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## The Distribution Right in the United States of America: Review and Reflections

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# ESSAY

## The Distribution Right in the United States of America: Review and Reflections

*John M. Kernochan\**

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## I. INTRODUCTION

This Essay on the distribution right considers the possibility and the merits of three options now widely discussed. These are: (a) extending the reach of an old right, the right of reproduction, to include the currently debated *droit de destination*,<sup>1</sup> or (b) broadening the right of distribution in nations that have such a right by cutting back on the "first sale doctrine"<sup>2</sup> and other limitations on that right, and (c) giving authors broad control over use of their work. All of these approaches aim to make authors' rights more substantial and effective to achieve their purpose amid the erosions resulting from technological change. In pursuing this aim we must look carefully at the law and experience of today as evolved from the past. "Historic continuity with the past," said Justice Holmes, "is not a duty, it is only a necessity."<sup>3</sup> If we are to help develop the law wisely for authors, it also will be necessary to look at the problems, implications, and potentialities of the three options described in a number of specific areas of the arts.

Because United States copyright law,<sup>4</sup> in addition to granting a reproduction right, expressly provides for a right of distribution,<sup>5</sup> I will begin my review of the United States law and its problems with an examination of that provision. So let me first briefly describe the terms of the United States distribution right and the limitations on it, including the first sale doctrine and other restrictions, as well as some of the existing avenues of expansion or avoidance. It seems best to start by examining the language of the general right currently in force and its history. Such a foundation will anchor and clarify any discussion of the merits and demerits of United States law and put suggestions for change in a sharper perspective.

## II. THE DISTRIBUTION RIGHT AND THE FIRST SALE DOCTRINE

Section 106(3) of the United States Copyright Act of 1976 grants to the copyright owner of a particular creative work the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public

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1. See Desurmont, *The Author's Right to Control the Destination of Copies Reproducing His Work*, 134 REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.] 2 (1987), reprinted in 12 COLUM.-VLA J.L. & ARTS 481 (1988). The "droit de destination" envisaged by M. Desurmont would "provide authors with the means of controlling, in the broadest sense the conditions governing use by a buyer of the copies whose ownership he has acquired." *Id.* at 4, reprinted in 12 COLUM.-VLA J.L. & ARTS at 481-82.

2. See 17 U.S.C. § 109(a) (1982); see also *infra* notes 16-23 and accompanying text.

3. W. AUDEN & L. KRONENBERGER, *THE VIKING BOOK OF APHORISMS* 231 (1962) (quoting O.W. Holmes, Jr.).

4. 17 U.S.C. §§ 101-810 (1982 & Supp. 1987).

5. See 17 U.S.C. § 106(3) (1982). For an excellent article on the distribution right, see generally Desurmont, *supra* note 1.

by sale or other transfer of ownership, or by rental, lease, or lending."<sup>6</sup> These words should be read with care and attention to several significant points about this very broad language.

First it refers, not to the author, but to the copyright owner, who may be the author, the author's heir, or any one to whom the author's title to the copyright, or to some element of it, is transferred whether by sale, gift, will, operation of law, or otherwise. In United States law, author may mean an employer in many circumstances.<sup>7</sup> In other words, the holder of the distribution right may be someone remote from the actual creator of the work in question. Section 106(3), like the rest of the Copyright Act, was not drawn with traditional *droits moraux* in mind.<sup>8</sup>

Second, notice that section 106(3) speaks of distribution to the public. Thus it encompasses a right of first publication or disclosure of the copyrighted work,<sup>9</sup> as well as some right of control over the disposition of objects embodying the work and the dissemination of those objects. We meet here the very basic and commonly observed distinction between the creative work and the tangible object in which it appears, a distinction preserved in section 202 of the United States law, which will be discussed later.<sup>10</sup> Both the legislative history and, recently, the United States Supreme Court have recognized expressly that section 106(3) does accord a first publication right in some measure.<sup>11</sup> Whether

6. 17 U.S.C. § 106(3) (1982).

7. *Id.* § 201(b). For a definition of "work made for hire," see *id.* § 101 (stating that with a work made for hire, the employer for whom the work is prepared is considered the author).

8. For an excellent discussion on *droits moraux*, see Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968). M. Sarraute defines the moral right of authors as including "non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality; it is extended to protect his personality as well as his work." *Id.* at 465. He further states:

[T]he moral right is generally composed of four aspects:

(1) The right of disclosure (*divulgation*);

Then, after the work has been made public and the author's rights to it have been transferred:

(2) The right to withdraw or disavow;

(3) The right of paternity—i.e., the right to have one's name and authorship recognized;

(4) The right of integrity of the work of art.

*Id.* at 467.

Various United States doctrines, including rights of privacy or publicity, or the law of defamation or unfair competition, especially under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982), can yield results comparable to those reached under *droits moraux* in a number of situations.

9. See Kernochan, *Protection of Unpublished Works in the United States Before and After the Nation Case*, 33 J. COPYRIGHT Soc'y U.S.A. 322 (1986) (analyzing and criticizing the limited nature of the § 106(3) first publication right in present United States law as compared with the first publication right in earlier United States law and with the French *droit de divulgation*).

10. See *infra* notes 28, 29, and accompanying text.

11. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985); H.R. REP.

the use of the explicit phrase "to the public" denies the author a right of limited publication or private restricted distribution has not been fully and clearly determined. My guess is that the answer is "no," at least if there is no transfer of title to the object in which the work is embodied.<sup>12</sup>

Third, notice the language "or other transfer of ownership, or by rental, lease, or lending." This language does not appear in the 1909 Copyright Act which gave only a "right to vend."<sup>13</sup> The broader scope of the 1976 Act is significant, even if only as a clarification.

One may ask why, if the reproduction right may be construed as broadly as the destination right proponents urge, the United States, Germany, and other countries would have thought it necessary to add a specific distribution right.<sup>14</sup> A possible reason, for the United States at least, may have been a fear that without this addition United States courts might not grant copyright owners adequate control over their own copies or over copies that were reproduced with their consent if, for example, such copies were wrongfully in the hands of another.<sup>15</sup>

What section 106(3) seems to give so generously in delineating the distribution right, however, section 109(a) withdraws in large measure. Section 109(a) sets out what has become known as the first sale doctrine and applies that doctrine to limit substantially the distribution right granted in section 106(3): "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."<sup>16</sup> The phrasing of this provision gives rights to owners of objects, copies, or phonorecords, in which copyrighted works are embodied, and to persons authorized by owners. Owners may sell or give away the copies of books or recordings they buy or may authorize someone to do these things. The first sale doctrine is plainly a misleading label for what section 109(a) provides because one can become an owner by means other than sale or purchase including gift, will, or operation of law. But observe now that the owner has the section 109(a) right described only if the object in question is lawfully made and does not constitute or contain

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No. 1476, 94th Cong., 2d Sess. 62, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5675-76; S. REP. NO. 473, 94th Cong., 1st Sess. 58.

12. Cf. 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 8.11(A) (1988). For further discussion of this topic, see 1 *id.* § 4.13.

13. See Act of Mar. 4, 1909, ch. 320, § 1(a), (d), 35 Stat. 1075, 1075 (repealed 1978).

14. See Desurmont, *supra* note 1.

15. See 2 M. NIMMER & D. NIMMER, *supra* note 12, § 8.11.

16. 17 U.S.C. § 109(a) (1982).

what amounts to an infringing, piratical, or otherwise forbidden reproduction or performance of a copyrighted work as defined by other provisions of the 1976 Copyright Act.<sup>17</sup>

That section 109(a) expressly limits or exhausts section 106(3) *pro tanto* is clear both from its initial words and from the phrase indicating that the right it gives is applicable whether or not the copyright owner consents. Here again copyright owners, not necessarily authors, are the focus of concern. The traditional *droits moraux* are still far from the minds of the draftsmen.<sup>18</sup> Finally, and especially, take note that the privilege given in section 109(a) is "to sell or otherwise dispose of the possession" of the object in question. It is curious that this language does not coincide with that of section 106(3) which extends the distribution right not only to sale or other transfer of ownership but also to "rental, lease, or lending." Does the failure to specify "rental, lease, or lending" in section 109(a) mean that these activities are not covered? One commentator has suggested that section 109(a) should be read in this manner and does not permit commercial rentals, leases, or loans.<sup>19</sup> But the legislative history and the tide of informed opinion seem to run the other way and to confirm that "otherwise dispose of the possession" includes rental, lease, or lending, commercially or otherwise, and even a right to destroy.<sup>20</sup> The notion that a wealthy collector owning one of the world's great paintings has the unqualified right to destroy it under this provision is a chilling one, even though that may also be the law in a number of countries other than the United States.

The first sale or, better, the first transfer of ownership doctrine in section 109(a) cannot be read apart from section 109(d), which provides that without the copyright owner's consent "any person who has acquired possession of the copy or phonorecord from the copyright owner,

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17. See 2 M. NIMMER & D. NIMMER, *supra* note 12, § 8.12(B)(4), (D).

18. See *supra* note 8.

19. See generally Colby, *The First Sale Doctrine—The Defense That Never Was?*, 32 J. COPYRIGHT SOC'Y U.S.A. 77 (1984).

20. See *Audio and Video First Sale Doctrine: Hearings on H.R. 1027, H.R. 1029, and S. 32 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. & 2d Sess. 366-67 (1983-1984)* [hereinafter *First Sale Doctrine Hearings*] (prepared statement of Dorothy Schrader, Associate Register of Copyrights for Legal Affairs, U.S. Copyright Office) (discussing the pros and cons of the commercial lending right and noting the existence of a right to destroy); *Audio and Video Rental: Hearing on S. 32 and S. 33 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 21-24 (1983)* [hereinafter *Audio and Video Rental Hearing*] (prepared statement of David Ladd, Register of Copyrights and Assistant Librarian for Copyright Services, Library of Congress) (arguing in support of a commercial lending right and noting the current right of purchasers to destroy their works); H.R. REP. NO. 1476, *supra* note 11, at 79, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5693 (noting that the right to dispose of a copy includes the right to destroy).

by rental, lease, loan, or otherwise, without acquiring ownership of it" is not considered an owner and is not accorded the first sale privileges of an owner under section 109(a).<sup>21</sup> The effect of this provision is to clarify the meaning of "owner" in section 109(a); passage of title to the possessor is required before the possessor is an "owner" for whose benefit the distribution right is neutralized or exhausted. While the phrase in section 109(d) about acquiring possession of the object from the copyright owner at first glance might be thought to have a narrowing effect, it seems clear that no such effect was intended. Section 109(d) and the legislative history in both houses of Congress plainly state that section 109(a) privileges, even after the first transfer of title, do not apply to someone who merely possesses the object without having acquired ownership.<sup>22</sup> In this, as in the other respects, the 1976 Copyright Act is far more explicit, clear, and detailed in its codification of the first sale right than the 1909 Act, which simply stated that "nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work *the possession of which* has been lawfully obtained."<sup>23</sup> Clearly, a copyright owner's rental of an unsold film now does not permit the party to whom it is rented to transgress the broad distribution right of section 106(3). In sum, the present so-called first sale doctrine operates to nullify the distribution right when the copyright owner transfers title to the object containing the work, but not when he or she engages only in rental, lease, lending, or bailment of the object.

Before examining other actual or potential expansions and limitations of the United States distribution right, let us look at the origins and rationale of the first sale doctrine of section 109(a), which cuts so broad a swath in authors' control over the use of their work. The so-called first sale doctrine originated in general English common-law rules of ancient ancestry disapproving restraints on the alienation of owned property.<sup>24</sup> The right of alienation was viewed as a basic element of ownership. It was founded on policies favoring the free transferability of land and, more particularly, goods.<sup>25</sup> Although over the centuries ma-

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21. 17 U.S.C. § 109(d) (Supp. V 1987).

22. See H.R. REP. NO. 1476, *supra* note 11, at 80, reprinted in 1976 U.S. CODE CONG. ADMIN. NEWS at 5694 (discussing § 109(c), which was redesignated § 109(d) by Pub. L. No. 98-450, 98 Stat. 1727 (1984)); S. REP. NO. 473, *supra* note 11, at 73.

23. Act of Mar. 4, 1909, ch. 320, § 41, 35 Stat. 1084, 1082 (repealed 1978) (emphasis added).

24. See, e.g., *Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1096 (3d Cir. 1988).

25. See, e.g., *John D. Park & Sons Co. v. Hartman*, 153 F. 24 (6th Cir. 1907), *cert. dismissed*, 212 U.S. 588 (1908). The court stated:

A prime objection to the enforcibility [sic] of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery.

The right of alienation is one of the essential incidents of a right of general property in

for inroads were made on these common-law rules in respect to real property, the rules continue to dominate in the realm of personal property, again in particular, chattels.<sup>26</sup>

Early United States copyright laws from 1790 to 1909 gave the copyright owner the "right to vend" his work but omitted specific reference to other types of transfer of ownership or to rental, lease, lending, or bailment.<sup>27</sup> As the years passed, the courts distinguished between the copyright owner's rights in a copyrighted work and the rights of the person owning the material object in which the work was embodied. Indeed the first sale doctrine cannot be understood apart from that distinction, which was codified along with the first sale doctrine in the 1909 law and, later, in section 109(a) and (d) and in section 202 of the 1976 Act.<sup>28</sup> These provisions include language to the effect that a transfer of ownership of an object does not carry with it, unless by virtue of an express writing to that effect, ownership of the copyright in the work embodied in the object concerned. In the nineteenth century United States courts began to apply the time-honored common-law rules for personal property disfavoring restraints on alienation by owners of objects embodying copyrighted works. They generally did not, however, deprive the copyright owners of their special copyright rights, notably the crucial exclusive rights of reproduction and performance, unless these were ceded expressly.<sup>29</sup> The United States statutes, with some

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movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. . . . A covenant which may be valid and run with land will not run with or attach itself to a mere chattel.

*Id.* at 39.

26. For a history and critique of these rules, see Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928) [hereinafter Chafee, *Equitable Servitudes*] and Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956) [hereinafter Chafee, *The Music Goes Round*]. In the latter article, the author notes: "Where chattels are involved and not just land or a business, the policy in favor of mobility creates even stronger cause for courts to hesitate and scrutinize carefully factors of social desirability before imposing novel burdens on property in the hands of transferees." *Id.* at 1261.

27. See Act of Mar. 4, 1909, ch. 320, § 1(a), (d), 35 Stat. 1075, 1075 (repealed 1978); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909); Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870); Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

28. See 17 U.S.C. §§ 109(a), (d), 202 (1982); Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1978). Section 202 provides:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202.

29. See *Bohbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908); *Red Baron—Franklin Park, Inc. v. Taito Corp.*, 11 U.S. P.Q.2d 1548 (4th Cir. 1989); *Columbia Pictures Indus., Inc. v. Redd*



embellishment and revision, followed the lead of the courts. This development poses a fascinating question: If this practice was wise at one time, is it wise today as a matter of social and economic policy?

In his famous, invaluable studies of equitable servitudes on chattels, the late Professor Chafee reviewed the history and merits of the rules forbidding restraints on alienation in their various applications.<sup>30</sup> Noting the many exceptions developed in the area of real property, he suggested that the old rules should not be considered immutable and that changing business circumstances might, in some cases, justify exceptions in connection with personal property when sound public policies would be served thereby.<sup>31</sup> In his review of the cases involving chattels, some in the copyright area, he found few instances in which application of the no-restraint rule was not preferable on the merits, after a weighing of pertinent policy factors.<sup>32</sup> We will return to this question later, but Professor Chafee's open-minded views can serve as a useful guide in this and future discussions regarding limits and exten-

Horne, Inc., 749 F.2d 154, 159-60 (3d Cir. 1984); see also H.R. REP. NO. 1476, *supra* note 11, at 79, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5693. See generally 2 M. NIMMER & D. NIMMER, *supra* note 12, § 8.12(D); cf. Nolan, *All Rights Not Reserved After the First Sale*, 23 BULL. COPYRIGHT SOC'Y U.S.A. 76 (1975) (discussing the 1909 Act).

30. See Chafee, *Equitable Servitudes*, *supra* note 26; Chafee, *The Music Goes Round*, *supra* note 26. In his later article, Professor Chafee summed up his conclusions as follows:

In 1928 I indulged in speculations on the validity of equitable servitudes on chattels. Although I concluded that such servitudes were "a reasonable and flexible device, which the courts might use when desirable," it was then plain that judges were looking with disfavor on the two chief ways in which businessmen had attempted to impose obligations on successive owners of personal property. . . . [T]hese devices [*i.e.*, resale price maintenance and tying restraints] were held invalid by 1928 on the ground that they would restrain trade unreasonably. With these two types gone, very little was left. My article pointed out a few stray decisions of miscellaneous sorts where restrictions had been enforced, and a few more hypothetical situations which might not encounter judicial objections.

*Id.* at 1254 (footnotes omitted).

31. See Chafee, *Equitable Servitudes*, *supra* note 26, at 946-48, 983.

32. Chafee observed:

The big point is that the imposition of a novel burden, either on land or a chattel or both, ought not to depend solely on the will of the parties. The validity or invalidity of the burden they want to create ought to depend on considerations of public policy. Do business needs make it desirable to create this novel burden? Does its enforcement involve such grave possibilities of annoyance, inconvenience, and useless expenditure of money that it should not be allowed? In other words, is the game worth the candle? . . .

After all, when you come to look at equitable servitudes, which have developed during less than two centuries, it is an extraordinary thing for the law to enforce them at all. They are in marked contrast with the strong legal rules against restraints on alienation.

Chafee, *The Music Goes Round*, *supra* note 26, at 1258 (footnote omitted).

Some of the cases involving copyright that Chafee considered were *RCA Mfg. Co. v. White-man*, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd per curiam*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937).

sions of the distribution right.

### III. SOME OTHER LIMITATIONS ON THE DISTRIBUTION RIGHT

Present United States copyright law imposes other important limitations, aside from the first sale doctrine of section 109(a), on the distribution right. Section 108 gives libraries the privilege to reproduce and distribute copyrighted works, excluding generally music and art, under certain circumstances.<sup>33</sup> Another limitation is the treatment of the transmission of copyrighted works authorized in sections 110 and 111, the latter including rights under compulsory licensing for cable television.<sup>34</sup> Other distributions are expressly allowed under the head of "ephemeral recordings" in section 112,<sup>35</sup> in section 113 for pictures and photographs of useful articles,<sup>36</sup> and in section 114(b) for sound recordings included in educational television or radio programs but excluding commercial distribution to the general public.<sup>37</sup> Section 114(b) is ambiguous with respect to the distribution rights of the owner of copyright in a sound recording in relation to recordings that imitate or simulate, rather than duplicate. But the compulsory license for public broadcasting allows some limited distribution rights to the licensee.

Most important, however, are the mechanical and rental compulsory licenses in section 115.<sup>38</sup> This section sharply poses a recurring question about the first sale doctrine: To what extent is the copyright owner's consent to transfer of title required to make the holder of a copy or phonorecord, lawfully made, an "owner" entitled to the privileges of section 109(a)? For example, when the manufacturer of the object, contrary to agreement, has not been paid by the copyright owner, may he sell under section 109(a) if state law permits it? What of one who acquires the object via bankruptcy proceedings? Can the holder of a compulsory mechanical license sell, without the copyright owner's consent, the records he or she has lawfully made? The language of section 109(a)<sup>39</sup> suggests the answer to this last question is "yes." Moreover, the legislative history flatly states that "the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not [be an infringement]."<sup>40</sup> Similar is the compul-

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33. See 17 U.S.C. § 108 (1982).

34. See *id.* §§ 110-111 (1982 & Supp. V 1987).

35. See *id.* § 112 (1982).

36. See *id.* § 113.

37. See *id.* § 114(b).

38. See *id.* § 115 (1982 & Supp. V 1987).

39. This language refers to "the owner of a particular copy . . . lawfully made." See *id.* § 109(a) (1982).

40. H.R. REP. NO. 1476, *supra* note 11, at 79, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5693; S. REP. NO. 473, *supra* note 11, at 72.

sory license situation under section 115(c)(3) relating to rental.<sup>41</sup> Finally, the last paragraph of section 117 limits the distribution of copies the law allows to be made in the utilization of a computer program by one who is not the copyright owner. It also bars the distribution, without consent, of any adaptation, even one lawfully made, in the same circumstances.<sup>42</sup>

Thus it can be seen that the right of distribution is limited by a number of provisions other than the drastic limitation of section 109(a). More important practical limitations are imposed today by new reproduction technologies of photocopying and taping used by private or institutional entities, whether or not sanctioned by fair use, another major source of limitation. Private copying and distribution of objects containing copyrighted material, by devices available even in the home, have passed beyond the control of the copyright owner. Other actual or potential incursions on the distribution right and other authors' rights include the eleventh amendment's immunization of state governments and their institutions from federal court suits<sup>43</sup> and other legal doctrines that may render other uses of copyrighted material noninfringing.<sup>44</sup>

#### IV. AVOIDING THE FIRST SALE DOCTRINE

If the picture drawn so far seems very dark now for those of us who wish to see the author's control extended, it is necessary to recognize a number of existing legal provisions or avenues of action that may restore some ground otherwise lost to the distribution right. In appraising these, it is desirable to reflect that the distribution right unlike any of the other exclusive enumerated rights purely is a right to control *use*, and not a right based on reproduction or any of its analogues of performance, display, or adaptation. The more closely an author's rights or copyright approach a right of control over use, whether via the reproduction right or *droit de destination*<sup>45</sup> or via expanding the present

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41. See 17 U.S.C. § 115(c)(3) (1982 & Supp. V 1987).

42. See *id.* § 117 (1982). The last paragraph of § 117 reads as follows:

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

*Id.*

43. This immunization hinders owners from enforcing their rights, because copyright actions may only be brought in the federal courts. See 28 U.S.C. § 1338 (1982).

44. See, e.g., Kernochan, *Music Performing Rights Organizations in the United States of America: Special Characteristics; Restraints; and Public Attitudes*, 21 COPYRIGHT 389, 394-406 (1985) (monthly review of the World Intellectual Property Organization), reprinted in 10 COLUM.-VLA J.L. & ARTS 333, 345-70 (1986).

45. See *supra* note 1 and accompanying text.

right of distribution, then the more they take on the character and scope of patent protection. The United States patent law's comprehensive grant of monopoly over use is hedged strictly by a number of limitations designed to redress the balance in favor of competition and dissemination: strict standards and scrutiny before any grant, a much shorter term of protection, and disclosure requirements.<sup>46</sup> I believe it is right to increase copyright control over use in an era when technology has made obsolete or unworkable in many areas the author's traditional reliance on control over copying and its analogues to secure compensation for, and earn a livelihood from, his or her work. Once we create for authors a new basis such as use for compensation, we must step carefully and define the new area of use monopoly with caution and reasonableness, with an effort at precision, and with consideration for the legitimate countervailing interests of intermediaries and the public. We must weigh the interests of competition and avoid imposing unnecessary transaction costs.

### A. Imports

The distribution right granted in section 106(3), and severely limited by the first sale doctrine in section 109(a) and by other provisions, nonetheless may be affected by section 602(a).<sup>47</sup> This section, with some exceptions, forbids importation into the United States, without the authority of the United States copyright owner, of copies or phonorecords of works acquired outside the United States.<sup>48</sup> Such importation is said to infringe the section 106(3) distribution right. Some United States district courts read section 602(a) to give copyright owners a special additional right to bar importation of a work already distributed with the authority of the United States copyright owner.<sup>49</sup> Such an additional right would be a significant supplement to the section 106(3) right. This reading of section 602(a) does not represent a unanimous view and the trend seems against it. The Court of Appeals for the Third Circuit decided that there was a second and preferable reading that harmonized sections 602(a) and 109(a).<sup>50</sup> Under this reading, section 602(a) merely provides a specific reference to another situation in which the distribution right is, as elsewhere, subject to section 109(a)'s limiting force, at least when what is in issue is not the importing of copies

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46. See generally 35 U.S.C. §§ 1-376 (1982 & Supp. V 1987).

47. 17 U.S.C. § 602(a) (1982).

48. *Id.*

49. See, e.g., *T.B. Harms Co. v. Jem Records, Inc.*, 655 F. Supp. 1575 (D.N.J. 1987); *Columbia Broadcasting Sys., Inc. v. Scorpio Music Distribs., Inc.*, 569 F. Supp. 47 (E.D. Pa. 1983), *aff'd mem.*, 738 F.2d 424 (3d Cir. 1984); cf. *Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986).

50. See *Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093 (3d Cir. 1988).

produced and sold abroad under a territorially restricted license.<sup>51</sup> This result leaves section 602(a) little, if any, effect as an extension of the distribution right defined by sections 106(3) and 109, except in cases of piracy.<sup>52</sup> The validity of this latest approach seems very questionable to me as a matter of construction and policy. The legislative history, however, is rather ambiguous on the effect of section 602(a) in nonpiracy situations and contains material that could support either of the two judicial positions.<sup>53</sup>

### B. Record Rental

If section 602(a)'s role is in doubt, the distribution right unquestionably was extended in the United States by adoption in 1984 of the Record Rental Amendment<sup>54</sup> now embodied in the 1976 Act's sections 109(b) and 115(c)(3). The Record Rental Amendment of 1984 enlarges the section 106(3) distribution right by carving an exception out of the first sale doctrine of section 109(a). It forbids the disposition of phonorecords for "direct or indirect commercial advantage . . . by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending" without the consent of the copyright owner of the sound recording and the copyright owner of the musical works it embodies.<sup>55</sup>

Notice that this Amendment is drawn quite narrowly. The reference to musical works would seem to exclude recordings of literary or dramatic works, and perhaps even dramatic works with music, without

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51. See *id.* at 1097-99; see also *Red Baron-Franklin Park, Inc. v. Taito Corp.*, No. 88-0156-A (E.D. Va. Aug. 29, 1988), *rev'd on other grounds*, 11 U.S.P.Q.2d 1548 (4th Cir. 1989); *Neutrogena Corp. v. United States*, 7 U.S.P.Q.2d 1900 (D.S.C. 1988). Note that § 602(b) provides in pertinent part: "In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited." 17 U.S.C. § 602(b) (1982).

52. H.R. REP. NO. 1476, *supra* note 11, at 170, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5786 (stating that § 602(b) retains the prohibition against importation of piratical copies, those whose making would have constituted an infringement if the title had been applicable).

53. *Id.* at 169-70, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5785-86 (reporting that "[s]ection 602(a) first states the general rule that unauthorized importation is an infringement merely if the copies or phonorecords 'have been acquired outside the United States'"); S. REP. NO. 473, *supra* note 11, at 151-52 (making an almost identical statement). This rule would seem to favor the view of the cases cited *supra* note 49. Later, the same sources say that § 602 applies when the copies or phonorecords were lawfully made but their distribution in the United States would infringe the United States copyright owner's exclusive rights as limited by § 109(a) to expire on first sale anywhere.

54. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (codified at 17 U.S.C. §§ 109(b), 115(c)(3) (Supp. V 1987)). This Amendment was enacted with the proviso that it would expire in 1989 unless renewed before then. It has been renewed for another eight years by the Record Rental Amendment Extension, Pub. L. No. 100-617, 102 Stat. 3194 (1988) (extending the Record Rental Amendment of 1984 until Oct. 4, 1997).

55. 17 U.S.C. § 109(b)(1) (Supp. V 1987).

sufficient reason.<sup>56</sup> Also, there is an express exception for rental, lease, or lending for noncommercial purposes by a nonprofit library or nonprofit educational institution, and the language of section 109(b)(1) implies that others too may engage in rental, lease, or lending of records in the absence of "direct or indirect commercial advantage."<sup>57</sup> Moreover, section 109(b)(1) encompasses only phonorecords of music and not copies of whatever nature. Finally, section 109(b)(3) specifies that only civil penalties may be invoked against infringements under this 1984 Amendment.<sup>58</sup> The related provisions of section 115(c)(3) supplement section 109(b) on record rental by ensuring that the compulsory licensees of the mechanical right in a recorded work may distribute by rental, lease, or lending subject to payment of prescribed royalties to the owner of the musical copyright in the work recorded.<sup>59</sup>

The circumstance that led to the proposal and passage of the Record Rental Amendment was the threat that record rental businesses, catering primarily to customers who rented recordings at low prices in order to make home copies of the recordings for themselves or others, would proliferate in the United States, depressing record sales severely.<sup>60</sup> This threat had materialized in Japan and elsewhere.<sup>61</sup> These downstream businesses made substantial sums by renting records principally used for home-taping, paid none of this money to the creator of the recording or of the music, and reduced potential record sales substantially. The root difficulty in this area, and for copyright generally, remains private copying, particularly home-taping. The Record Rental Amendment addresses only one facet of this difficulty: the spread of commercial rental outlets to assist home-taping. Home-taping continues in any case on an ever-broadening scale in the United States, using other sources, including phonorecords loaned by exempted libraries,<sup>62</sup> broadcasts, and borrowed privately owned recordings. This problem is the most damaging to authors. It is the one that most needs in depth congressional consideration.

The Amendment slipped through the congressional processes due

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56. The legislative history of the Record Rental Amendment of 1984 does not appear to settle these questions of coverage. See generally H.R. REP. NO. 987, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2898; S. REP. NO. 162, 98th Cong., 1st Sess. (1983). There has not been any relevant case law to date.

57. 17 U.S.C. § 109(b)(1) (Supp. V 1987).

58. See *id.* § 109(b)(3).

59. See *id.* § 115(c)(3).

60. See H.R. REP. NO. 987, *supra* note 56, at 2, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 2899; S. REP. NO. 162, *supra* note 56, at 2-3.

61. See S. REP. NO. 162, *supra* note 56, at 2-3.

62. The statute expressly exempts libraries from the royalty payment requirement. See 17 U.S.C. § 115(c)(3) (Supp. V 1987).

to a series of lucky coincidences.<sup>63</sup> The accompanying legislative proposals concerning video rental and more importantly audio and video home-taping were less fortunate and have not been enacted. A major factor in the 1984 Record Rental Amendment's passage was the lack of effective opposing vested interests of the kind that blocked the accompanying audio and video legislative proposals. Relatively few record rental establishments had taken root in the United States at the time of the Amendment, and the Amendment did stop their spread. If rental outlets had been as numerous in the United States as in Japan, and had objected to the bill, it is quite likely, given the ease with which opposing interest groups may block our congressional processes, that the Amendment would not have become law.

This new restraint on alienation is justified, as are measures to discourage or collect for video rental and audio or video home-taping, because unhampered alienation in this area erodes or destroys the basic right of reproduction that is the core of the traditional copyright system.<sup>64</sup> In such a situation created by new technology, it would seem that Professor Chafee would have approved as sound policy this legislative overriding of old common-law objections to restraints on the disposition of chattels.

### C. *Other Rentals, Leases, or Lending*

There are other avenues, some noted earlier, by which the distribution right can be preserved or extended, or the first sale doctrine avoided. One avenue by which the author or copyright owner can retain control under the distribution right, defined by sections 106(3) and 109(a) and (d), is to restrict the methods of distribution of the objects containing the work to rental, lease, loan, or bailment, thus avoiding any transfer of title. This practice can be effective in certain arts areas such as film, in which motion picture companies typically distribute their product by leasing. To avoid problems great care must be taken to assure that every transaction falls into the rental, lease, or lending category and that none can be characterized as transferring title.<sup>65</sup> Moreover, with sales of videocassettes increasing, this form of control is possible only in narrowing circumstances or as a temporary measure.

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63. For a fascinating account of the enactment of the Record Rental Amendment of 1984, see Horowitz, *The Record Rental Amendment of 1984: A Case Study in the Effort to Adapt Copyright Law to New Technology*, 12 COLUM.-VLA J.L. & ARTS 31 (1987).

64. *Id.* at 68.

65. There are cases attesting to some of the difficulties that may arise in practice. *See, e.g.*, *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977) (applying the doctrine of first sale under the 1909 Act to transfers of films for television purposes); *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977) (discussing what constitutes a first sale under the 1909 Act).

Under the shadow of the Supreme Court's 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc. (Betamax)*,<sup>66</sup> and given the existing strength of the videocassette rental industry, it has not been possible to secure congressional approval of a video, as opposed to an audio, rental amendment. Leakage, piracy, and off-the-air taping still will take a high toll even if a pure rental system is pursued. In some areas such a system may be unworkable.

#### D. Contractual Provisions

The congressional reports accompanying section 109(a) state expressly that the first sale doctrine "does not mean that conditions on future disposition of copies or phonorecords, *imposed by a contract* between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright."<sup>67</sup> Thus, apart from retention of title, contractual arrangements may stave off application of the first sale doctrine and expand the right of distribution. One can imagine scenarios in which a contract between A, the copyright owner, and B, an intermediary or user or consumer, might restrict B's rights, whether or not B holds title, to dispose by contract of the object transferred. Further, a contract might require B to assure the subjection of any subsequent purchasers, from B onward, to a contractual provision requiring that any later transfer must subject the transferee to the restrictions binding B. In effect, the chattel would be saddled with a restraint on use or disposal throughout any succeeding chain of contracts. An analogy may be drawn to covenants running with the land. This state of affairs is the very one the courts have sought to discourage with their time-honored rules against restraints on alienation of chattels. Thus, some judicial hostility can be expected. Indeed, to strengthen that hostility, a number of the early cases dealing adversely with contractual restraints on chattels involved anticompetitive restraints disfavored by antitrust policy, such as efforts to impose resale price maintenance or tying arrangements.<sup>68</sup> A fear that the Record Rental Amendment of 1984 might give rise to anticompetitive conduct by copyright owners of phonorecords led to the inclusion of section 109(b)(2), which expressly assures that whatever actions such owners might take under section 109(b) are subject to antitrust standards.<sup>69</sup>

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66. 464 U.S. 417 (1984).

67. H.R. REP. NO. 1476, *supra* note 11, at 79, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5693 (emphasis added); *see also* S. REP. NO. 473, *supra* note 11, at 72.

68. *See supra* note 30.

69. *See* 17 U.S.C. § 109(b)(2) (Supp. V 1987); H.R. REP. NO. 987, *supra* note 56, at 5, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 2899.



If contracts may supplement the distribution right despite section 109(a), at least two cautionary observations must be made. The first is the familiar one that contract rights in many cases may not be available to copyright owners, especially authors, lacking bargaining power equal to or greater than that of the other contracting party. Rights purportedly granted to an author can be useless unless the author has the bargaining power to make them effective.<sup>70</sup> The second observation is that even for a party with strong bargaining power, reliance on contract may raise more problems than it solves. On this matter I recommend an excellent memorandum submitted by Peter Nolan, Senior Counsel for Walt Disney Productions, at the 1983 Senate Judiciary Subcommittee Hearings on the audio and video rental bills.<sup>71</sup> Mr. Nolan's memorandum finds that the contract route is inadequate even for a party as powerful as Disney.<sup>72</sup> A key problem, of course, is the nonuniformity of contract law in the fifty states.<sup>73</sup>

### E. Some General Observations

The distribution right also is subject to various countervailing forces that beset United States copyright law including the first and eleventh amendments, fair use, formalities, and the vagaries of the standards and remedies for infringement.<sup>74</sup> The United States is not even close to recognizing a *droit de destination*. Of four particularly vital proposals relating to audio and video rental, and audio and video home-taping, the United States has acted on only one, audio rental, and that only in a limited way.<sup>75</sup> The configurations of power necessary to secure congressional action on the other three are at present wanting in

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70. Boytha, *The Development of Legislative Provisions on Authors' Contracts*, 133 R.I.D.A. 41 (1987), reprinted in 12 COLUM.-VLA J.L. & ARTS 155 (1988).

71. See *Audio and Video Rental Hearing*, supra note 20, at 92-104 (prepared memorandum of Peter Nolan, Senior Counsel, Walt Disney Productions).

72. Referring particularly to videocassettes, Mr. Nolan concluded:

In sum, copyright owners cannot effectively prevent the unauthorized use of the copyrighted videocassettes by contract under state law. Although a copyright owner could bind the first purchaser of his videocassette to a restrictive use agreement, it may be legally impossible for him to bind subsequent purchasers of that tape, and any attempt to do so would be a highly inadequate means of providing himself with complete protection against the unauthorized uses of his works. Besides the fact that video retailers can easily avoid liability using conventional contractual agreements, there also are significant burdens in administering, monitoring, and enforcing these contracts under state law. A federal remedy which would permit copyright holders to bring a copyright infringement action against those making unauthorized uses of videocassettes would alleviate most of these problems and provide copyright owners with an effective means of securing compensation for the use of their works.

*Id.* at 104.

73. *Id.* at 94.

74. See generally Kernochan, supra note 44.

75. See supra notes 54-64 and accompanying text.

such degree as to suggest these measures are a considerable distance from realization. Better education and organization of authors, other procopyright forces, and the public are needed urgently before we can be truly hopeful of positive results. We are very far in the United States from giving copyright owners a patent-style right over use.

## V. DISTRIBUTING PARTICULAR TYPES OF WORKS

I now would like to examine some aspects of the distribution of particular kinds of copyrighted works and speculate a little about some of the ways in which we might justifiably consider extending the dominion of the copyright owner or author into the very large territory encompassed by a comprehensive right of use. While this Essay has sought to describe quite fully and accurately the United States right of distribution and its limitations, I can only address and illustrate the possible extensions of the right in a few areas. Each area that I will discuss, and the many others I will not, would merit a paper on its own. I have not dealt in any substantial way in this paper with the implications of either *droits moraux* (except the *droit de divulgation* discussed below) or their United States analogies.<sup>76</sup> Nor have I been able to cover the serious and urgent distribution right questions arising in the highly complex area of computer programs and databases.<sup>77</sup> Both of these subjects are of great and pervasive importance and, with others, also deserve separate consideration *in extenso*.

### A. Unpublished Works

As an initial step, I recommend strong provisions, a *droit de divulgation* in effect, protecting authors' exclusive rights to control their unpublished works of all kinds,<sup>78</sup> except in extraordinary circumstances.<sup>79</sup> Authors generally should have the power to decide whether, when, and how their works are first released to the public. I see this power as a fundamental right of individual autonomy and dignity in a free society,

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76. See *supra* note 8 and accompanying text.

77. For a discussion of these areas, see, e.g., Maher, *The Shrink-Wrap License: Old Problems in a New Wrapper*, 34 J. COPYRIGHT Soc'y U.S.A. 292 (1987); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268-70 (5th Cir. 1988). Note that bills have been introduced in both houses of Congress to accord computer programs the same protection in regard to rental that is accorded to recordings of music in the Record Rental Amendment of 1984. See S. 2727, 100th Cong., 2d Sess., 134 CONG. REC. S11,463 (daily ed. Aug. 11, 1988) (sponsored by Sen. Orrin Hatch); H.R. 1743, 100th Cong., 1st Sess. (Mar. 19, 1987) (sponsored by Rep. Patricia Schroeder). These are important proposals that need weighing, with attention to the differences between many kinds of computer programs and other kinds of literary and artistic property.

78. See generally Kernochan, *supra* note 9.

79. See, e.g., Goroff, *Fair Use and Unpublished Works: Harper & Row v. Nation Enterprises*, 9 COLUM.-VLA J.L. & ARTS 325, 346, 348-49 (1985).

serving values that are embodied in the first amendment to the United States Constitution and that are vital to free people everywhere. The creation of speech must be protected and assured just as we protect its utterance. Curiously, the Berne Convention does not mention this fundamental moral and economic right though one could argue that it is assumed in Article 10.<sup>80</sup> But we can agree perhaps that here the control of use should be very extensive. In the United States, however, this control is less than it was before 1976. Again, a right of limited publication for unpublished works, as afforded by United States common law before 1976,<sup>81</sup> seems necessary to protect the process of creation. Perhaps legislative reform on unpublished works is possible in the United States to regain territory lost in 1976.

### B. Books

Authors' rights began in the area of published books. Within this area, consider novels in particular. Once a novel is released to the public, how far should the author be able to control its use? It seems doubtful that the rental market for such books will become significant in the near future, even though the United States version of the first sale doctrine leaves the copyright owner the right to opt for rentals only if that is desired.<sup>82</sup> Of course, in the near future all marketing approaches should be reconsidered as computers increasingly scan books into databases and as computer terminals replace hand-held books for a larger number of readers.<sup>83</sup> If title to the object, as against its copyrighted content, did not change hands, there would be no first sale and the monitoring and regulation of the book's use in a database might be the subject of fixed-term arrangements and engineered safeguards. These ideas are speculative, and the risks of further loss of practical control by authors in such circumstances are, as always, daunting. My very limited gifts of prophecy falter before the possibilities of the future in this area.

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80. See The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 10, as revised July 14, 1967, 102 Stat. 2853, T.I.A.S. No. \_\_\_\_\_, at \_\_\_\_\_, 828 U.N.T.S. 221, 239.

81. See Act of Mar. 4, 1909, ch. 320, § 2, 35 Stat. 1075, 1076 (repealed 1978) (stating that "nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor" (emphasis added)); see also *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912) (approving author's right to bar publication of unpublished works).

82. See 17 U.S.C. § 109(a) (1982); see also *supra* note 20 and accompanying text.

83. See, e.g., Veliotes, *Copyright in the 1980s—American Publishers Face a New Round of Challenges*, 35 J. COPYRIGHT Soc'y U.S.A. 281, 284 (1988); see also *supra* note 77 and accompanying text.

For a while it seems that the primary market for books, novels at least, and periodicals will continue to be the firsthand sale of copies. How far into the area of use do we wish to extend the author's control over a book once it is bought or validly owned by another? Strictly speaking, total control of use would mean an ability to limit or prevent reading, discussing, criticizing, quoting, selling, renting, lending, storing, and exercising control over the copyright rights of recording, adaptation, performance, computer input and retrieval, and the non-title-transfer distribution that copyright law now imperfectly protects. It seems obvious that even the most fanatical partisans of authors' rights would be forced to exclude many of the first-listed senses of the immensely broad word "use" in defining a "right to use" that would satisfy a legislature or court of the reasonableness of the author's claim to dominion. On the other hand, while the exclusions may change with technology, for the present we may insist as a minimum that the primary sales market for novels and other books should continue to be protected. For a novel, that market has many aspects, some of which we may call print uses: first serial publication, hardcover edition, paperback editions of various types, second serial publication, book club distribution, abridgements and condensations, and quotations, together with similar marketing in other countries, and in other languages. When a novel has exhausted its appeal in the United States so that it does not sell in significant quantity, it may be remaindered. Remaindering means that the publisher sells off its remaining stock at a cheap price, commonly below cost. In the area of print uses, the author arguably should reap some share of the returns on all such traditional commercial dispositions. Authors' contracts have come a long way from the days of lump-sum sale of manuscripts to provide commonly for such a share except for remaindering, which continues to be a source of current author-publisher conflict.<sup>84</sup> Otherwise, control over much of the print uses territory described above within the concept of use is generally available to the author now, by law or by contract, in the United States as elsewhere.

We know that downstream owners under the first sale doctrine now may make commercial dispositions of the copies they own and pocket the proceeds without paying any share to the copyright owner. Downstream owners, however, are not privileged by section 109(a) or (d) to exercise any of the section 106 exclusive rights (reproduction, adaptation, performance) other than those of distribution,<sup>85</sup> and in some cases

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84. See *infra* note 91 and accompanying text.

85. See 17 U.S.C. § 109(a), (d) (1982 & Supp. V 1987); see also *Red Baron—Franklin Park, Inc. v. Taito Corp.*, 11 U.S.P.Q.2d 1548 (4th Cir. 1989) (affirming that exhaustion of the copyright

under section 109(c), display.<sup>86</sup> The prospect of organized commercial rentals of audio recordings by downstream owners triggered the Record Rental Amendment of 1984, despite policies against restraining alienation. The threat posed by such activities, along with home-taping, to the fundamental reproduction right and to the economic returns to authors therefrom was recognized. The Register of Copyrights remarked in 1984, "[t]he first sale doctrine was never intended to encourage growth of a second-hand rental market that may eventually replace a primary sales market or traditional public performance markets."<sup>87</sup>

With these points once more in mind, let us look further at the possibilities for broadening the distribution right for books and for narrowing its limitations. How far and in what ways should we, or can we as a practical matter, make additional extensions in favor of a use right in relation to downstream activities?

First consider commercial activities related to books. In my youth, I can recall, there were establishments in the United States that rented best-selling and other perennially popular books for a small sum as part of their general business activities. To my knowledge, the traffic in book-rentals was not substantial enough to be considered a threat to the author's sales market. If that is still the case today,<sup>88</sup> then extending the book author's distribution right to cover commercial rental use is not an urgent priority, though perhaps it should be accomplished anyway by Congress for safety's sake, if the lack of opposing vested interests is as great as I believe it to be. When literary and dramatic works are recorded and then rented on a commercial basis by downstream owners of the recordings, such activity should be covered clearly by the terms of the 1984 Record Rental Amendment.<sup>89</sup> I believe this clarification could be done without difficulty; it should have been done except that authors failed to organize and lobby to accomplish it.

Then there is the second-hand or used book market in which money is made by the second-hand dealer without payment of any share to the authors. The Honorable David Ladd, when serving as Register of Copyrights, remarked that this market "has existed since the beginning of printing . . . [and] has never been perceived as a threat to the sale of new copies of the work." "The major reason for this," he

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owner's distribution right does not per se impair the owner's other rights under the copyright law, in particular his or her performance rights).

86. See 17 U.S.C. § 109(c) (Supp. V 1987).

87. *Audio and Video Rental Hearing*, *supra* note 20, at 28-29 (prepared statement of David Ladd, Register of Copyrights and Assistant Librarian for Copyright Services, Library of Congress).

88. See *id.* at 28 (agreeing that a market has not developed for the commercial lending of books).

89. At present, such recordings are not expressly and plainly included. See *supra* note 56 and accompanying text.

added, "seems to be that the public prefers to purchase unused books: the second-hand copy generally is not competitive with an unused book. In the case of videocassette rentals, the same product is being rented as is sold. The competition is direct."<sup>90</sup> If this statement is true and secondhand disposition is not used as a device to avoid paying fair compensation to authors, it seems unnecessary to extend the distribution right to cover such sales. It might be a traumatic change to put second-hand bookstores, including the bookstalls along the Seine, under authorial control. Remaindering of books by publishers may resemble second-hand selling; proceeds often are not shared with the authors. Remaindering is still a bone of contention between authors and publishers. Authors' societies are pressing this issue and contractual arrangements may be worked out to satisfy both parties and curb reported abuses.<sup>91</sup> If not, some legislative provision barring publisher

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90. *Audio and Video Rental Hearing*, *supra* note 20, at 28 (prepared statement of David Ladd).

91. The Authors Guild Recommended Trade Book Contract and accompanying Guide now deal with publishers' sales of overstock of hardcover books. Increased and evolving remaindering activity by publishers involves closing out stocks below cost with no royalty due the author under most contracts, either when the remaindered copies are sold off to remainder dealers by the publishers or are sold to the public by such dealers. The Authors Guild Contract now recommends the following contractual provision:

There shall be no sale of overstock (i.e., copies sold in the United States at 70% discount or more) during the first 18 months after publication. Thereafter, or sooner with Author's consent, Publisher may sell overstock and shall pay Author 10% of the gross price received, provided, (i) Publisher will give Author 30 days notice and guarantee that Author may match the highest bid of the remainder house for the copies to be remaindered or for any portion thereof, and (ii) if the purchaser is a firm owned or affiliated in any way with Publisher, Author will be paid 10% of the price at which copies are resold by the purchaser. Upon Publisher's complete remaindering of the Work, U.S. hardcover trade publishing rights and U.S. hardcover reprint rights shall revert to Author.

THE AUTHORS GUILD, INC., THE AUTHORS GUILD RECOMMENDED TRADE BOOK CONTRACT 9 (1987). The Guide to the Model Contract states:

This clause sets out that authors must be compensated for every book sold, even if sold at or below manufacturing cost. Remaindered books are sold to consumers at a range of from one-half to one-tenth the retail list price. An alternative to receiving 10% of the gross price received for sale would be to require the remainder house to pay the author the previously contracted hardcover percentage of the new retail price it sets on the book, or to renegotiate percentages with the author.

In the Winter of 1987, one publisher announced that it would pay its authors a royalty of 5% of the net amount it receives on remainder sales of hardcover adult books and that one of the remainder houses to which the publisher sells will give 5% to the publisher of what it pays for the publisher's books, as royalty to the authors.

The author may prefer to purchase the copies to be remaindered and arrange for distribution.

THE AUTHORS GUILD, INC., GUIDE TO THE AUTHORS GUILD TRADE BOOK CONTRACT 22 (1987). Note that in 1984 another publisher had announced that its newly-formed subsidiary, Retriever Books, which removes hard covers from remaindered books it purchases and remarkets them as trade paperbacks, would pay the publisher and author standard royalties on copies sold, plus a modest advance.

disposition of books for money without paying some share of proceeds to the authors might well be considered.

Many of the noncommercial dispositions of books by downstream owners do not seem appropriate to include in any right of use. Thus, the buyer of a novel should have many rights of use, including reading it alone, nonpublic reading to others, lending it to family or friends or even strangers,<sup>92</sup> fair use quotation of nonsubstantial portions (with credit, if the quotation is in published form and in print), plus discussing, criticizing, and storing. It seems to me that the buyer of a novel should have the right to annotate, sell, give away, bequeath, lend, or store his copy or even perhaps to rent his book to another if this is not done as part of a rental business. Likewise, if the downstream owner's copy is sold as part of disposal of a private library or book collection, the same rights should apply.

The lending of books by libraries is a major noncommercial activity on a scale that almost certainly cuts substantially into sales on behalf of, and remuneration to, authors. Awareness of this practice has led a number of nations not including the United States to establish a public lending right.<sup>93</sup> It is not my purpose to review here the growth and the varieties of lending rights that have emerged, or their respective merits, other than to say the principle has appeal but its implementation gives pause. One might enter a caveat that the practical results of these lending right schemes for many authors raise questions, which may be answerable, about the economic costs of the system in relation to its yield below the top tiers of already prospering authors. It seems questionable, too, why the returns, very modest in many cases, are often devoted, in part at least, to social benefit purposes, though perhaps the strengthening of authors' societies would be a justifiable expenditure. Arguably, the lending right is of more symbolic than economic importance. It seems regrettable that these plans rarely include payments for works other than books, or payments to foreign authors, though the latter suggestion raises considerations of reciprocity. Do not such problems of reciprocity profoundly affect the viability of international copyright generally and the attitudes of nations depending on whether they are net importers or exporters of printed works? I am in no position to complain that United States authors are not paid for such uses by other nations, because Congress does not provide for lending fees to any au-

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92. It would be interesting to know whether the reported Swedish ban on private lending of a copy outside the private circle, without the author's consent, is enforceable and enforced. See Desurmont, *supra* note 1, at 42-44, reprinted in 12 COLUM.-VLA J.L. & ARTS at 495.

93. See, e.g., Dworkin, *Public Lending Right—The UK Experience*, 13 COLUM.-VLA J.L. & ARTS 49 (1988); Note, *Closing the Book on the Public Lending Right*, 63 N.Y.U. L. REV. 878 (1988); Seemann, *A Look at the Public Lending Right*, 30 COPYRIGHT L. SYMP. (ASCAP) 71 (1983).

thors, foreign or domestic, and seems unlikely to do so. Congress remains unpersuaded to appropriate large sums for the public lending right, especially in a period of grave national deficit. It will take sustained, organized, effective pressure over time by authors and their allies to move the Congress in this direction. I do not see such movement as imminent, though the Authors Guild will continue to mount a substantial effort to achieve recognition of a public lending right.<sup>94</sup>

One final observation on novels is that compared with periodicals and sheet music, their sales have suffered comparatively little so far from the tide of home-copying and home-taping. Copying an entire novel at home is too laborious to compensate for the ease of buying an attractive book for a relatively low cost, in paperback at least. With the development of scanning and print-out equipment, among other things, the computer age may well change this long stable area in the very near future. It has not done so yet, though we should plan now for the foreseeable electronic possibilities; many electronic publishers are now making such plans.

Let me turn from novels to deal briefly with texts or other nonfiction books, books of short stories, and periodicals. In each of these classes of works, there is substantial public demand to use extracts, particular chapters, stories, or articles, short enough so that (unlike the full-length work of fiction) the advent of private (or even nonprivate or governmental) or home-copying technology is a major threat to the sales that make publication economically feasible. The same fate has befallen much sheet music and reproductions of works of art. For example, I can testify from personal experience in music publishing that photocopying of the entire work of sheet music for choral singing, especially by churches and educational establishments, almost has halved a category of sales that was once a mainstay of the music publishing business and a boon to the composers of such music. Such wholesale unauthorized copying, beyond the copyright owner's control and not permitted by the distribution right even as restricted by the first sale right, has made vast inroads into the viability of both the reproduction and distribution rights and other core authors' rights. It has caused deep damage to the publishers who serve authors. In the United States, the Copyright Clearance Center (CCC), a private effort of collective administration that licenses copying of printed matter, is making a great effort to recover some lost ground, at least for the book publishing industry.<sup>95</sup>

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94. See, e.g., Meltzer, *Steps Guild Members Can Take to Promote ALR in the U.S.*, *AUTHORS GUILD BULL.* 27-28 (Winter 1987).

95. The CCC is participating in the internationalization of that effort through the Interna-



Some years ago, with shocking callousness and a refusal to consider new technology in its interpretation of the copyright laws, the United States Supreme Court divided equally and thus refused to impose legal sanctions in a case in which wholesale photocopying of medical journals by government agencies had been judicially approved as fair use.<sup>96</sup> Section 108 of the 1976 Copyright Act and the Guidelines for Educators, together with the fair use doctrine, still leave too much room for damaging copying.<sup>97</sup> The Supreme Court seems to defer to Congress, as a matter of general policy, when new technology issues arise.<sup>98</sup> This practice is a disaster for copyright interests, leaving them at the mercy of a Congress in which they have one of the least powerful voices. Collective licensing action would be the best solution to rescue authors' reproduction and distribution rights in the printed word, in printed music, and in the reproduction of art works. Resulting antitrust problems should be dealt with by new legislation.<sup>99</sup> If commercial rental rights can be enacted, they should be considered for nonfiction books. If "public lending rights" are obtainable, they should include not only all books, but also printed music, records, and all other forms of protected artistic work loaned by public and private libraries, or other institutions, to the public or to each other.

In sum, concerning books, periodicals, sheet music, and some works of art, I believe some steps can and should be taken toward a *droit de destination* or a use right, but that any claim to a right of use must be qualified in ways I have indicated to be realistically "saleable" and fair to authors and all who must live under the rules.

### C. Music

Distribution of music in printed form has been discussed already to some degree in conjunction with books. As in the context of books, giving composers, authors, and publishers control over commercial rental

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tional Federation of Reproduction Rights Organizations.

96. See *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (4-4 decision), *aff'g per curiam*, 487 F.2d 1345 (Ct. Cl. 1973).

97. Cf. Address by Ralph Oman, U.S. Copyright Office Research on Current Problems in Reprography (Photocopying) Under United States Law (ATRIP Conference, Washington D.C. July 27, 1988), reprinted in Oman, *The Register's Second Report: An Update on Library Photocopying*, 13 COLUM.-VLA J.L. & ARTS 39 (1988).

98. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc. (Betamax)*, 464 U.S. 417, 431 (1984).

99. See Kernochan, *supra* note 44, at 398-99, reprinted in 10 COLUM.-VLA J.L. & ARTS at 355 (noting the problems caused by application of the existing antitrust laws to artists). Canada's new amendments to its Copyright Act seem to move in the direction of reducing antitrust barriers to collective licensing. See An Act to Amend the Copyright Act and to Amend Other Acts in Consequence Thereof, ch. 15, Bill C-60, 35-36-37 Eliz. II (June 8, 1988), reprinted in 11 Can. Gaz. 279 (1988).

of protected sheet music might be considered. What sort of opposition there might be, I do not know. The sale of second-hand or used music, as a business, probably is similar in present impact to that in the book area. But a right of use, broadly taken, would encompass control over distribution or dissemination of music in other forms as well. If music is recorded, the compulsory license of section 115 makes an inroad on any right of use. After the first recording, the license triggers the first sale doctrine and takes control from the copyright owner of the work recorded, except as the Record Rental Amendment of 1984 restores some control in the area of commercial rentals to the copyright owners of the sound recording and the musical works recorded.<sup>100</sup> The uses and distributions of video cassettes are not protected in this way, and the distributions made possible by home-taping should be addressed, opposition notwithstanding. Recordings, we saw, like books and printed music or drama, can be lent by libraries, or sold off or otherwise disposed of by individual or other record owners in a second-hand market.<sup>101</sup> They may be sold off cheaply by record companies without royalties when cut from a catalog in a manner similar to remaindering in the book trade; this practice should be addressed at least by contract. Beyond the Record Rental Amendment of 1984 and home-taping tax legislation,<sup>102</sup> it would seem difficult to extend control or compensation for distribution of recordings much farther into the zone of use here. The supplementary, problematic, and hard-to-achieve public lending right option also deserves study.

Distribution of performances apart from recordings falls somewhat outside my focus. Live or broadcast or in synchronization with film, this category falls largely in the domain of the very active performing rights societies and the mechanical licensing organizations.<sup>103</sup> Copying and recording technology make their practical inroads here too, and Congress has not been able to resist calls for a number of unjustified exemptions to performance rights.<sup>104</sup>

#### D. Drama

An area of interest, insufficiently examined, is that of grand rights in dramatic or dramatico-musical works. For a long time authors and publishers of such works have relied substantially, as section 109(a) al-

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100. See *supra* note 54 and accompanying text.

101. See *supra* note 57 and accompanying text.

102. Bills to establish home-taping tax legislation have been proposed, but none has been enacted so far. See, e.g., S. 33, 98th Cong., 1st Sess., 129 CONG. REC. S90 (daily ed. Jan. 26, 1983); H.R. 1027, 98th Cong., 1st Sess., 129 CONG. REC. H201 (daily ed. Jan. 27, 1983).

103. See Kernochan, *supra* note 44, at 398, reprinted in 10 COLUM.-VLA J.L. & ARTS at 355.

104. See, e.g., 17 U.S.C. §§ 110(6), (10), 111, 116, 118 (1982 & Supp. V 1987).

lows, on not relinquishing title to the embodiments of the works in order to retain control under the section 106(3) distribution right. Often the materials of plays or operas or musical shows have been made available only through rentals. Before the reprographic revolution, control was retained over distribution to a reasonable degree because these materials typically were voluminous and too laborious to copy. That era has ended for at least two reasons. First, it is now easy and not prohibitively expensive for renters to photocopy these rental materials for their own and others' future use. That practice is in fact infringement, however, and the law covers it without any new steps needed toward extension of a right of use. Such photocopying still opens a de facto breach in control over distribution that is difficult to remedy in practice. Second, grand rights works, though not subject to compulsory licensing, are now available on records. Sales of recordings, although a logical, desirable marketing avenue, exhaust the physical distribution right. This practice opens the door to distribution or dissemination by public performance and broadcast that in the United States, at least, is not monitored or policed adequately by existing machinery, though such machinery could be established. Authors want, need, and, I think, deserve control over primary performances and recordings, along with collective administration to monitor and collect for broadcast or secondary uses of the primary authorized performances. Existing law seems adequate to support this proposal without extending the right of distribution very much. Consideration might be given to providing that sale of phonorecords or printed copies to performing groups for performance will not trigger section 109(a) if copies bear warning notices. Special antitrust exemption for collective action by authors is needed here as elsewhere. Of course, if dramatic or dramatico-musical works are sold in book form, they are subject to the first sale doctrine. A clarification on the prohibition of unauthorized commercial rentals of such works to the public, both in printed and recorded form, might be considered in relation to the Record Rental Amendment of 1984.<sup>105</sup> It would be proper to inquire whether the second-hand sales market is significant and needs attention.

#### *E. Film*

Films made for the theatre in the United States generally are leased in their various noncassette phases of domestic and foreign exploitation: chiefly pay-per-view cable; monthly subscription pay cable; network broadcast; and syndicated broadcast, with or without satellite complexities. This practice ensures that the distribution right is not le-

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105. See *supra* note 56 and accompanying text.

gally lost. It may be lost, however, as a practical matter through pirated and off-the-air copying, or by careless transfer of title to prints. Alas, the sale of videocassettes changes all that, so that video rental legislation that will compensate for increases in video home-taping seems an essential extension of the distribution right in the direction of a right of use, despite heavy foreseeable opposition. Libraries' rentals of protected films should be covered by any public lending right obtainable.

#### F. Visual Art (*Painting and Sculpture*)

As a final illustration, I would add a word about visual art, specifically, painting and sculpture. Unless an artist has such rare prestige that he or she could exact rental arrangements rather than sale arrangements, he or she probably must submit to the traditional sale mode of marketing unique or limited-supply art works. In the United States, upon sale, there is a consequent and sometimes serious loss of artistic and economic control over the future of the work, especially if weak bargaining power means the artist must yield the copyright along with the object. United States museums, I think unfairly, are demanding some or all copyright rights without royalty obligations when purchasing art. Collective effort is needed here. Attempts by artists to exert continuing control, through the so-called Projansky and Jurrist contracts,<sup>106</sup> have been vehemently resisted and rarely accepted by dealers, collectors, and museums. The main avenue for actual or potential compensation for the work of visual artists remains distribution by sale or by rental of the original or reproductions. An organized arts community should follow the example of the Record Rental Amendment and lobby for revenues from rental of originals or visual or audiovisual reproductions. Library lending of visual artworks should be included in any future public lending right scheme.

Display of art is more problematic. Because original art works are unique, or nearly so, the first sale is crucial for the artist's direct compensation unlike the first sale of the book writer who trades on multiples. To make up for this difference, a number of countries and the State of California have adopted the *droit de suite*,<sup>107</sup> or resale right, which provides for a payment to the artist on resale. In only a few of

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106. See F. FELDMAN, S. WEIL & S. BIEDERMAN, ART LAW 556-58, 572-76 (1986).

107. See, e.g., CAL. CIV. CODE § 986 (West 1982 & Supp. 1989). Nations that have enacted artists' resale right legislation include: Algeria, Belgium, Brazil, Chile, Congo, Costa Rica, Czechoslovakia, East Germany, Ecuador, France, Guinea, Hungary, Italy, Ivory Coast, Luxembourg, Madagascar, Mali, Morocco, Peru, Philippines, Portugal, Senegal, Spain, Tunisia, Turkey, Uruguay, West Germany, and Yugoslavia. See generally L. Pierredon-Fawcett, *Le Droit de Suite en Propriete Litteraire et Artistique—Etude de Droit Compare* (1984) (unpublished thesis, University of Paris).

these cases has this scheme been successful. The impact of the right is at best erratic. Its opponents say it is unsatisfactory because it only enriches the rich without helping the poorer artist. Copyright, however, generally fails to provide start-up capital. It tends to reward popularity, which may or may not coincide with quality. Note that individual nations may be unwilling to adopt the resale right for fear of losing valuable art sales to nations that impose no such tax on transfers. The pros and cons are fully and carefully reviewed elsewhere and the conclusion reached that the right has value and is workable, if properly implemented, seems hard to rebut.<sup>108</sup> The California right received much criticism.<sup>109</sup> A bill proposed by Senator Edward Kennedy,<sup>110</sup> which would establish, among other things, an artists resale right on a national level in the United States, as must be done if it is to be truly effective, also received much criticism.<sup>111</sup> One feasible step, though it faces daunting opposition, is for the United States to extend the distribution right in the direction of a use right and to limit the first sale doctrine. This step may require coordinated action with other nations, and certainly will call for effective collective activity by United States artists, with attendant antitrust risks.

Although a few countries, including the United States, have a display right,<sup>112</sup> I have not found any record that it has had a significant effect anywhere. Perhaps the idea could and should be pursued fur-

108. See L. Pierredon-Fawcett, *supra* note 107.

109. See, e.g., McInerney, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F.L. REV. 1 (1984).

110. S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987).

111. See, e.g., Note, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. ON LEGIS. 153 (1988). The Kennedy bill, after bruising hearings, was reported out in revised form by the appropriate Senate subcommittee. As of August 10, 1988, the revised bill has dropped previous provisions for an artists resale right (*droit de suite*) and calls for study of this problem. In sum, it would:

Create a new Section 106(a) in the Copyright Act to give unwaivable and unassignable rights of paternity and integrity to authors of works of visual art;

Permit an author to claim or disclaim authorship of publicly displayed works, and to bring infringement actions when such works are mutilated or altered;

Permit authors of works of recognized stature to bring such infringement actions, and grant them certain rights of integrity against removal of their works;

Call for a joint study by the Register of Copyrights and the National Endowment for the Arts on allowing visual artists to share monetarily in the enhanced value of their work;

Preempt state moral rights laws;

Exempt normal conservation from actionable mutilation, and exempt works for hire from paternity and integrity rights.

S. 1619, *supra* note 110. For a criticism of the resale right by economists, see Bolch, Damon & Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689 (1978).

112. Chile, Ecuador, Germany, Peru, and Portugal provide for a right of exhibition or display. L. Pierredon-Fawcett, *supra* note 107, at 57 n.84.

ther.<sup>113</sup> In England, I learned that exhibitors, though not required to do so, sometimes make *ex gratia* payments to exhibited artists.<sup>114</sup> I doubt this practice is a source of significant artistic compensation. To have such a right in the United States, as urged by some scholars,<sup>115</sup> would require amendments to section 109, that ubiquitous barrier to a *droit de destination* or right of use. Section 109(c) undercuts the right of display given in section 106(5) and seriously hampers the right of artists to control in any way, except as to audiovisual use, the exploitation of a transferred work via displays. The interrelations between sections 106(5) and 109(c) were not adequately thought through. Artists have a right of display in section 106(5) if they retain copyright, but no right of access or borrowing for display is provided in section 109(c) or elsewhere once they part with title. Owners of title on the other hand have full rights not to display, or to display at the place where the work is located—*i.e.*, to all comers at exhibitions or otherwise. The title-holder may not, however, allow display on television or film without the consent of and probably compensation to the artist unless the title-holder is also copyright owner. If the experience of display-right nations,<sup>116</sup> or some proposed new shaping of that right, suggests that the artist's control, perhaps nonexclusive, of display of a transferred work is feasible and profitable without undue transaction costs, it should be explored as a possibly desirable extension of the artists' rights.

Rights in reproductions can be vital to the compensation and livelihood of visual artists. Because in the United States this basic right often is surrendered in contracts through ignorance or weak bargaining power, there is a special need for strengthened collective organization and resistance by artists to bad bargains or, alternatively, a need for remedial legislation requiring proportional sharing of the revenues from this source. Here, being played out once again, is the historic, centuries-old struggle of creators to progress from lump-sum payments to the royalties or residuals that enable them to share in the profits earned from their labors.

## VI. REFLECTIONS ON REFORM

From the descriptions of United States law and the selective comments regarding particular areas of the arts, can we extract some general observations about the major avenues of reform in our effort to

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113. See generally Goetzl & Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM.-VLA J.L. & ARTS 15 (1984).

114. Interview with the Design Artists Copyright Society Ltd. in London, England (Oct. 1987).

115. See generally Goetzl & Sutton, *supra* note 113.

116. See *supra* note 112.

define and achieve a *droit de destination* in some measure approaching a right of use? Three general observations seem plausible.

1. I think it is clear that in the United States an effort to secure from Congress a blanket patent-style right of use in lieu of our present distribution right would not be successful and would be unwise policy. There are too many necessary exceptions to such a right to make a claim to it plausible and politically achievable. Seeking a right so broadly phrased will appear naive or overreaching or both. The claimant risks being dismissed at the threshold before the case is heard.

2. It would seem better for the United States to clarify the priority needs in moving toward extension of existing rights to make up for technological erosion and to disclaim expressly areas not claimed within the broad right of use. In other words we must define clearly what is sought, since we must chip away at existing barriers and have not the luxury of resting on broad principle from which others must seek subtractions.

3. If this approach is desirable for the United States, we should concentrate our efforts at expansion on some urgent matters of concern.<sup>117</sup>

a. We need a virtually full-fledged right of use for unpublished works.<sup>118</sup>

b. An expanded Record Rental Amendment is necessary; it should include recorded literary, dramatic, and musico-dramatic works not limited by the section 115 compulsory license.<sup>119</sup> Control over commercial rental of original or reproduced visual artworks should also be considered, and the possible opposition weighed.

c. We should have a new video rental bill covering not only films but all kinds of protected creative works that may be embodied in video recordings.<sup>120</sup> United States Copyright Office testimony at hearings on the home audio and video taping bills provided a telling metaphor to support the concept. Ms. Dorothy Schrader, Associate Register of Copyrights for Legal Affairs, spoke in behalf of the audio and video rental bills and urged that the rental problems illustrate:

the need to accommodate copyright to the shifts in market realities caused by advantageous new technologies. If rentals are moving the film theater to the home, the copyright box office must follow in order to recoup investments and secure the rewards previously taken in at the theater box office. This relocation of the box office is necessary to provide a stream of support flowing back to distributors, actors, producers, studios, scenarists, and the entire industry and all the workers who

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117. *Accord* Desurmont, *supra* note 1.

118. *See supra* Part IV.

119. *See supra* note 89.

120. *See, e.g., supra* Part VE.

created the movies.<sup>121</sup>

The *Betamax* case,<sup>122</sup> which removed the pressures on Congress, and the strong opposition by tape and tape machine makers to any payment, seem to presage a long, uncertain struggle for any such legislative solution. To secure this solution there must be an effective army of organized author groups and their supporters. A more persuasive argument must be made to the Congress that, as in the area of audio recordings, the thriving video industry, and more particularly, the creative elements, need this added protection to make up for revenues lost to home-taping.

d. We need legislation to compensate for private or institutional taping and its inroads on sales to the public.<sup>123</sup> Many European countries have moved in this direction. Here, too, a great and organized effort will be needed in the United States. Once more, the concept of "moving the box office" applies, and one might also analogize, to the development of the notion of enterprise liability in United States tort law governing compensation for injury from defective products.<sup>124</sup> A 1963 New York case<sup>125</sup> described enterprise liability as intending

to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise. The risk, it is said, becomes part of the cost of doing business and can be effectively distributed among the public through insurance or by a direct reflection in the price of the goods or service.<sup>126</sup>

In this analogy, the creators and their commercial partners are, of course, the "victims" to be compensated for loss of revenues, but the economic case for such legislation will have to be very persuasive against heavy and powerful opposition.

e. Provisions for private institutional copying of print material are needed. It seems possible that collective administration, if supported properly by publishers and authors of books, periodicals, music, etc., can provide a viable solution.<sup>127</sup> The CCC already seems to have made significant headway, although it still has far to go. Visual artists' societies must join this effort for greater strength or proceed independently.

121. *First Sale Doctrine Hearings*, *supra* note 20, at 357 (prepared statement of Dorothy Schrader); *see id.* at 366-67; *Audio and Video Rental Hearing*, *supra* note 20, at 21-24 (prepared statement of David Ladd).

122. *Sony Corp. of Am. v. Universal City Studios, Inc. (Betamax)*, 464 U.S. 417 (1984); *see supra* notes 66 & 98.

123. *See supra* note 20.

124. *See supra* note 121 and accompanying text.

125. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

126. *Id.* at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 598 (Burke, J., dissenting).

127. *See supra* note 99.



f. Finally, we need public lending rights, the *droit de suite*, and perhaps a stronger display right supplemented perhaps by legislative provisions which would call for a sharing with artists of proceeds from reproduction, as well as from commercial distribution of artworks by rental or loan. These measures are all steps to be considered in the effort to enhance distribution rights.<sup>128</sup> They seem, in varying degrees, quite distant from legislative realization in the United States and other countries and from effective practical realization even in many of the nations where they are, in principle, recognized by law. Viability and economic consequences are key questions. Once more, organization of artists to fight for justifiable rights is essential, as the opposition is strong. The existing exclusively domestic focus of many of these devices in other nations should be made general and international when their adoption is socially and economically supportable.

I can only hope that a few of these preliminary reflections will contribute in some positive way to a reasoned extension of reproduction or distribution rights in the United States and elsewhere. Such extensions are essential to cope with the tidal wave, a veritable tsunami, of technology that threatens to drown the fragile but infinitely precious authors' rights whose welfare concerns so many of us so profoundly.

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128. See *supra* Part VF.