. Jones, who was born in 1931, lives to be ninety-years-old, the copyright would extend until 2091. See *id.* (providing date of birth of Mr. Jones). In the latter situation, by delaying compliance with statutory formalities until 1979, Daily would receive a copyright term that lasts thirty-six years longer than it would had Daily complied in 1960. See *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 21 (M.D. Tenn. Sept. 22, 2003) (noting that Daily complied with statutory formalities in 1979).

308. See *supra* note 307.

309. *Mayhew v. Allsup*, 166 F.3d 821, 822 (6th Cir. 1999).

310. See *supra* text accompanying note 190.

311. See *supra* text accompanying notes 231-236.

312. See *supra* text accompanying notes 146-152.

Likewise, the performance exception does not apply because complying with statutory formalities presents no special burden with a work embodied in a studio recording.<sup>313</sup> Although jukebox play does not permit as wide a dissemination of a song as radio play does, what matters is not the number of people who gain access to the work but the availability of copies of the work to interested members of the public.<sup>314</sup> In addition, even courts that import judicial interpretation of "public performance for profit" from section 1 into the performance exception to publication would have great difficulty equating jukebox play with performance.<sup>315</sup> One reason is that the 1909 Act explicitly precludes jukebox play from constituting a performance under section 1 in many, if not most, instances: "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."<sup>316</sup>

Another reason is that not all transmissions on the radio or television were deemed public performances for profit under section 1.<sup>317</sup> To reach this conclusion, courts developed a distinction between broadcasters and viewers, whereby broadcasters perform but viewers do not.<sup>318</sup> Broadcasters select the programs to be viewed or to be listened to, "procure programs and propagate them to the public."<sup>319</sup> On the other hand, a listener or viewer is "[o]ne who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, [and] does not 'perform' within the meaning of the Copyright Law."<sup>320</sup> It would be difficult to argue that a person who presses play on a jukebox does anything other than "merely actuate electrical instrumentalities." In fact, it is difficult to imagine a more passive actor in the transmission of a song on a jukebox than a person who simply presses play. Thus, because

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313. See *supra* text accompanying notes 182-185.

314. Nimmer, *supra* note 74, at 187.

315. See *supra* text accompanying notes 173-181.

316. 17 U.S.C. § 1(e) (1909).

317. For example, in *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, the Supreme Court held that the transmission of distant signals did not constitute a "performance" within the meaning of the 1909 Act. 415 U.S. 394, 403-405 (1974); see also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968) (holding that CATV systems do not perform the programs they receive and carry); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162-64 (1975) (holding that a restaurant owner who played the radio for his customers did not perform songs broadcast on the radio).

318. *Fortnightly Corp.*, 392 U.S. at 398.

319. *Id.* at 400.

320. *Id.* at 399 n.24 (quoting *Buck v. Debaum*, 40 F.2d 734, 735 (S.D. Cal. 1929)).

jukebox play involves listening, as opposed to broadcasting, even under the meaning of “public performance for profit” under section 1, jukebox play should constitute publication, not performance.

*B. Film: Star Trek*

In the late 1960s, Paramount Pictures Corp. and its predecessor, Desilu Productions, Inc. (collectively “Paramount”), produced the “Star Trek” television series.<sup>321</sup> Over time, the series became enormously popular. It has been re-run by many television stations and has generated full-length feature films, animated cartoons, toys, books, and other accessories.<sup>322</sup> Between 1969 and 1979, Paramount executed two types of licensing agreements with various stations for the broadcasting of the series.<sup>323</sup> Under the first, a library license, the television stations acquired all seventy-nine of the “Star Trek” episodes for the term of the license.<sup>324</sup> At the end of the term, the license required the stations to return the prints to Paramount.<sup>325</sup> The second type of license, a booking license, provided television stations with the episodes on a one-by-one basis and required their return within forty-eight hours of their broadcast.<sup>326</sup> The two types of licenses provided essentially the same restrictions upon the licensee.<sup>327</sup> The licensee could only broadcast the episodes to non-paying audiences, could not relinquish possession of the prints, could not allow copies of the prints to be made, and had to comply with the aforementioned restrictions on the delivery and return of the prints.<sup>328</sup> The “Star Trek” series was broadcast on various television stations across the country pursuant to these licenses.<sup>329</sup> Paramount, however, did not obtain a valid copyright notice prior to the broadcast on these stations.<sup>330</sup> After a video company engaged in the unauthorized sale of “Star Trek” videocassettes, Paramount sued the company for copyright infringement and related violations.<sup>331</sup> The video company countered that Paramount’s syndication of the series

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321. *Paramount Pictures Corp. v. Rubinowitz*, No. CV 81-0925, 1981 U.S. Dist. LEXIS 17553, at \*2 (E.D.N.Y. June 26, 1981).

322. *Id.* at \*\*2-3.

323. *Id.* at \*10.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at \*\* 2, 10-11.

330. *Id.* at \*\*3-4.

331. *Id.* at \*1.

without compliance with the statutory requirements dedicated the works to the public domain.<sup>332</sup>

In *Paramount Pictures Corp. v. Rubinowitz*, the district court held that Paramount's syndication of the series did not constitute publication.<sup>333</sup> The court reasoned that "Paramount's explicit and exhaustive reservation of rights" in its licensing agreements prevented the syndication from constituting publication.<sup>334</sup> Instead, the court held that the distribution of prints to television stations was a limited publication because Paramount "reserved its rights in each contract as to the number of persons who would have access to the series and the use they could make of it."<sup>335</sup>

Under this Note's definition, each of Paramount's three types of authorized exploitation of the films would have constituted publication. First, the licensing of the film prints allowed Paramount to generate revenue from the exploitation of the films and, thus, would have constituted publication. As the *Rubinowitz* court determined, a key question is whether the restrictions placed on the licensees limited the exploitation to a limited publication.<sup>336</sup> The answer should be "no" because Paramount did not limit to a select group the pool of licensees.<sup>337</sup> Instead, apparently any interested party could have negotiated to become a licensee.<sup>338</sup>

Second, the distribution of film prints to various television stations also was a form of exploitation that was a central component of Paramount's ability to make money on the transactions. The general rule for the distribution of film prints to television stations is that "[t]he mere fact that only a selected group evinced interest in obtaining copies will not render the publication limited."<sup>339</sup> Thus, for example, "placing the film prints in regional distribution offices for rental to anyone" would constitute a general publication.<sup>340</sup> *Rubinowitz* attempts to distinguish this general rule by holding that Paramount's direct negotiations with individual television stations

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332. *Id.* at \*3.

333. *Id.* at \*12.

334. *Id.* at \*11.

335. *Id.* at \*12.

336. *Id.* at \*\*8-12.

337. See NIMMER ON COPYRIGHT, *supra* note 10, § 4.13 n.13.1 ("Unless the stations that might engage in such negotiations were limited in some manner, it would seem that there was no limitation as to persons.")

338. *Id.* at § 4.13.

339. See *id.* ("The mere fact that only a selected group evinced interest in obtaining copies will not render the publication limited.")

340. *Paramount Pictures Corp.*, 1981 U.S. Dist. LEXIS 17553, at \*12 (quoting NIMMER ON COPYRIGHT, *supra* note 10, § 4.11[B], 4-55 (1978)).

constituted the requisite limitation on the persons who obtained licenses of the works.<sup>341</sup> However, *Nimmer on Copyright* has criticized this distinction as “questionable” because “[u]nless the stations that might engage in such negotiations were limited in some manner, it would seem that there was no limitation as to persons.”<sup>342</sup> Thus, because the parties who could be involved in the negotiations were not limited to a “select group,” the licenses failed to restrict the exploitation from constituting a general publication.

Third, the authorized broadcasting of the series on television constituted publication as a revenue-generating exploitation of the works. Although some courts have held to the contrary,<sup>343</sup> broadcasting the series should not be deemed a performance because, like previously recorded phonorecords and unlike the live performance of a play, there is no special burden in complying with the statutory formalities.<sup>344</sup>

The result that the films should have been published has several policy benefits. It is consistent with the Congressional balance between the dual policies of the 1909 Act by linking publication to the author and/or owner’s economic reward. Moreover, it promotes compliance with the 1909 Act’s formalities by providing a disincentive to delay compliance while a copyright owner continues to generate revenue from the work’s exploitation. Furthermore, this result preempts the possibility of judicially extending the limited monopoly period by delaying the commencement of the copyright term.<sup>345</sup>

### C. Sculpture: *The Chicago Picasso*

In the mid-1960s, Pablo Picasso agreed to create a sculpture for the City of Chicago entitled “The Chicago Picasso.”<sup>346</sup> In 1965, Picasso completed the maquette (model) of the sculpture.<sup>347</sup> One year later,

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341. *Id.*

342. NIMMER ON COPYRIGHT, *supra* note 10, § 4.13 n.13.1.

343. *See supra* text accompanying notes 168-171.

344. *See supra* text accompanying notes 182-185

345. It is not clear how much of an extension on the limited monopoly that Paramount gained because the *Paramount Pictures Corp.* decision does not indicate whether Paramount later complied with the statutory requirements. If Paramount complied prior to 1978, Paramount would have gained an extension lasting the number of years of delayed compliance. *See* 17 U.S.C. § 304(a) (2004) (measuring the duration of certain pre-1978 copyrights from the date of publication). If, instead, Paramount did not comply, and its common law copyright converted into a federal copyright, the federal copyright would last at least until 2047 if Paramount published the work prior to January 1, 2003. *See* 17 U.S.C. § 303(a) (2004).

346. *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm’n of Chicago*, 320 F. Supp. 1303, 1305 (N.D. Ill. 1970).

347. *Id.*



the City of Chicago mounted a public relations campaign to publicize the sculpture.<sup>348</sup> As part of the campaign, the City allowed any person to copy the maquette for any purpose, to obtain a camera permit for photographing the work, and to obtain photos of it upon request.<sup>349</sup> Additionally, the City authorized the press to photograph the maquette and to publish these photographs in widely read newspapers and magazines.<sup>350</sup> In 1967, the sculpture was dedicated, and a photograph of it was published in a report of the Chicago Art Institute with a circulation of 40,000 copies.<sup>351</sup> Several months later, the City applied for statutory copyright protection for the work.<sup>352</sup> A publisher who wanted to market a copy of the sculpture sought a declaratory judgment to determine whether the work had been published prior to the City's compliance with the 1909 Act's notice requirement.<sup>353</sup>

In *Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago*, the district court held that the display of the maquette constituted publication.<sup>354</sup> The *Letter Edged in Black Press, Inc.* court distinguished *American Tobacco Company v. Werckmeister* where, in 1907, the Supreme Court held that the display of a painting in a gallery was a limited publication when making copies of the work was prohibited and guards were stationed to enforce the prohibition.<sup>355</sup> The *Letter Edged in Black Press, Inc.* court relied on dicta from *American Tobacco Company* that "[w]e do not mean to say that the public exhibition of a painting or statute, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect."<sup>356</sup> In reference to the City's acts of exploitation, the *Letter Edged in Black Press, Inc.* court reasoned that "[w]ere this activity classified as limited publication, there would no longer be any meaningful distinction between limited

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348. *Id.* at 1306.

349. *Id.* at 1306-07, 1311.

350. *Id.* at 1306, 1311.

351. *Id.* at 1306-07.

352. *Id.*

353. *Id.* at 1305.

354. *Id.* at 1311. The court rejected the argument that the work of art that was copyrighted was the sculpture, not the maquette, concluding that the maquette was the original work that qualified for statutory copyright protection. *Id.* at 1310. It determined that "[w]hen the monumental sculpture was finally completed it could not be copyrighted for it was a mere copy, albeit on a grand scale, of the maquette, a work already in the public domain." *Id.*

355. *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 300 (1907).

356. *Letter Edged in Black Press, Inc.*, 320 F. Supp. at 1310-11 (quoting *Am. Tobacco Co.*, 207 U.S. at 300).

and general publication.”<sup>357</sup> It concluded that its decision was consistent with the 1909 Act’s “policy of enriching society” through the “broadest and most uninhibited reproduction and copying of a provocative piece of public sculpture.”<sup>358</sup>

Under this Note’s definition, the result would have been the same on three grounds. First, the unrestricted distribution to the public of photographs of the maquette and sculpture constitutes publication as authorized acts of exploitation of the work.<sup>359</sup> On the other hand, had the City distributed photographs of the work only to the press for purposes of news coverage, the distribution would have been a limited publication.<sup>360</sup> Second, the circulation of the Chicago Art Institute’s report containing a photograph of the sculpture constitutes publication. The press’s printing of photographs of the sculpture, however, would have constituted a limited publication.<sup>361</sup> Third, the public display of the work for unrestricted copying and photographing was also an authorized act of exploitation that constituted publication.<sup>362</sup> Unlike *American Tobacco*, there was no express limitation on copying the maquette that would have restricted the exploitation to a limited publication.<sup>363</sup> In addition, the City’s public display does not fall within the performance exception because complying with the statutory formalities presented no special burden. Unlike the “I Have a Dream” speech where Dr. King would have been forced to choose between press coverage and a copyright had there not been the performance exception to the general rule of publication, the City of Chicago itself generated the press coverage of the work through its massive public relations campaign.

This result furthers the dual policies of the 1909 Act because the City’s acts of exploitation were intended to generate interest in the sculpture, presumably, to attract attention to Chicago and generate tourism revenues to the City.<sup>364</sup> Moreover, if the *Letter Edged in Black Press, Inc.* court had concluded that the Chicago Picasso had not

357. *Id.* at 1311.

358. *Id.* at 1313.

359. NIMMER ON COPYRIGHT, *supra* note 10, § 4.09 n.7.

360. *See infra* text accompanying notes 146-48.

361. *Id.*

362. Nimmer concluded that the court’s ruling that the public exhibition of the statute constituted publication could be regarded as dicta because of the aforementioned unrestricted distribution of photographs of the work without a copyright notice. NIMMER ON COPYRIGHT, *supra* note 10, § 4.09 n.7.

363. *Letter Edged in Black Press, Inc.*, 320 F. Supp. at 1311.

364. *Id.* at 1306.

been published, the City would have gained roughly a one-and-a-half year extension on its copyright term.<sup>365</sup>

#### *D. Placing Copies in Public Files*

In *Fader v. Twentieth Century-Fox Film Corporation*, the owners (collectively "Fader") of the common law copyright in the motion picture "My Hero" filed the script with the U.S. Copyright Office in 1950, but the resulting certificate of registration was invalid so that Fader did not obtain a valid federal copyright.<sup>366</sup> Fader later sued Twentieth Century-Fox Film Corporation ("Fox") for copyright infringement after Fox allegedly copied the plot in Fox's movie entitled "The Lieutenant Wore Skirts."<sup>367</sup> Fox claimed that the filing of the manuscript with the Copyright Office constituted publication, thereby forfeiting Fader's ownership interest in the work.<sup>368</sup> The district court held that the deposit of the manuscript did not constitute publication even though the copyright registration certificate issued upon the deposit was invalid.<sup>369</sup> The court reasoned that "Congress has not provided that one who seeks to obtain the benefits of statutory protection must surrender his common law copyright if statutory protection is not afforded him."<sup>370</sup>

Under this Note's definition of publication, the result would be the same as the above decision, even though depositing a copy of the work in the Copyright Office is literally an authorized exploitation of the work. The rationale is that depositing a copy in public files was not a use that provided an incentive for the author to create the work. Under the 1909 Act, depositing a copy did not, for example, generate monetary benefits for the author but, instead, was merely a condition precedent to obtaining the full benefits of statutory copyright protection.<sup>371</sup> It would be inconsistent with the dual policies of the 1909 Act to conclude that publication occurred where there was no act of exploitation that provided an incentive for the author to create the work.

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365. The City began exploiting the work in late 1966 and filed an application for copyright registration in early 1968. *Id.* at 1306-07.

366. *Fader v. Twentieth Century-Fox Film Corp.*, 169 F. Supp. 880, 881 (S.D.N.Y. 1959).

367. *Id.*

368. *Id.*

369. *Id.* at 881-82.

370. *Id.* at 882.

371. See NIMMER ON COPYRIGHT, *supra* note 10, § 4.10 (discussing requirement of depositing a copy of an unpublished work).

*E. Speech: Dr. King's Performance Plus*

Dr. Martin Luther King, Jr. gave his famous "I Have a Dream" speech on August 28, 1963.<sup>372</sup> He spoke in front of hundreds of thousands of people and received massive coverage in newspapers and on the radio and television, thereby allowing millions of others to view and listen to the speech.<sup>373</sup> About one month later, on September 30, 1963, Dr. King applied for statutory copyright protection for the speech.<sup>374</sup> In 1994, CBS broadcasted a documentary on the civil rights movement with a segment entitled "Martin Luther King, Jr. and The March on Washington."<sup>375</sup> The segment contained material that CBS had filmed during the March, including substantial footage of the speech.<sup>376</sup> However, CBS did not request permission from Dr. King's estate for its use, nor did CBS pay royalties to the estate for its use.<sup>377</sup> Dr. King's estate subsequently sued CBS for copyright infringement.<sup>378</sup>

The district court granted CBS' motion for summary judgment, holding that Dr. King's "performance coupled with such wide and unlimited reproduction and dissemination" in 1963 constituted publication, thereby placing the speech in the public domain before Dr. King complied with the statutory requirements for protection.<sup>379</sup> The district court considered the following factors to be crucial to its decision:

(1) the March organizers were aware of and encouraged the press' coverage of the March, (2) the studied effort by March organizers to secure as wide dissemination of the March's speeches as possible, (3) dissemination of the speakers' words to the greatest public audience possible was one goal of the March organizers, (4) the press was invited to attend and to film the day's events, (5) the March was broadcast live on multiple television networks and radio stations, and portions, including Dr. King's speech, were subsequently re-broadcast, (6) at no point was the press given express limitations regarding who could film the event or the extent to which their footage could be used, (7) there is no indication that any such limitations were made or implied, and (8) there is no

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372. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1213 (11th Cir. 1999).

373. *Id.*

374. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1354 (N.D. Ga. 1998); *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1214.

375. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1213.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Estate of Martin Luther King, Jr., Inc.*, 13 F. Supp. 2d at 1354.

record of objections by Dr. King or by other March participants or organizers as to the press' coverage of the event.<sup>380</sup>

In a two-to-one decision, the Eleventh Circuit reversed on two primary grounds.<sup>381</sup> First, it concluded that a performance does not constitute a general publication, regardless of the size of the audience.<sup>382</sup> Second, it held that distribution to the news media "for the purpose of enabling the reporting of a contemporary newsworthy event" constituted merely a limited publication.<sup>383</sup> The court remanded the case, however, due to factual disputes regarding (1) whether an advance text of the speech was available in the press tent on the day of the speech, and (2) whether Dr. King authorized the Southern Christian Leadership Conference ("SCLC") to reprint the entire text of the speech in the organization's newsletter in September 1963.<sup>384</sup> In a concurring opinion, Judge Cook concluded that none of the factors that the district court found determinative are relevant to the issue of publication in the context of performed works "in the absence of an authorized dissemination of a tangible copy of the work without a copyright notice."<sup>385</sup> Judge Roney dissented on the basis of the district court opinion.<sup>386</sup>

Under this Note's definition, the result is the same as the 11<sup>th</sup> Circuit's decision. There are four types of exploitations of the speech at issue. First, Dr. King delivered the speech.<sup>387</sup> Dr. King's live delivery is a classic example of the need for the performance exception to the doctrine of publication. It would have been incredibly burdensome for him to have been forced to deposit copies of the speech prior to his performance.<sup>388</sup> Moreover, the size of the audience is not relevant to the issue of performance.<sup>389</sup>

Second, Dr. King authorized its rebroadcast on television and radio stations and its reprinting in newspapers.<sup>390</sup> This type of

380. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1224 (Cook, J., concurring) (internal quotation marks omitted); see *Estate of Martin Luther King, Jr., Inc.*, 13 F. Supp. 2d at 1352-53 (providing above quoted factors).

381. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1220.

382. *Id.* at 1217.

383. *Id.* at 1216.

384. *Id.*

385. *Id.* at 1221 (Cook, J., concurring).

386. *Id.* at 1227 (Roney, J., dissenting).

387. *Id.* at 1213.

388. Dr. King finished writing the speech at 4:00 a.m. on the morning of the day he delivered it. *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 103 (S.D.N.Y. 1963).

389. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1352 (N.D. Ga. 1998), *rev'd*, 194 F.3d 1211 (11th Cir. 1999).

390. There is some question as to whether Dr. King approved the press's extensive coverage of the speech. On the one hand, March organizers actively encouraged widespread press

exploitation constitutes a limited publication because “distribution to the news media, as opposed to the general public, for the purpose of enabling the reporting of a contemporary newsworthy event, is only a limited publication.”<sup>391</sup> This rule makes sense because, in allowing media coverage of his event, Dr. King limited the speech’s rebroadcast to the “select group” of the media for the “limited purpose” of providing news coverage of his speech.<sup>392</sup> Moreover, such a result “does not force an author whose message happens to be newsworthy to choose between obtaining news coverage for his work and preserving his common-law copyright.”<sup>393</sup> Furthermore, under the performance exception, the media’s broadcasting of the speech is clearly distinguishable from the radio play of a studio recording or the television broadcast of a film previously recorded on a set. Although both involve the dissemination of an intangible embodiment of the work, there is a much greater burden in depositing copies of a work performed live than in depositing copies of a work embodied in a previously made studio recording.<sup>394</sup> Moreover, the media’s rebroadcasting of Dr. King’s live delivery is also distinguishable from a previously made studio recording because Dr. King would have carried the same burden for complying with the statutory formalities whether the press broadcast the speech live or waited a short time before broadcasting its recording of the live address.

Third, Dr. King may have authorized an advance text of the speech to be made available in the press tent on the day of the speech.<sup>395</sup> Assuming that Dr. King authorized the text’s availability, this form of exploitation would have constituted a limited publication if the intended recipients were only members of the press whose use of the text was limited to covering the speech.<sup>396</sup> If Dr. King intended for the members of the public also to have access to the text, however, the distribution of the text would have constituted a general publication. Although injection in the public domain would be especially harsh in this situation, Dr. King could have avoided this result by simply restricting the text’s dissemination to the press for news coverage

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coverage of the event, and, according to the Georgia district court’s findings, “there is no record of objections by Dr. King . . . as to the press’ coverage of the event.” *Estate of Martin Luther King, Jr., Inc.*, 13 F. Supp. 2d at 1352-53. However, in earlier litigation of the issue in New York, Dr. King said that he did not consent in any way to the NEW YORK POST’s printing of the speech’s complete text in its issue dated September 1, 1963. *King*, 224 F. Supp. at 104.

391. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1216.

392. *See supra* text accompanying notes 143-152.

393. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1216.

394. *See supra* text accompanying notes 182-185.

395. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1217.

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

purposes. Such a limitation would have only marginally reduced the public's exposure to the speech,<sup>397</sup> while preserving his common law copyright in the speech. In addition, the tangible-intangible distinction has no relevance to the issue of publication in this situation. Dissemination to the public of a copy of the text of the speech would constitute a general publication, whereas distribution only to the press for reporting would not.

Fourth, Dr. King may have authorized the SCLC to reprint the speech's text in its entirety in the organization's newsletter prior to compliance with the statutory formalities.<sup>398</sup> Such an act would have constituted a general, not limited, publication because the distribution would not have been to a select group for a limited purpose. Although the SCLC could be considered a select group, its reprinting of the speech was not for the purpose of news coverage but for the purpose of exhibiting or displaying the speech "in such a manner as to permit unrestricted copying by the general public."<sup>399</sup> After all, the SCLC's mission was to promote the type of values that the speech embodied, and distributing the speech served that purpose.<sup>400</sup>

A closing comment on the application of the 1909 Act's dual policies to Dr. King's "performance plus" is warranted. Perhaps no other work in the history of U.S. copyright law is more important to the free dissemination of ideas than the "I Have a Dream" speech. Its message of hope and equality was a particularly influential aspect of the civil rights movement that brought about the end to legalized segregation in the South<sup>401</sup> and continues to resonate in the American conscience.<sup>402</sup> On the other hand, granting Dr. King the economic reward of a limited monopoly would have provided him little, if any, additional incentive to create the "I Have a Dream" speech. Few would dispute that his reason for giving the speech was not economic motivation but rather his hopeful vision of an America which "will rise

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397. For example, about 200,000 people witnessed the "I Have a Dream" speech in person, but millions more viewed or read it through its media coverage. See *supra* text accompanying notes 2-3.

398. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1214.

399. *Id.* at 1215.

400. See SCLC (Southern Christian Leadership Conference), Who We Are, at <http://sclcnational.org/page.aspx?s=3021.0.0.2607> (last visited Aug. 27, 2004) (stating that the SCLC has a "long history of struggle for basic human rights" and that it has "roots in the larger history of liberation struggles by Black people and all oppressed peoples the world over").

401. Cf. *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1213 (noting that the speech "became symbolic of the civil rights movement").

402. The continued prominence of the speech is manifested, for example, by the recent press coverage of the speech on Martin Luther King Days and anniversaries of Dr. King's performance. E.g., Courtland Milloy, *King Day's Parade Route Is Out of Step*, WASHINGTON POST, Jan. 19, 2004, at B01; Gary Dorsey, *The American 'Dream'*, THE BALTIMORE SUN, Aug. 28, 2003, at 1C.

up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'"<sup>403</sup> Nonetheless, the 1909 Act gave owners the ability to choose copyright protection or to donate the work to the public domain. Dr. King chose copyright protection, and the practical considerations of the performance and limited publication exceptions should have prevented federal law from stripping him of that protection.

## VI. CONCLUSION

This Note proposes a solution to an unsettled legal problem that is almost a century old. It provides a new definition of publication under the 1909 Act: subject to the exceptions of limited publication, performance, and the distribution of a phonorecord embodying a musical composition, publication is the exploitation of a work authorized by the author and/or owner of the work. This definition, which is consistent with the 1909 Act as written, has three primary strengths. First, it adheres to the congressional balance between the dual policies of the 1909 Act. The definitions of publication that preclude the exploitation of intangible embodiments of a work from constituting publication greatly favor the principle of reward to authors over the policy of free dissemination of ideas. This result occurs under those definitions because they allow for an author to gain an extended copyright term, while simultaneously postponing the public's unfettered access to the work. This Note's definition avoids this problem by treating tangible and intangible exploitations of a work the same way.

Second, this Note's definition avoids the problem of rewarding those who did not comply with the 1909 Act's statutory formalities while penalizing those who did. Under the definitions that endorse the tangible-intangible distinction, those who exploited only intangible embodiments of a work and did not comply with the 1909 Act's formalities obtained an extended copyright term. Thus, adherence to the tangible-intangible distinction created an incentive for authors and/or owners to delay, or avoid altogether, compliance with the 1909 Act's formalities in order to lengthen the term of the limited monopoly. On the other hand, those who complied immediately with the formalities of the 1909 Act would have essentially been punished by receiving a copyright lasting only the statutorily determined period, instead of the extended period that could have been achieved through

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403. Dr. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), available at, <http://www.americanrhetoric.com/speeches/Ihaveadream.htm> (last visited Aug. 27, 2004) (full audio and text version).



delayed compliance. This Note's definition avoids this problem by eliminating the incentive to delay compliance with the 1909 Act's formalities.

Third, this Note's definition prevents the considerable judicial overreaching that can occur through reliance on the tangible-intangible distinction. The Constitution gives Congress, not the courts, the power to determine the duration of a copyright term.<sup>404</sup> Under the 1909 Act as originally enacted, Congress provided a copyright lasting a maximum of fifty-six years. However, courts that adhere to the tangible-intangible distinction can greatly lengthen the copyright term. Where an owner only disseminates intangible embodiments of a work, for instance, by broadcasting a song on the radio, a court could grant a copyright term of one hundred-and-thirty-seven years.<sup>405</sup> This Note's definition prevents this encroachment on Congress's constitutionally authorized power.

On the other hand, critics of this Note's definition may argue that it leads to harsh results for authors in some instances by slightly expanding the acts of exploitation that constitute publication and, therefore, that may place a work in the public domain. This Note's definition leads to such an expansion in two ways. First, it rejects the tangible-intangible distinction, espoused by some, but not all, as a requirement for a work's publication.<sup>406</sup> The result is that, for example, broadcasting a previously made studio recording of a song on the radio or a previously made set recording of a film on television can constitute publication.<sup>407</sup> Second, it limits the performance exception to situations where either a live performance is involved or situations in which practical considerations warrant a broader interpretation of the term "performance."<sup>408</sup> Thus, the live performance of a play or a song constitutes a non-publishing performance,<sup>409</sup> but the playing of a previously made phonorecord on the radio should be considered a publication, not simply a performance.<sup>410</sup>

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404. U.S. CONST. art. I, § 8., cl. 1, 8 ("The Congress shall have Power") (emphasis added); cf. *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (concluding that the Supreme Court "defer[s] substantially to Congress" on questions of the constitutionality of statutes providing the duration of copyright terms).

405. See *supra* text accompanying notes 107-111, 192.

406. See *supra* note 85.

407. See *supra* text accompanying note 253-254.

408. See *supra* text accompanying notes 193-195.

409. See *Ferris v. Froham*, 223 U.S. 424, 435 (1912) (holding that the live performance of a play does not constitute publication).

410. See *King Records, Inc. v. Daily*, No. 3:00-0300, slip op. at 17 (M.D. Tenn. Sept. 22, 2003) (holding that radio play constitutes publication).

Such a critique, however, is misguided. No one has proposed equating publication with obtaining a valid federal copyright. Yet, under the 1909 Act, harshness necessarily results when using any other definition.<sup>411</sup> Compared to definitions that adhere to the tangible-intangible distinction and a broad interpretation of the performance exception, this Note's definition is less arbitrary in the way that it grants a copyright and injects a work into the public domain.<sup>412</sup> It does so by generally deeming a publication any exploitation of a work that provides incentive for the author and/or owner to create. Moreover, this Note's definition accommodates the practical considerations, such as live performance and limited distribution to friends and even to the press, where publication would be especially harsh. In addition, unlike competing definitions, this Note's definition generally prevents the unauthorized extension of monopoly privileges, which ameliorates the harshness of injection into the public domain.

Although forfeiture of an author's work to the public domain can be a significant loss to the author, the 1909 Act provides for precisely this result under certain circumstances. This consequence encouraged compliance with the statutory scheme<sup>413</sup> and promotes the 1909 Act's policy of providing copyright protection "primarily for the benefit of the public."<sup>414</sup> Courts that apply the 1909 Act should not forget that the central purpose of the 1909 Act, and U.S. copyright law in general, is to promote ideas that benefit the public—ideas such as those embodied in Dr. King's "I Have a Dream" speech.

*W. Russell Taber\**

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411. For example, publication by distribution of sheet music divests an author of his ownership rights, but the notion that the distribution of sheet music constitutes publication is uncontroversial. *See supra* note 198.

412. *Cf. GORMAN & GINSBURG, supra* note 199, at 385 ("Despite how crucial it was to have a clear understanding of the concept of 'publication' under the 1909 Act, a number of rather arbitrary distinctions emerged in giving content to that term.").

413. *See La Cienega v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995), *superseded by* 17 U.S.C. § 303(b) (2004) (discussing compliance with the 1909 Act's statutory formalities).

414. *See supra* text accompanying note 22.

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