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Do Art Exhibitions Destroy Common-law Copyright in Works of Art?

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LITERARY WORKS provided the model for early copyright law. The concept of publication, critical for determining the loss of common-law rights, was viewed as the public dissemination of a copy of the literary work. But a work of art, such as a painting or sculpture, may never be copied yet exposed to the view of thousands through a public exhibition. Is such an exhibition a publication? In part because cases on this question have been infrequent, the law is unclear. Still the problem is obviously not without importance given the large number of works of art daily exhibited in the United States apparently with little attention to the possible loss of copyright involved.

The problem in defining publication has been to draw a line somewhere between the case of completely private enjoyment and the case of truly public distribution.[1] The per-

[1] Consequently different scholars have come up with different formulations for *publication.*

"A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies abandonment of the right of copyright or its dedication to the public." Werckmeister v. American Lithographic Co., 134 F. 321, 326 (2d Cir. 1904).

"The public distribution of copies is the prototype of publication. This distribution generally takes place through sale, lease or circulation and does not

haps misnamed doctrine of limited publication has introduced facts such as the nature and size of the group to which the work was distributed, the context of the distribution, and the explicit restrictions, if any, placed on the work's use. Similarly, in the case of art exhibitions, there are a number of factors which might be thought relevant.

The Conditions of Entry into the Exhibition. Under this heading such questions might be asked as: Did the artist inquire about the conditions of display? What was the artist told about such conditions? Did the artist submit his work with any reservations about how the art could be exhibited?

The Purposes of Exhibition. The following questions might be asked: Was the art for sale? Was the purpose of the exhibition to publicize the sale of reproductions? Was the artist receiving money from the exhibition?

The Conditions of the Display. Relevant questions would include: Was the exhibition open to the general public? Was an admission fee charged? Did the place of display restrict the copying of the art? If so, how was the notice of that prohibition communicated to the viewers and how was it enforced? If the exhibition was not open to the public, to whom was it limited? How long was the art displayed?

Unfortunately the extant opinions do not give guidance in weighing those factors.

Although our concern here is with American law, we start with an early British case, *Turner v. Robinson.*[2] In 1857, Henry Wallis painted *The Death of Chatterton.* Upon com-

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embrace such preliminary steps as printing, advertising the work, or the sale or offering for sale of the author's manuscript to a prospective publisher." A. LATMAN, HOWELL'S COPYRIGHT LAW 63 (4th ed. 1962).

"The relevant decisions indicate that *publication occurs when by consent of the copyright owner the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does occur.*" M. Nimmer, *Copyright Publication,* 56 COLUM. L. REV. 185, 187 (1956). (Footnotes omitted.)

[2] 10 Ir. Ch. 121 (1860); *aff'd,* 10 Ir. Ch. 510 (App. 1860).

pletion he exhibited the work at London's Royal Academy of Art. The picture was then sold to Augustus Leopold Egg, who displayed it again at the Royal Academy and also at the Manchester Exposition. Egg sold the rights for an engraving to Robert Turner, and the painting was subsequently lent to Turner in order to show it at Dublin for the purpose of getting subscribers to the engraving. James Robinson viewed the picture at the Dublin exhibition and from memory constructed a backdrop similar to the scene in *The Death of Chatterton*, posed a servant in front of the construction to imitate the Wallis original, photographed the setting, and made stereoscopic pictures from the photographs. Turner then sought to enjoin the sale of those pictures.

The case was tried on the assumption that unless there had been no publication, the painting was in the public domain because the British copyright statute in force at that time did not cover paintings. The Master of the Rolls held that no publication had occurred.[3] He quickly dispensed with the exhibition at Dublin. To claim that a display for the purpose of obtaining subscribers for an engraving was a publication, he said, was "an extravagant proposition, as it would defeat the very object for which the painting was exhibited." [4]

However, *The Death of Chatterton* had also been on general display at the Royal Academy and at the Manchester Exposition. Whether those exhibitions constituted publications posed a more serious problem. The plaintiff argued that a painting is never published at an exhibition, relying on precedents that a public performance of a play was not a publication. The court was unwilling to adopt such a broad holding. Instead the opinion said that an exhibition of a painting at a gallery which has rules against the making of copies is not a publication.

The parties had not, however, presented adequate evidence

[3] The opinion contained no discussion of whether the sale from Wallis to Egg constituted publication.

[4] 10 Ir. Ch. 121, 144 (1860).

about the regulations on copying at the Royal Academy. The Master of the Rolls felt he could not make a decision until he had knowledge of the absence or presence of such rules; so after chastising the parties for not presenting that information, the Master of the Rolls admitted that he had taken it upon himself to have letters sent out inquiring about the rules at the relevant exhibition halls:

> I inquired, during the course of argument, whether there were any rules or bye-laws of the Royal Academy preventing the taking of any copy or sketch from the painting exhibited. . . . It is strange, where the petitioner and respondent are artists, that no trouble should have been taken to furnish the Court with information proper and necessary for the decision of this question. I did not wish, of course, to decide a point so important to all painters, as to whether the exhibiting of a painting at the Royal Academy amounted to a publication, without knowing whether there were any such rules or regulations as I have adverted to; and I have accordingly taken the necessary steps to ascertain the facts, which ought to have been ascertained and brought before the Court by petitioner.[5]

The information so garnered indicated that the Academy had rules restricting copying, so the court went on to hold that

> it would, in such a case, be a clear breach of trust and confidence on the part of the members of the Royal Academy to permit copies or sketches to be taken, where it is assumed that paintings are sent to the Royal Academy on the faith of such regulations. . . . The exhibition at the Royal Academy was subject to the resolutions and bye-law and it was, in my opinion, no publication, as it would have been a breach of trust and a breach of implied contract to have allowed the painting to be copied.[6]

This theory of protection appears to be closer to a holding in contract law than to one in copyright. But the opinion might be interpreted as saying that the distribution was for a restricted purpose—that it was for viewing without copying and therefore was a "limited publication" which did not end common-law protection. The Lord Chancellor, on appeal,

[5] *Id.* at 136–37. [6] *Id.* at 135 and 137.

came even closer to using the term *limited publication.* First he said:

> No doubt, those exhibitions did give a certain amount of publication to the picture. Any visitor to those exhibitions might discuss the merits of the paintings, or he might write a full account of the picture in the newspaper.[7]

But then the Lord Chancellor went on to hold that the exhibition was not a divesting publication because the rules against reproductions made any copying a breach of trust.

While settling a narrow issue, neither the trial court nor the appellate court expressly said that a painting displayed at a gallery without restrictions on duplication would be a publication of the painting. However, that is the clear implication of both opinions. The approach used by the Master of the Rolls was novel, for Turner had obviously not considered it important enough to present evidence on the matter; instead he was willing to rest his argument on the assertion that no exhibition of a painting is a publication. The courts, probably swayed by a desire to give paintings as much common-law protection as possible to offset the lack of statutory coverage, rejected the contention, indicating that the argument had so little merit that the conception of a new distinction was warranted.

The Master of the Rolls showed the influence of the lack of statutory coverage when he said that, in spite of his taking on the burden of proof about the existence of rules against duplication and of his reprimanding the plaintiff for not presenting that key information, the burden of proof in the future should probably be shouldered by the one alleging a divesting publication.

> Indeed it may be a question whether the onus of proof did not lie on the respondent J. Robinson to prove that the exhibiting of a painting at the Manchester Exposition amounted to a publication. It is a startling proposition that all persons, whether the owners or

[7] 10 Ir. Ch. 510, 516 (App. 1860).

painters of paintings of great merit and value, and who conferred the privilege on the public to view those paintings at the great exhibitions in London, Dublin or Manchester, forfeited thereby the very insufficient protection which they are entitled to before publication, by the Common Law. That there may be a qualified publication there can be no doubt.[8]

Thus the court's predisposition was to protect the painter. Still, since the plaintiff was arguing that there was no exhibition by presenting an analogy to the public performance of a play, perhaps it is startling that the court did not go further and declare all exhibitions as nonpublications. Its failure to do so might indicate that the Master of the Rolls felt there was something faulty with the analogy.

However, the appellate court indicated that if paintings had been covered by a copyright act, even exhibitions with restrictions on copying would be publications. This is implied by the Lord Chancellor's comments about statues which were so protected.

Again, in the statutes bestowing protection upon works of sculpture, the *terminus a quo* from which that protection commences is the publication of the work, that is, from the moment the eye of the public is allowed to rest upon it. Many large works in this branch of art, which decorate public squares and other places, are of course so published; but there are others, not designed for such purposes, which could never be published in other ways than in exhibitions; therefore I apprehend that these works of sculpture must be considered as "published," by exhibitions at such places as the Royal Academy and Manchester, so as to entitle them to the protection of the statutes, from the date of such publication.[9]

Yet the Lord Chancellor held that a similar showing of a painting was not a publication. The essential difference between the two rulings does not seem to be anything in the nature of the two types of art—surely there are many paintings that cannot be displayed outdoors and can only be exhibited in galleries and museums. Instead the distinguishing

[8] 10 Ir. Ch. 121, 139–40 (1860).
[9] 10 Ir. Ch. 510, 516 (App. 1860).

difference seems only to be that paintings were not then covered by a copyright law, while statues were. This clearly implies that if both statues and paintings had been protected, then paintings, like statues, would have been held published at an exhibition, even if the gallery had restrictions on copying.

This hypothesis cannot be tested, however. Shortly after *Turner*, the Fine Arts Copyright Act became law.[10] This act expressly gave protection to both published and unpublished paintings, thus downgrading the importance of the concept of publication of paintings in Great Britain. Consequently, no other British cases on the subject were found. In contrast to the English situation, all the relevant American decisions were handed down after paintings were protected by United States law,[11] but still the rule of *Turner* was picked up without looking at its probable foundation.

If the above hypothesis about the lack of statutory coverage for paintings is rejected as the basis for the distinction between the rule for publication of statues and the rule for the publication of paintings, then the decision quite obviously indicates that under laws covering both, different rules for the publication of each type of art should still exist. Such a distinction has failed to survive, although at least one early treatise does note the different holdings.[12] However, the modern notion is to drop the distinction as a later edition of that work does.[13] Yet not only does the distinction disappear, the *Turner* rule for paintings is adopted for both types of art. Such an inclusive adoption comes in spite of the language differentiating the two, and in spite of the above analysis which indicates that the *Turner* courts would now favor the statue standard for publication.

Furthermore if *Turner v. Robinson* were first being de-

[10] 25 & 26 Vict. c. 68 (1862). [11] 16 Stat. 212 (1870).

[12] W. COPINGER, LAW OF COPYRIGHT 359 (4th ed., Easton 1904).

[13] F. E. SKONE JAMES & E. D. SKONE JAMES, COPINGER AND SKONE JAMES ON COPYRIGHT 23 (9th ed. 1958).

cided now under United States copyright law, a general publication would be found. A modern court would not turn to a breach of trust argument or to an analogy to performances of plays; instead a court would employ the limited-publication doctrine which includes the other methods of approach.

One of the definitions of *limited publication* says that a distribution

> which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a "limited publication," which does not result in loss of the author's common-law right to his manuscript; but that the circulation *must be restricted both as to persons and purpose*, or it can not be called a private or limited publication.[14]

The last part of the definition clearly applies to an exhibition with rules against copying. The exhibition, which communicates the contents of the painting, may restrict the public's use of the work, but if the display is open to a general audience, it ought to be a publication.

The two earliest American cases on art exhibitions as publications were New York decisions, the reports of which are very incomplete.[15] The facts of the earlier one, *Oertel v. Woods*, were stipulated by a demurrer, which began:

> The plaintiff Oertel is an artist. He composed and painted a picture intended to illustrate that portion of the Christian faith which affords the greatest comfort to its believers, and he borrowed from one of the most beautiful hymns that piety has produced a name for the composition, *viz.*, "The Rock of Ages."[16]

Oertel licensed his co-plaintiff James to reproduce the art, and James made lithographic copies. It was then discovered

[14] White v. Kimmel, 193 F.2d 744, 746–47 (9th Cir. 1952). (Emphasis added.)

[15] Oertel v. Woods, 40 How. Pr. 10 (N.Y. Special Term 1870); and Oertel v. Jacoby, 44 How. Pr. 179 (N.Y. Special Term 1872).

[16] 40 How. Pr. 10, 11 (N.Y. Special Term 1870).

that the defendant Woods was marketing photographs of the original painting. Oertel and James obtained an injunction prohibiting Woods from distributing his photographs on the grounds that the plaintiffs' common-law rights were violated. The reported decision was on a motion to dissolve the injunction.

The report consists largely of the argument for Oertel and James, with no space alloted to the defendant. The opinion of the court, by Mr. Justice Cardozo, takes up only a few lines.

The plaintiffs contended that common-law rights existed in a painting until the painting was published. Part of the argument said:

> The picture may be exhibited, and ten thousand may see it, and carry away its ideas, as they could carry away the ideas of a lecture, but the proprietary right still remains uninjured. Nothing short of an absolute sale of the manuscript, or of the original painting, can deprive the authors thereof of their proprietary interest therein. Anything less than this is but an exercise of the right of exhibition, which the law permits to be made without injury to the right of absolute ownership.[17]

However this assertion was based on an exceedingly narrow conception of publication, for earlier the plaintiffs had contended that

> as nothing short of a sale of a manuscript by the author of a book can, in the one case, divest him of his proprietary right, so on the other, nothing short of the sale of the original painting can divest the artist of his proprietary right therein.[18]

Surely, though, publication can be effectuated in many ways different from just the sale of the original manuscript.[19]

In spite of the plaintiffs' incorrect contention, the court agreed with them. Cardozo said: "This cannot be distinguished in principle from . . . *Turner v. Robinson.*" [20] This

[17] *Id.* at 19. [18] *Id.* [19] *See* note 1, *supra.*
[20] Oertel v. Woods, 40 How. Pr. 10, 24 (N.Y. Special Term 1870).

rationale is of course unenlightening about what constitutes the publication of a work of art.

In *Oertel v. Woods* the defendant's photographs evidently were of the original painting. However, in *Oertel v. Jacoby* the defendant copied the authorized lithographs of *The Rock of Ages*. Consequently the defendant argued that the making of the copies was a publication of the original painting—an argument rejected in *Woods*—but then he went on to contend that the copies were published when they were sold to the public. Thus, *Jacoby* concluded, copies could legally be made from the James reproductions. The court agreed that the uncopyrighted publicly circulated lithographs had been published and could therefore be duplicated.

These brief reports leave out an important fact. The crucial distinction between the two cases is that in *Woods* the alleged infringing copies were made from the original while in *Jacoby* they were made from published copies. The fact left out is how the photographs of the original were made. Were they taken by stealth or published as a breach of trust or were they taken at a public exhibition which did not have restrictions on copying? The reports contain no hint on the matter, but if the photographs were obtained in some deceitful manner, it would not seem illogical to assume that the plaintiff would have stressed that fact in order to have made a more favorable comparison with *Turner v. Robinson.* And the flat assertion that an exhibition was not a publication might imply that Woods did take the photographs at a showing that did not have restrictions on reproductions. If so, Cardozo's judgment against the photographer was a holding that an exhibition with no prohibition on copying is not a publication. However, that conclusion is obviously tenuous so both *Oertel* cases can hardly be convincingly cited for any such proposition.

The two *Oertel* cases present some of the considerations of *Turner.* American copyright protection was not extended to

paintings until 1870, and presumably the painting here could not have had statutory protection. In addition, since *Burrow-Giles Lithographic Co. v. Sarony* [21] and *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*[22] had not been handed down, the plaintiffs probably did not view the authorized lithographs as independently copyrightable. Consequently, the choices here were between extending common-law protection and stripping the painter of any reproduction rights.

Some of those considerations had been eliminated by the time the next two relevant cases entered the courts. Both actions were instituted by Emil Werckmeister, a German national doing business as the Photographische Gesellschaft in Berlin. The results of the two were to produce inconsistent ways of viewing exhibitions as publications.

One of the two, *Werckmeister v. Springer Lithographing Co.*, was instituted in the Southern District of New York, in 1894, and concerned a painting entitled *Floreal*—"a half-length figure of a girl, with flowers falling on her head and lap." [23] The painting's French creator had exhibited the work in the salon at the Palais de l'Industrie, in the Champs-Elysees, Paris, in May, 1892. Later the artist sold the original, but he expressly reserved the reproduction rights. Shortly thereafter these rights were assigned to Werckmeister. Werckmeister copyrighted *Floreal* in the United States and produced lithographic representations of the flower girl. However, the defendant was also making copies of that same work, and Werckmeister brought Springer Lithographing to court.

The defendant made several arguments all coming to the conclusion that the painting had been published without notice of copyright and was consequently in the public domain. One contention claimed that since a reproduction of *Floreal* was present in the catalogue of exhibits distributed

[21] 111 U.S. 53 (1884). [22] 191 F.2d 99 (2d Cir. 1951).
[23] 63 F. 808, 809 (C.C.S.D.N.Y. 1894).

at the showing in the Palais de l'Industrie, the painting was published. District Judge Townsend disagreed:

> This was an illustration not taken from the painting, but from a very superficial crayon sketch printed in the catalogue of the salon where the painting was exhibited prior to the assignment to the complainant. It was not intended to be a copy of the painting. The purpose of the catalogue was merely to furnish to the holder of the catalogue information regarding the paintings described, and perhaps to recall the paintings to the memory afterwards. It was not intended to serve in any way as a copy of the painting. No one would think of considering it as a work of art. Such a printing would at most be a qualified or limited publication, which would not work a forfeiture of the right of copyright. Such use of catalogue is under the implied qualification that the privilege shall not be extended beyond the purpose for which it was granted.[24]

That explanation does not really make the rationale clear. Was there no publication because there was no copy or because the copy was published with enough restrictions to constitute only a limited publication? If the former reason were the holding, then a photograph of a painting used in a similar catalogue would be a publication, while the photograph would not be if the second part of Townsend's statement were the rationale. However, perhaps more should be known about such a catalogue before deciding whether a photograph in it should be considered as a publication. For instance, important facts bearing on whether the artist's actions evidence an intention to give up control of his art might include: whether the catalogue is sold or distributed free; whether the artists have expressly given their consents to have copies of their art so reproduced; whether the users are made aware of any limits on the use of the catalogue; and whether the catalogue becomes a possession of the user. Surely, if the catalogue is sold outright to the gallery-goer without any communication of restrictions on use of the pamphlet, the contents of the catalogue have been published

[24] *Id.* at 812.

if the artists whose works are incorporated in the booklet have agreed to such a reproduction of their art.[25] It must be admitted that this is a guess, however, since no other cases about the publication of paintings through copies in exhibition catalogues exist. And the court here did not even mention such factors as those listed above, much less attempt to balance the policy implications of each; consequently little guidance was given to future courts on the matter.

Springer Lithographing never raised the possibility that the exhibition of the painting itself might have been a divesting publication. But even so, the court assured counsel that no disastrous slip-up had been made:

> Defendant has not claimed that the exhibition of the painting in the salon at Paris was a publication, so that is unnecessary to decide that point. It would seem that such an exhibition would not be a publication unless the general public was permitted to make copies at pleasure. In the absence of direct evidence, such permission will not be presumed. It would seem that such exhibition of the painting and use of the catalogue were under an implied qualification that the use should not be extended beyond the purpose for which it was granted, and that such special use did not constitute publication.[26]

The entire statement is dictum, but three conclusions can be drawn from it. First, an exhibition with restrictions against duplication is not a general publication. Second, an exhibition without such regulations probably is a general publication. Third, a rebuttable presumption is established that such prohibitions existed at the gallery. These three points of course were also indicated in *Turner v. Robinson.* However, as was seen above, the result in the British case was possibly predicated on the fact that the British copyright law did not then protect paintings. The American laws did cover such art at the time of *Springer Lithographing*, but the court ignored the possibility that that might distinguish the foreign case

[25] *See* note 1, *supra.*

[26] Werckmeister v. Springer Lithographing Co., 63 F. 808, 812–13 (C.C.S.D. N.Y. 1894).

from the dispute before the court. In addition the court just stated a conclusion without giving any analysis as a step in reaching that result. This judgment was not appealed.

The matter of exhibition as publication was directly raised in the litigation instituted in the Circuit Court for the District of Massachusetts.[27] The disputed painting was by one G. Naujok. Werckmeister had obtained the copyright on the work, but the canvas had already been displayed at Berlin's Kunsthandlung von Schulte, a public art gallery, five months earlier. Pierce & Bushnell Manufacturing Company, which had allegedly produced copies of the painting in violation of the copyright, claimed that the exhibition constituted a publication. The court, through District Judge Putnam, disagreed:

> [A] mere exhibition of a picture in a public gallery, like that at Berlin, does not, at common law, forfeit the control of it by the artist or owner, unless the rules of the gallery provide for copying, of which there is no evidence in this case.[28]

Once again the results paralleled those of *Turner v. Robinson.*

This time the loser appealed, and the judgment was reversed.[29] Circuit Judge Colt, writing for a majority, said:

> The evidence shows that the painting was publicly exhibited in Berlin, from January to March, 1892; and at Munich, in the summer of 1892. Under these circumstances, we hold that the alleged copyrighted painting has been "published," . . . and should have been inscribed with notice of copyright in order to entitle the plaintiff to maintain this action for infringement.[30]

This conclusory statement is entirely inadequate. It was neither preceded nor followed by analysis or citations. In light of the statements in *Turner*, *Springer Lithographing*, and the decision below, this lack of discussion becomes frus-

[27] Werckmeister v. Pierce & Bushnell Mfg. Co., 63 F. 445 (C.C. D. Mass. 1894), *rev'd*, 72 F. 54 (1st Cir. 1896).
[28] *Id.* at 447.
[29] Pierce & Bushnell Mfg. Co. v. Werckmeister, 72 F. 54 (1st Cir. 1896).
[30] *Id.* at 58.

trating, for two opposite ways of treating exhibitions now appear in the cases without any attempt to explain the difference. District Judge Webb dissented from the appellate court's opinion, but he did so without any opinion of his own, and thus the frustration becomes compounded.

These conflicting lines of interpretation did not merge until the first decade of this century. Once again Emil Werckmeister was the complainant. This time the dispute concerned W. Dendy Sadler's creation of *Chorus*—a painting of "a convivial group of gentlemen gathered about a punchbowl, holding pipes and filled glasses in their hands, and singing in a chorus." [31] On April 2, 1894, Sadler gave Werckmeister the right to reproduce the painting. On April 16, 1894, photographic copies of the picture were deposited with the Library of Congress, and Werckmeister thereby obtained the copyright on *Chorus*. However, starting the next month and running through August, 1894, Sadler displayed the painting at the Royal Academy at London without affixing any copyright notice to the work. In addition it was found that "the painting while on exhibition was for sale at the Royal Academy, but with the copyright reserved, which reservation was entered in the gallery sale book." [32] Furthermore,

> the public are not admitted to said exhibitions, except upon payment of an entrance fee, but that members of the Academy and exhibitors and their families are entitled to free admission, and that the following rule of the Academy is strictly enforced, namely: "No permission to copy works during the term of the exhibition shall on any account be granted." [33]

Sadler subsequently sold the original to a Mr. Cotterel of London. Cotterel was told that the copyright was already owned by someone else, and at the time of the trial the work was hanging in Cotterel's dining room.

[31] Werckmeister v. American Lithographic Co., 134 F. 321 (2d Cir. 1904).
[32] American Tobacco Co. v. Werckmeister, 207 U.S. 284, 287 (1907).
[33] Werckmeister v. American Lithographic Co., 134 F. 321, 322 (2d Cir. 1904).

The American Lithographic Company produced "cheap copies" of the painting as part of an advertising campaign for the American Tobacco Company. Werckmeister brought copyright infringement actions against both companies.

The defendants claimed that the exhibition published the painting, and the trial court agreed.

> It is true that the artist, by displaying the picture, has wronged the complainant; but he has also misled the public, and has been able to do this by the failure of the complainant to see to it that the duty [of affixing the copyright notice] imposed by the statute was fulfilled. . . . It is to be presumed that, in consequence of such nonfulfillment, the persons intended by the statute to be warned that the painting was copyrighted have not been so advised, and have acted accordingly.[34]

The Supreme Court, which subsequently held that *Chorus* was not published at the exhibition, indirectly replied to Judge Thomas. Justice Day, writing for a unanimous court, said:

> It would seem clear that the real object of the statute is not to give notice to the artist or proprietor of the painting or the person to whose collection it may go, who needs no information, but to notify the public who purchase the circulated copies of the existing copyright, in order that their ownership may be restricted.[35]

Thus at first glance the difference in interpretation as to the purpose of the copyright notice causes the difference in results. This part of the decision as to whether the display was a publication of the painting was determined not from the facts of the exhibition, but from the policy behind the copyright notice. Although this may be a worthwhile approach, Day's reasoning fails for covering insufficient ground.

Day's statement only envisions two segments of the relevant public—the buyer of the original painting and the buyers of the published copies. These two sets, however, do not comprise the entire field, for viewers of the copies and

[34] Werckmeister v. American Lithographic Co., 117 F. 360, 362 (C.C.S.D.N.Y. 1902), *rev'd* 134 F. 321 (2d Cir. 1904).

[35] American Tobacco Co. v. Werckmeister, 207 U.S. 284, 294 (1907).

viewers of the original also exist, and Day did not consider them. It can be said that the viewers of the copies are of no concern because they will see the copyright notice on the reproductions, but that still leaves the viewers of the exhibited original, who could possibly make copies of the original without knowing that it was protected.

This last worry, of course, is of no concern here because the infringing advertisements were probably not produced in any innocent way. The original went from the control of Sadler to a dining room in a private home. The purchaser knew that someone else held the reproduction rights, and there is nothing to indicate that the buyer allowed copying by American Tobacco or American Lithographic. Instead the pictures in the advertisements were no doubt produced from Werckmeister's copies which contained the copyright notice. Consequently, as in *Turner* the court's feelings would have been leaning in favor of the plaintiff.

Thus the Supreme Court's result might be justified by the facts of the case, but Day was laying down a principle broader than one just to cover this controversy. And the principle may be too wide to be equitable in all circumstances. As stated above, even though the copyright might be reserved, this would not be apparent to the viewer of the painting; according to the facts of this case, he would have had to have looked in the gallery sale book. Surely, though, many people go to an exhibition just for the aesthetic experience and without any intention of making an acquisition, and thus these persons might not look in the sale book. Such a viewer might realize that most galleries do not allow photographs, but maybe, just maybe, this viewer will be an innocent Robinson, who, when back home will reconstruct the grouping for his camera. The probabilities of this are not high, but if it happened the copier could make a convincing argument that he was not given adequate notice of the copyright.

Werckmeister appealed the circuit-court decision. The Circuit Court of Appeals for the Second Circuit had never

decided the question of whether an exhibition of a painting was a publication of the art, but the court did have the opinions of its lower courts and of a sister circuit to build on. Doctrine demands unity, so the obvious thing for the court to do was either to attempt a Hegelian sort of synthesis of the conflicting views or just to reject one of the ways of interpretation. The Second Circuit did neither; the court did hold that the exhibition at the Royal Academy was not a publication, but in so doing the court felt constrained to make the following comment about *Pierce & Bushnell*:

> It is true that this decision was reversed by the Court of Appeals in the First Circuit by a divided court. But the opinion appears to be based on the assumption, in the absence of proof that copying was prohibited, that the painting was publicly exhibited, and therefore, published within the meaning of the copyright act.[36]

Perhaps the Second Circuit had access to additional sources of information, but the report of *Pierce & Bushnell* contained no intimation of such an assumption. Instead a more reasonable interpretation of the earlier decision would be that an exhibition is always a publication.

The court, however, was not content just to attempt a dubious reconciliation with a past case; the court did present reasons of its own. First, Judge Townsend, writing the unanimous opinion, stated the applicable principle:

> A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public.[37]

Then the court went on to decide that the exhibition here was a limited publication.

> It is not perceived how the legal status of a right of copyright in a painting or statue, so far as concerns their publication, can be dis-

[36] Werckmeister v. American Lithographic Co., 134 F. 321, 329 (2nd Cir. 1904).

[37] *Id.* at 326.

tinguished from that of lectures or dramatic compositions. In fact, such distinctions as may be suggested only serve to strengthen the presumption of limited publication in favor of the work of art. There the author may wish to enjoy the profit from exhibition of the original and from the right to publish copies, but his chief object often is to secure the profit arising from the sale of the original work. The exhibition of a work of art for the purpose of securing a purchaser or an offer to sell does not adversely affect the right of copyright; and from the fact that the right protected by statute in a work of art is that of copying and not of exhibition is derived the general rule that the mere exhibition thereof is not a general publication. . . . In a limited publication, as of a play, there is no dedication to the public, no presumption or recognition of a right to copy, and therefore no abandonment of said right. In the case at bar not only was there no presumption of a right to copy, but there was an express denial of such right. Whether said exhibition would have amounted to a publication in the absence of any such prohibition is immaterial to the disposition of this case, and upon that question we express no opinion.[38]

The court here held that the exhibition in question was not a publication of the art. But what was the rationale for such a holding? Was it because the painting was being displayed in order to find a buyer? Or was there no publication because the Royal Academy had rules against copying? Or were both factors necessary? Once again a court's reasoning was incomplete, for the opinion does not give the answers. Instead, the only definite conclusion to be made is that the court does not decide whether an exhibition without restrictions on copying is a publication.

The opinion goes on to repeat both the reasons:

It must be conceded that the author of a work of art does not lose his common-law copyright by exhibition in his studio for purposes of sale, and that the same rule would be applied to an association of artists exhibiting their work in a common gallery solely for this purpose. . . . The extent of the publication to such members of the public as chose to pay the fee was a permission to view the exhibition, but a prohibition to make any copies of the paintings therein. This prohibition clearly expressed the limitations implied in the

[38] *Id.*

private lectures or the dramatic performance, namely, a prohibition of any use inconsistent with the purpose for which the exhibition was given.[39]

This, too, fails to make explicit the deciding rationale. And the rationale could be important, for there must be some galleries where paintings are for sale with no express prohibition against copying or with no adequate enforcement measures for such a policy, while there surely are museums that have the requisite rules against reproduction, but do not conduct sales.

The Supreme Court, when it considered the exhibition of *Chorus*, did not mention the "securing of a purchaser" reasoning. Instead the high court based its decision solely on the fact that the Royal Academy had rules against copying:

> . . . the exhibition of a work of art where there are by-laws against copies, or where it is tacitly understood that no copying shall take place, and the public are admitted to view the painting on the implied understanding that no improper advantage will be taken of the privilege [does not amount to a general publication].
>
> We think this doctrine is sound and the result of the best considered cases. In this case it appears that paintings are expressly entered at the gallery with copyrights reserved. There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place. . . .
>
> We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artists' purpose or notice of reservation of rights which he takes no measure to protect. But such is not the present case, where the greatest care was taken to prevent copying.[40]

This is the first time a court's opinion was influenced not only by the fact that there were rules against copying but also because the prohibition was "rigidly" enforced. This seems wise, for a rule which was easily broken would not stop the spread of reproductions of the art. But the opinion

[39] *Id.* at 330.

[40] American Tobacco Co. v. Werckmeister, 207 U.S. 284, 300 (1907).

does not detail what enforcement measures were taken at the Royal Academy. Furthermore, the court made no attempt to suggest what would be less than adequate enforcement. Bound up with enforcement is the matter of communication of the rules to the gallery's patrons, but the court neither explained how such communication was effectuated nor does the opinion even vaguely indicate any standards about the giving of such information.

The court's statement also left out any mention of the presumption first floated in *Turner* and later picked up in the lower-court opinions. Evidently the Supreme Court felt that enough information was before it so that a presumption did not have to be determinative, but the bypassing of the presumption did leave its status unclear.

Furthermore, although the court quite clearly did indicate that at least some exhibitions would not produce a publication of the displayed art, the opinion withheld judgment about exhibitions lacking regulations against copying. Thus, even though the implications of the early opinions were that common-law rights were divested unless the gallery had restrictions on duplication, this problem has not been authoritatively resolved.

However, there have been lower-court opinions about that unsettled area. One of the few reported decisions concerning the publication of sculpture enters here.[41]

Not too long after *American Tobacco*, a monstrous 60-foot elk was constructed which straddled a busy Butte, Montana, street. The constructor built it under cover and then unveiled it as part of a public celebration. When displayed the elk contained the notice, "Copyright. Infringers beware." But this legend did not deter the defendant from selling post-card reproductions of this rather unique arch.

District Judge Borquin held that a publication had taken place and that the work could not be validly copyrighted.

[41] Cairns v. Keefe Bros., 242 F. 745 (D. Mont. 1917).

> Copyright, in analogy to patents, is to reward originality, inventive genius, and to encourage it to put out its productions for public enjoyment and benefit, which otherwise the author proprietor might withhold having right and power to do so, for his exclusive use and pleasure. If, however, the production is intended for or bound to be given free and unrestricted public exhibition—to attract the public to come and enjoy without price—and, if it is so displayed, there is publication of the thing and dedication to the public, again in analogy to patents, defeating copyright. For this display inevitably exposes the production to copy, and so is inconsistent with the claims of copyright; and the latter cannot be preserved by any notice thereof hung upon this exhibit. This accords with the spirit of the law, and is suggested by *American Tobacco Co. v. Werckmeister*. . . .
>
> That is this case. Plaintiffs built the structure for public free exhibition, and were bound to yield it to such. They could not withhold it. This elk could no more be copyrighted than Liberty Enlightening the World, or the Dewey Arch, or the Washington Monument, and no one will seriously claim these latter could be.[42]

This statement gives two steps in reaching the result of a judgment for the defendant. The second concludes that this piece of art could never be copyrighted as long as it was displayed in the manner it was. That part of the holding has been criticized; a suggestion has been that although the correct result was reached, the decision should have been based on the inadequacy of the notice.[43]

Although Borquin's analysis may seem novel, it is not entirely without logic. A statue displayed as this one was will surely be seen by many with cameras, and perhaps those viewers will be so moved by the sight so as to want to preserve the image photographically. There appears to be no way to stop such infringement. The artist must be aware of that fact, so it might be fair to conclude that the artist was dedicating his work to the public. Of course this principle would mean that a public exhibition of any work of art where no effective rules against copying existed would preclude a copyright on the work even though the art contained the

[42] *Id.* at 745–76. [43] LATMAN, *supra* note 1, at 66.

notice in proper form. Thus Borquin's analysis runs counter to the basic idea that statutory protection starts with publication with notice, not that a publication of a statue prevents any protection whatsoever.

More important here is the holding that the exhibition published the elk. As has been seen, the trend of the cases decided before 1917 might be taken to indicate that publication ensued from a display without prohibitions on duplication; but this is the first decision holding that a specific exhibition was a publication. Borquin, however, did introduce a new concept by stressing that this was a free showing. Money did not seem to be a determinant in the cases discussed above, nor is money considered necessary in the usual definitions of *publication*,[44] and its introduction seems to lead to unfortunate results. To hint that if admission fees had passed hands no publication would have occurred means that if the artist had displayed the work, to get remuneration from it, he would not have lost his common-law rights. Presumably then the artist could indefinitely retain those prepublication rights even though the public was being exploited by the artist—an idea which seems contrary to the principle of the copyright system that allows a monopoly to the artist only for a limited time after the public has access to the work.

Another dubious factor in Borquin's comments is his comparison of originality in copyright to originality in patent law. The two, however, are in no way equal, as *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.* made clear.[45]

Thus, the *Cairns* case, interesting as its results may be, hardly forms the firm foundation for any statement about exhibitions as publications.

[44] *See* note 1, *supra.*

[45] "It is clear, then, that nothing in the Constitution commands that copyrighted matter be striking unique or novel . . ." and "a patentee, unlike a copyrightee, must not merely produce something 'original'; he must also be 'the first inventor or discoverer.'" Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102, 103 (2d Cir. 1951).

Nor is the foundation shored up by *Pushman v. New York Graphic Society Inc.*,[46] which also contains vague references about the publication of a painting being caused by a display. In 1930, the painter, Hosvep Pushman, sold his uncopyrighted *When Autumn is Here* to the University of Illinois. The sales agreement made no mention of reproduction rights. In 1940, the university granted the New York Graphic Society a license to copy the work. Pushman sought an injunction restraining the sale of the resultant lithographs as a violation of his common-law copyright. Although it is not clear from the statement of the case, apparently the painting had been on public display at the University of Illinois.

In a somewhat confusing opinion the trial court denied relief. The court produced alternative reasons for its result. One rationale said that a sale of a painting without an express reservation of reproduction rights transferred those rights to the purchaser. The other rationale referred to publication:

> In this case the absolute sale and delivery of the painting without any condition, reservation or qualification of any kind, to a state-owned public institution where it has been displayed for a long period of time, constitutes an abandonment of all the plaintiff's rights and a publication and dedication to public use free for enjoyment and reproduction by anybody.[47]

This statement leaves many unanswered questions. For instance: Are both a sale and display necessary? Does the purchaser and displayer have to be a public institution? How long is a long period of time? Perhaps the most interesting aspect of this statement is the holding that the artist published his painting because after he unconditionally sold the work, the purchaser displayed it. Perhaps if the university had stored *When Autumn is Here*, the court would not have held that the picture was published. Thus, the court might have

[46] 25 N.Y.S.2d 32 (Sup. Ct. N.Y. County 1941), *aff'd*, 262 App. Div. 729, 28 N.Y.S.2d 711 (1st Dept. 1941), *aff'd*, 287 N.Y. 302, 39 N.E.2d 249 (1942).

[47] *Id.* at 34.

been saying that although Pushman published the painting, the actual acts constituting the publication were not controlled by him.

The New York Court of Appeals,[48] after the Appellate Division affirmed without opinion,[49] upheld the judgment on the grounds that Pushman had given up his common-law copyright by selling the painting without making a reservation of rights. The court expressly refused to consider the matter of publication: "We are not entering into a separate discussion as to whether by this sale *and* the public exhibition the artist is to be held to have 'published' the work so that his common law right is lost." [50] Consequently, *Pushman* does not make any advance in the knowledge about art exhibitions as publications.

A decision more clearly holding that an exhibition of a work of art was a publication of the work is *Morton v. Raphael.*[51] Morton painted a mural on the walls of the Great Lakes Room of Chicago's Knickerbocker Hotel. Raphael was an interior decorator hired to furnish the room; after finishing, he took photographs of his work. These photographs also reproduced Morton's mural, and when Raphael had the pictures published in a nationally circulated magazine, Morton brought suit for infringement of a common-law copyright. The court held that those rights had been divested because the mural had been published by the exhibition of the art.

> It is apparent . . . that plaintiff, under hire by the Knickerbocker Hotel, made the first publication of the murals when she painted them on the walls of the Great Lakes Room where they could be seen and were undoubtedly observed by many persons.[52]

This is the most recently reported decision touching on the subject of exhibition of works of art as publication. This case

[48] 287 N.Y. 302, 39 N.E.2d 249 (1942).
[49] 262 App. Div. 729, 28 N.Y.S.2d 711 (1st Dept. 1941).
[50] 287 N.Y. 302, 308, 39 N.E.2d 249, 251 (1942).
[51] 334 Ill. App. 399, 79 N.E.2d 522 (1st Dist. 2d Div. 1948).
[52] *Id.* at 400, 79 N.E.2d 522, 522–23 (1st Dist. 2d Div. 1948).

is also the first and only one holding a painting published by exhibition; but like all the other decisions we have considered the opinion leaves much to be desired. For instance, it is not clear whether the hotel guests could have copied the murals—in other words the court did not make any mention of the fact which had been dispositive in nearly all similar disputes. Indeed, the court never cited the *Werckmeister* series of cases and just based its decision on general principles of publication. Actually, this case conflicts with *American Tobacco Co. v. Werckmeister*, for the court here finds publication just because many people could see the mural, and such a rationale does not depend on any facts about prohibitions against reproductions.

As in other cases, however, factors other than neutral principles about publication may have been placed on the judicial scales. Here the predisposition was against the painter.

> If the murals were as artistic and effective as all the parties concede, it would seem that plaintiff was rather benefited from the publicity afforded, than damaged thereby, and it would be quite strained to hold that her name, reputation and income as an artist had been seriously and permanently damaged.[53]

For this reason and for the lack of analysis, this last decision in the line of cases touching on exhibitions of art as publications, like all the opinions that precede it, is unsatisfactory.

This study has shown that the resolution of tension in the field of exhibitions of art as publication has not been successful—although the definite rule that exhibition with prohibi-

[53] *Id.* at 405, 79 N.E.2d 522, 525 (1st Dist. 2d Div. 1948). For a case with a similar factual basis *see* Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940). There the court held that any common-law copyright would have vested in the commissioner of the painting, and thus the painter had no standing. The Morton court, as an alternative holding, gave the same reasoning.

tions on copying is not a publication has been promulgated, the opinions establishing that holding have been poor; the extent of the rule is unknown because of inadequate discussions of the notice or enforcement problem; and the wisdom of the rule is unclear because the courts have used insufficient and faulty reasoning or incorrectly borrowed doctrines from similar, but not really analogous, situations. Furthermore, no rule about exhibitions lacking restrictions on duplication has been authoritatively established, although the trend deducible from the cases is that works of art so shown would be regarded as published. Since the status of the later exhibitions is still uncertain, there is time to discuss the logic of holding those exhibitions as publications, in hopes of reducing the existing tensions.

A few scholars have made comments about such a holding. One, an early commentator, said exhibition should equal publication:

> It is submitted that the exhibition of a picture in a public gallery is a publication. It seems to afford the public an opportunity of making every legitimate use of the contents of the picture. They could not make any greater use of the contents if they bought an engraving of the picture. It would not even then be lawful for them to make copies of the picture.[54]

A later scholar has concluded that the common-law rights should be lost only when copying is not stopped. "Publication takes place where the work is exhibited in a way that, in the absence of a claim of copyright notice, would make it accessible for public copying." [55] But not all have agreed with these conclusions.

> It is submitted that mere exhibition of a work of art should no more constitute a publication than does the public performance of a dramatic or musical work. In neither case do members of the public receive into their possession tangible copies of the work. Thus, in

[54] E. McGillivray, A Treatise Upon the Law of Copyright 262 (1902).
[55] Latman, *supra* note 1, at 66.

neither case would publication result. Since judicial decisions on this question are as yet meager, with no court of last resort expressly holding that mere exhibition constitutes publication, it is hoped that future cases will establish that exhibition without actual or offered public sale or other disposition of tangible copies does not constitute publication.[56]

Those who view an exhibition as always being a limited publication usually make an analogy to performances of plays and oral deliveries of lectures. Those comparisons were urged by the plaintiff in *Turner v. Robinson*, and they received mention in *Werckmeister v. American Lithographic Co.*, besides being urged by Melville Nimmer. Interestingly one court specifically rejected a paralleling of *Ferris v. Frohman*,[57] a leading case holding that a public performance of a dramatic work was not a publication, with the exhibition of a painting:

> In the Frohman case the owner of the play had not dedicated the work to the public, whereas in the case at bar the murals were undoubtedly dedicated to the public when they were painted on the walls of the hotel room with plaintiff's name endorsed on each of the murals, open to the inspection of anyone who visited the hotel.[58]

Admittedly that statement is more conclusory than analytical, but no more so than those which proclaim a painting to be like a play. Furthermore it should be stressed that the rationale of *Ferris v. Frohman* was that under the settled decisions of the common law as handed down in Great Britain, a performance of a play was not a publication; the opinion did not mention any specific policy reasons for the result other than following established precedents.[59] But the common law as made in *Turner v. Robinson* indicated that an exhibition of a painting where there were no restrictions on

[56] Nimmer, *supra* note 1, at 199. (Footnotes omitted.)

[57] 223 U.S. 424 (1912).

[58] Morton v. Raphael, 334 Ill. App. 399, 403, 79 N.E.2d 522, 524 (1st Dist. 2d Div. 1948).

[59] For a discussion of Ferris v. Frohman *see* R. Roberts, *Publication in the Law of Copyright*, ASCAP COPYRIGHT LAW SYMPOSIUM NUMBER NINE 111, 123–27 (1958).

copying would be a publication. Similarly, the trend of the American cases has been in that direction. It would seem then that a policy reason for holding no publication should be found before the drift of the decisions should be altered. The main justification for the narrow interpretation of publication would appear to be that the art has not been reproduced in a visual form—that it has not been *published* in the layman's sense of the word. But, of course, such a reproduction is not always necessary for publication.[60] On the other side is the argument that with no rules against copying, persons with no knowledge of wrongdoing could innocently infringe the art. Since it can be expected that those seeking protection would have better information about the law than the general public, the balance ought to be tipped against the artist.

Doctrinal unity would clearly indicate that exhibitions ought to be publications. As we have seen, a general publication occurs when a distribution of the work is made to the public at large even though the distribution may be for a restricted purpose.[61] Clearly an exhibition open to the public falls within that rule. Of course, so does a performance of a play. However, the results in the drama situation were predicated on precedent, not logic, and so a good argument can be made that the *Ferris* ruling is an anomaly; consequently the play precedent should not be controlling elsewhere.

Perhaps the countering argument is that protection should not be taken away in a dubious situation unless the artist has gained monetary benefits from the public.[62] The percentage of works of art which accrues money from display prizes or just from the exhibition is not known, but it should also be said that income from the work has not always been necessary to constitute a publication.[63]

Although it may be correct now to say that few artists make

[60] *See* note 1, *supra.* [61] *See* text accompanying note 14, *supra.*
[62] For an economic interpretation of publication, *see* Roberts, *supra* note 57.
[63] *See* note 1, *supra.*

much money from exhibitions, it seems plausible that artists' income from displays of newly created works of art will increase in the future. A significant portion of recent art has not chosen to use a neatly packaged form; instead there seems to be increasing showings of multi-media art, walk-through art, and other types that cannot easily be placed in the homes of private collectors. Probably this kind of art will only be exhibited at a gallery, and thus the artists' traditional sources of income—sale of the original and sale of reproductions—will be eliminated. Instead it seems as if the only money the creator will be able to obtain will be from admission charges collected from the public coming to see the work. If so, then not to hold the exhibition a publication would be to grant a perpetual protection to a monopolistic money-making opportunity. The wisdom of such a grant has been questioned by the Copyright Office,

> This result—perpetual protection for works disseminated in any other manner than publication—seems contrary to the principle embodied in the provision of the Constitution (art. I, sec. 8) empowering Congress "to promote the progress of science and useful arts, by securing *for limited times* to authors . . . the exclusive right to their . . . writings." [64]

Of course these points about doctrinal unity and perpetual monopoly apply equally to exhibitions that do not allow copying as well as to those that do, and by the logic of the preceding paragraphs all exhibitions should be publications.

Another problem is that a high percentage of exhibitions are for the purpose of finding purchasers for the work. Typically a solicitation for a manuscript has been regarded as a limited publication because it is a distribution to a limited class for a limited purpose. But a sale of a painting through an exhibition is different. The writer of a short story or a book, in an attempt to find a buyer for his work, sends his

[64] REGISTER OF COPYRIGHTS, 1 REPORT ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW 39 (1961). (Emphasis added.)

manuscript to *Playboy* or Random House. The editors at those institutions decide if they want to publish the work. If not, the writer sends the manuscript on elsewhere. In this process the work is seen by only a small number of people who are interested in obtaining such works and who probably have some knowledge of copyright law. In no way can it be said that the general public has seen the work. However, the same is not true of the art sale. At many galleries conducting sales, the doors are open to the public. The artist is hopeful that one of those members of the public will want to buy. The artist in such a situation is offering his work to any person, not to a limited class of people. In addition, the artist is surely aware that many viewers will have entered the gallery not for the purpose of making a purchase, but just for the pleasure of seeing art. At least one commentator has realized that such an exhibition would not be a limited publication because it was a solicitation for a sale:

> However, where a work of art is sold, if such sale was not preceded by a general offer of sale made to all members of the public and if the right of reproduction is expressly or impliedly reserved by the seller, then under the principles discussed in connection with limited publication . . . the sale should not constitute a surrender of common law rights.[65]

This statement, of course, implies that without the restrictions listed such an offer of sale would be a publication. An exhibition open to the public with the art on sale would be an offer without the requisite restrictions.

The Supreme Court, it will be remembered, avoided considering any of these issues in *American Tobacco*. One of the court of appeal's rationales in *American Lithographic* was that the exhibition in question was to obtain buyers for the paintings and was therefore only a limited publication. The Supreme Court refused to use this logic and solely held that the painting was not generally published because it was ex-

[65] Nimmer, *supra* note 1, at 199 n.112.

hibited at a gallery with rules against copying. Consequently, an exhibition should not be regarded as a limited publication merely because the display is for the purpose of finding a purchaser for the art.

As we have seen, the rules about exhibitions as publications are not settled. Perhaps one portion of the area does have a firm result, and so it might be wise to counsel artists to show their works only at places that prohibit copying. But effective enforcement of such a restriction will not always be feasible—for instance, stopping photographs at street art fairs surely would be difficult. In addition, the logic of *American Tobacco* is suspect. Consequently, anyone attempting to counsel artists should feel the insufficient resolution of the tension caused by the application of the concept of *publication* to art exhibits.

One way to reduce the tension is to revamp the copyright system. Consequently, we will conclude by looking at how the new copyright proposal would affect exhibitions of art.[66]

The most significant change, of course, would be that the period of copyright protection, instead of running for a fixed period from the date of first publication, will last from the instant the work is *fixed* until fifty years after the death of the creator.[67] The bill would specifically extend statutory rights to unpublished works.[68] A copyright notice would be required on all "publicly distributed copies from which the work can be visually perceived," [69] but omission of the notice would not carry as many dire consequences as it does now.

(a) Effect of Omission on Copyright—The omission of the copyright notice prescribed by sections 401 and 402 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if:

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

[66] Under discussion here is S. 543, 91st Cong., 1st Sess. (1969).
[67] *Id.* §302. [68] *Id.* §104. [69] *Id.* §401.

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.[70]

The second part of section 404 removes liability from innocent infringers of works without the copyright notice.

These are significant improvements over the present system, for under the new proposal there would be little advantage in delaying the date of publication, but the suggestion is not without its problems. Most of the troubles stem from the definition of *publication*, which reads, " 'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." [71]

The first problem comes with the word "copies." That term is also defined:

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with aid of machine or device. The term "copies" includes the material objects, other than a phonorecord, in which the work is first fixed.[72]

Clearly an original artwork would be within the definition of *copies*, but it is not clear if just the distribution to the public of that original would be a publication—that definition speaks in terms of *copies* and does not mention *copy*. Of course if the distribution of the original were not a publication, then the distribution of a single reproduction would not be either. But at least I can see no practical distinction between the distribution of two copies and the distribution of

[70] *Id.* §404. [71] *Id.* §101. [72] *Id.*

one, and apparently the Copyright Office agrees that the distinction should not exist.

> In other words, the placing of *one* or more tangible objects embodying the work in the hands of "the public" constitutes "publication," regardless of whether the objects are sold, given away, lent or distributed under some sort of rental or lease arrangement.[73]

The next problem is with the phrase "to the public." [74] The Copyright Office's *Supplementary Report* said:

> "The public" in this context is intended, very generally, to refer to persons who are under no express or implied restrictions with respect to the disclosure of a work's contents, but we believe the situations are so variable that this particular concept of "the public" is better left undefined in the statute.[75]

That explanation implies that an exhibition would be a publication, for even if the gallery had rules against copying, the patrons would still be able to describe the painting to others.

Further support for the position that exhibitions would be publications came out of the discussions about copyright revision conducted by the Copyright Office. Sydney Kaye, counsel for Broadcast Music, Inc., in referring to the term *the public* in the definition of *publication*, said, "This would mean that motion pictures and similar works, which are not disseminated to the public at large, would never be published, perhaps with consequences in other areas." [76] Kaye came to this conclusion because films are only rented or lent to theater owners, not to the public, much as an artwork is lent to the gallery owner, not the public.

But Abraham L. Kaminstein, Register of Copyrights, said

[73] REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW, SUPPLEMENTARY REPORT 91 (1965). (Emphasis added.)

[74] The bill defines "publicly" as: "To perform or display a work." S. 543, 91st Cong., 1st Sess. §101. But that definition does not appear to be applicable to the definition of *publication*.

[75] REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW, SUPPLEMENTARY REPORT 91 (1965).

[76] REGISTER OF COPYRIGHTS, 4 REPORT ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW 24 (1961).

that the definition of *publication* was meant to include the distribution of motion pictures. If so, the definition ought to include the lending, leasing, or renting of an artwork to an art gallery.

Another aspect of the definition is that not all distribution of copies to the public are publications, but only the ones expressly listed in the definition. Specifically, *exhibition* is not mentioned. Interestingly, that word did appear in an earlier draft, but has been dropped.[77] Consequently, the definition would seem to treat exhibitions in no prescribed manner; instead, the facts of each exhibition should be scrutinized to see whether they fall within the boundaries of *publication.*

Most exhibitions, of course, would be within that term. Either there will have been a sale of the art work to the art gallery, or the art object will have been rented, leased, or lent to the showing place—but not always. The one obvious exception would be if the artist exhibited the painting himself. It is not clear whether that exemption was an intentional omission; it may be doubtful whether the drafters had artists in mind when drawing up the formulation, but it is possible that they were aware that under a similar analysis a playwright producing his own drama or a composer singing his own songs would not be publishing his works. The merits of such an exemption may be arguable, but whatever the substance in that distinction, the new system would end the categorization of exhibitions into those with rules against copying and those without, unless some court would feel inclined to reach out and hold that an exhibition with rules against copying was not a distribution to the public. Such an interpretation would bring back the old complexities which revision has intended to eliminate, however.

[77] "Publication would be defined elsewhere as the sale or other transfer of ownership, or the rental, lease, or lending of copies or records of the work to the public. It would not include public performance or exhibition." REGISTER OF COPYRIGHTS, 3 REPORT ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW 18 n.14 (1961).

Once again, however, it should be stressed that the perimeters of the definition would not be as important under the new system as they are now. In fact the major significance of the term would be in section 104. The first part of that section extends copyright protection to published works if on the date of first publication the author is a national or domiciliary of the United States or of a country with which the United States has a copyright agreement; if the work was published in the United States or one of those treaty nations; if the work was published by the United Nations or the Organization of American States; or if the work comes within the scope of a presidential proclamation.

Publication is also used in the notice provision:

> Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.[78]

A brief conclusion, then, is that the tension which copyright law produces in its use of the term *publication* can be resolved in two ways. The first method is to attempt more specific definitions. The new proposal has utilized this way, and from appearances the reformulation, while not completely eliminating all problems, will ease the tension.

Another method of reducing the trouble is to lessen the results that hinge upon the problematic area. Then even if all contingencies have not been considered—as exhibitions of art as publications have probably not been considered—attention will less likely have to be focused on the tension. The new copyright proposal uses this resolution more fully. Thus because legal rights will not depend as much on the fact of publication under the new system as now, the tensions centered on exhibitions of art as publications will be lessened.

[78] S. 543, 91st Cong., 1st Sess. §401(a) (1969).