

# EXPANDING PROPRIETARY ENTITLEMENTS AND THE PUBLIC INTEREST IN DISSEMINATION OF ART

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## I. INTRODUCTION

Contemporary American artists have continually organized and lobbied for both increased compensation for their works of art and for increased control over their aesthetic future use.<sup>1</sup> Much of the current dialogue has centered on proprietary rights, including the aesthetic use of art work (as embodied in the "moral rights" doctrine);<sup>2</sup> expansion of proprietary entitlements granted under the copyright laws;<sup>3</sup> and laws affecting the right to financial remuneration.<sup>4</sup>

A question that inevitably emerges is whether expanded pro-

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<sup>1</sup> Visual artists have recently formed active and influential advocacy groups and trade associations to 1) lobby for more favorable legal treatment through legislation, 2) share information about legal rights, and 3) improve working conditions and benefits. Such groups include Volunteer Lawyers for the Arts, Coalition for Copyright Justice, Visual Artists and Galleries Association, Artists' Equity Association, the Visual Arts Guild, in addition to several large regional groups such as the Bay Area Lawyers for the Arts, the Los Angeles Visual Arts Association and the Society of Humboldt Artists. These groups have advocated legislation that would expand the concept of artists' entitlements in their works to include control over the aesthetic appearance of the work, as well as legislation that would expand artists' rights to benefit financially from the future value of their works. The former aesthetic rights are called "moral" rights, *see infra* note 2 and accompanying text, and the latter, economic rights are called "resale" rights. This increased activism may reflect an increased "careerism" among artists. *See, Portrait of the Artist, 1987, Who Supports Him/Her?* ARTS REV. 64 (1987) (interview with Dennis Adams, artist, New York City) and ARTS REV. 73 (1987) (interview with Chuck Close, artist, New York City) [hereinafter ARTS REV. (1987)]. This symposium consisted of interviews with distinguished individuals involved in creating, criticizing, collecting, exhibiting, selling, and studying contemporary visual art. All interviewees were asked questions focused on the source(s) of support for modern American artists.

<sup>2</sup> *See* F. FELDMAN, S. WEIL, S.D. BIEDERMAN, ART LAW I, § 5.1, 425 (1986) and commentaries referenced therein (e.g., "The *droits patrimoniaux* are analagous to the American Federal copyright . . . . *Droit Moral*, on the other hand, is by nature non-pecuniary . . . ." *Id.* at 437, quoting DaSilva, A. LE TARNEC, MANUEL DE LA PROPRIÉTÉ L'ARTISTIQUE, 15 (1966). 28 BULL. COPYRIGHT SOC'Y 1, 3 (1980)). *See also* Lewis, *infra* note 45.

<sup>3</sup> *See* 17 U.S.C. § 106 (1982); *see also* S.1619, 100th Cong., 2d Sess. (1988) (a bill introduced by Senator Edward Kennedy to expand the proprietary rights of creators under the current copyright laws by including moral rights and resale rights within the property rights created by 17 U.S.C. § 106 given to "authors.")

<sup>4</sup> S. 1619, 100th Cong., 2d Sess. (1988).

proprietary rights for creators are compatible with the public interest goals of the first amendment of the Constitution.<sup>5</sup> "The core of the controversy is how large the copyright owner's domain should be in order to control consumer access to the copyrighted work."<sup>6</sup> If the control of expression also encompasses control of ideas,<sup>7</sup> expanding entitlements in art may not necessarily be in the public interest. Increased recognition of property entitlements may diminish access to the ideas embodied in copyrighted work.<sup>8</sup> This phenomenon occurs particularly in the area of the visual arts, where expression and idea are synonymous.<sup>9</sup>

This Article will examine the problem of accommodating multiple proprietary interests in a single work without diminishing public access to the ideas contained in the tangible medium of expression. Section I of this Article will examine the competing interests embodied in the copyright clause and the first amendment of the Constitution, paying particular attention to their impact on the visual arts. Section II will examine possible methods for accommodating the values of the first amendment and the principles of copyright law within the contexts of the fair use doctrine and compulsory licensing. Section III will explore the joint and collective work doctrines, which suggest one way of accommodating the competing interests of copyright and the first amendment. These doctrines could prove to be especially helpful for the collaborative visual arts such as opera, film, and collections of visual or graphic works. Finally, this Article will discuss possibilities for expanding the proprietary entitlements of artists without infringing upon either public access to protected works or the copyright owner's entitlements.

## II. THE TENSION BETWEEN OWNERSHIP AND ACCESS TO IDEAS

### A. Generally

The United States Constitution rewards artists and authors

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<sup>5</sup> U.S. CONST. amend. I.

<sup>6</sup> Patterson, *Free Speech, Copyright and Fair Use*, 40 VAND. L. REV. 1, 10 (1987) [hereinafter Patterson].

<sup>7</sup> See *infra* Section III(B): *The Approach of the Joint and Collective Work Doctrines*.

<sup>8</sup> Public access to ideas serves two related purposes in terms of the remaining discussion: 1) political speech; and 2) to promote learning. See Patterson, *Free Speech and Copyright Law*, 12 A.L.I. — A.B.A. COURSE MATERIALS J. 45, 50 (1987) [hereinafter *Free Speech and Copyright Law*].

<sup>9</sup> "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole. . . . A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1982).

for their creativity by granting them copyrights, intangible property rights in their works.<sup>10</sup> These rights, like other tangible property rights, may be exploited in the marketplace by sale, rental, or other transfer for value. This profit incentive is intended to ultimately benefit the public by increasing the production of creative works which are, in turn, more widely available to the public.<sup>11</sup> Hence, the copyright clause, by providing an economic incentive for creation, has been interpreted as promoting the public interest in learning<sup>12</sup> through its economic incentive for creation and for dissemination of protected works.<sup>13</sup> Absent such a public benefit rationale, the justification of the monopoly rights granted by copyright legislation might be considered questionable.<sup>14</sup>

The theory of the public good advanced by this limited monopoly contrasts sharply with the more prevalent notion of the public good served by the "marketplace of ideas" model contained in the first amendment.<sup>15</sup> Under this theory, the public benefits of free speech and freedom of expression are realized by the wide dissemination of a variety of ideas. Both dissemination and access to these ideas are indispensable tools for maintaining

<sup>10</sup> The copyright clause provides: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." U.S. CONST. art. I, § 8, cl. 8.

<sup>11</sup> See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Id.* at 156.).

<sup>12</sup> "The constitutional purpose of copyright is to promote the progress of learning." *Free Speech and Copyright Law*, *supra* note 8, at 50.

<sup>13</sup> "[H]istorically, statutory copyright did not come into existence until the work was published, that is, distributed. . . . The statutory reward, in short, was not for the creation of the work, but for distribution." *Id.* See also 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03[A] at 1-31 to -32 (1988) [hereinafter NIMMER] ("The primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors'."); *Harper and Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985).

<sup>14</sup> NIMMER, *supra* note 13, § 1.03[A], at 1-32. But see *Pacific and Southern Co., v. Duncan*, 744 F.2d 1490, 1498-1499 (11th Cir. 1984) ("every copyright holder [need not] offer benefits to society, for the copyright is an incentive rather than a command.").

<sup>15</sup> The "marketplace of ideas" model comes from the jurisprudence of clause 2 of the first amendment to the Constitution. U.S. CONST. amend. I, cl. 2. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785-787 (2d ed. 1988) [hereinafter TRIBE]:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution . . . .

*Id.* (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). See also *United States v. Bily*, 406 F. Supp. 726 (E.D. Pa. 1975).

the democratic dialogue and for advancing the progress of learning.<sup>16</sup>

In different ways, both the copyright clause and the first amendment attempt to promote the progress of learning in our society. Copyright encourages creation of scientific and artistic works, which add to the foundation of knowledge in American society. The first amendment guarantees the free exchange of ideas, thereby assuring broad access to information. Both copyright and the first amendment share this overall goal of maximizing the exchange of knowledge and information among members of our society. In order to achieve this goal, however, copyright removes a degree of freedom of expression from the "market-place of ideas" by providing the copyright owner with exclusive control over his form of expression.

Freedom of expression, in contrast, resists the withdrawal of ideas from the public. First amendment goals are inhibited to the extent that certain ideas are withdrawn from or made inaccessible to the public. Copyright may be inimical to these goals because it diminishes access to those ideas by denying the public the ability to copy the protected work. This conflict is exemplified in the field of the visual arts, where the idea *is* the expression and where copyrighting a work may limit access to ideas embodied in that work. The movement towards expanding proprietary rights in art aggravates this potential for conflict.<sup>17</sup>

If the copyright owner is an entrepreneur, his or her economic interest in the wide dissemination of the copyrighted work will also serve the public interest, as this distribution will increase public access to ideas. For example, because book publishers must sell numerous copies of books to generate a profit, both the

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<sup>16</sup> See *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis J., concurring). Justice Brandeis, in his famous concurrence, stated that the free exchange of ideas (1) is necessary to assure democratic self-government and is therefore instrumental to democracy itself; (2) is important in and of itself, not simply as an instrument to achieve a higher good; and (3) acts as a safety-valve by co-opting more violent antisocial responses. The dissemination and accessibility of ideas are necessary to effectuate these goals. See also NIMMER, *supra* note 13, at § 1.10[B][1]-[B][-] at 1-71 to -75. It has also been suggested that first amendment protections are necessary to achieve further ends, such as social stability, or the discovery and dissemination of the truth. See TRIBE, *supra* note 15, § 12-1, at 785-789. Professor Tribe asks: "[I]s freedom of speech in part also an in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be?" *Id.* See also *Free Speech and Copyright Law*, *supra* note 8, at 51.

<sup>17</sup> Assuming the existence of an economic incentive to disseminate protected expression, first amendment concerns are theoretically protected, provided that subsequent copyright owners do in fact disseminate the creator's ideas and expressions in the same form as the creator made them. An analogue to the moral right of integrity may thus be found in the creator's interest in preserving the expression of his or her ideas *as* they were expressed, without modification or alteration by the copyright owner.

publishers' entrepreneurial interests and the interest of the public in accessibility will be served by the widest possible dissemination of the work.

In order for the constitutional concept of copyright to be consistent with the constitutional goals of freedom of speech and expression, the copyright clause must allow the ideas embodied in copyrighted materials to become accessible to the public.<sup>18</sup> "The rationale for the regulatory concept of copyright is that copyright must serve the interest of three groups: the author, the entrepreneur, and the public. . . .

. . . Copyright thus must fulfill three functions: the creative function, the distributive function, and the learning function."<sup>19</sup> In response to these needs, copyright law has developed several doctrines and approaches to provide access to copyrighted work without depriving the copyright owner of economic benefits or diminishing the entrepreneur's incentive to disseminate protected work for economic gain.<sup>20</sup> However, fine artists, painters, and sculptors often create works which are not intended for reproduction and do not carry an economic incentive to disseminate the work.<sup>21</sup> Subsequent owners of these works make money, if at all, on the appreciation in value of these individual works.

### B. *The Special Problem of the Visual Arts*

In American copyright law, while a particular form of expression may not be copied without permission of the copyright owner, the ideas contained therein may be freely circulated without infringing upon the property interests of the copyright holder.<sup>22</sup> This idea-expression dichotomy protects the first amendment interest in the free exchange of ideas especially well in the case of literary works.<sup>23</sup>

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<sup>18</sup> See *Free Speech and Copyright*, *supra* note 8, at 51.

<sup>19</sup> *Id.* at 53-54.

<sup>20</sup> See *infra* note 42 and accompanying text.

<sup>21</sup> As a result of the Copyright Act of 1976, a copyright holder's exclusive rights now include a right of display. 17 U.S.C. § 118(d) (1982). This right may encourage owners of works of visual fine art to exhibit their art more widely in hopes of increased remuneration. Works of well-known, established artists are the most likely to earn money in this way for their owners, because well-known artists have greater access to the public eye by virtue of their reputations. Moreover, the public remains less likely to have access to the works of less established artists, even assuming this entrepreneurial incentive for owners of fine art to disseminate art.

<sup>22</sup> See NIMMER, *supra* note 13, § 2.03[D], at 2-34 to 2-34.1.

<sup>23</sup> *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 556 (1985). The Supreme Court recognized that "copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'" *Id.* (quoting

It is important that we have free access to the ideas of both William F. Buckley, Jr. and John K. Galbraith; and everyone should have the right to disseminate Buckley's and Galbraith's ideas, either by way of endorsement or criticism. But that process of enlightenment does not require the freedom to reproduce without permission either Buckley's book *Up From Liberalism*, or Galbraith's *The Affluent Society*. To reproduce the "expression" of their ideas may add flavor, but relatively little substance to the data that must inform the electorate in the decisionmaking process. Such minimal substance, lost through the copyright prohibition on reproduction of expression, is far outbalanced by the public benefit that accrues through copyright encouragement of creativity.<sup>24</sup>

The idea-expression dichotomy may adequately balance the public interest in dissemination of ideas with protection of the proprietary rights of copyright owners of literary works; however, when the idea itself is the expression, as in the case of paintings and sculpture, idea and expression can no longer be separated.<sup>25</sup> For example, the idea of the Mona Lisa by Leonardo da Vinci is hard to communicate in any form other than a picture of the Mona Lisa.<sup>26</sup> Unlike literary works, where the copyright owner has an en-

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Harper & Row, Publishers, Inc. v. Nation Enter., 723 F.2d 195, 203 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985)).

<sup>24</sup> NIMMER, *supra* note 13, § 1.10[B][2], at 1-75; W.F. BUCKLEY, *UP FROM LIBERALISM* (1959); J.K. GALBRAITH, *THE AFFLUENT SOCIETY* (1958). The Ninth Circuit considered the balance of interests struck by the idea-expression dichotomy, stating, "[T]he idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment. The 'marketplace of ideas' is not limited by copyright because copyright is limited to protection of expression." *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978).

The point is not that ideas are useful without expression, but rather that while public enlightenment may require the copying of ideas from others, it remains perfectly possible for the speaker (or writer) who copies ideas from another, to supply his own expression of such ideas. True, it would often be easier to copy the expression as well as the idea, but the value of such labor-saving utility is far outweighed by the copyright interest in encouraging creation by protecting expression.

NIMMER, *supra* note 13, § 1.10[D], at 1-89 (citing *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972)). *But see* Goetzl and Sutton, *Copyright and The Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM. J. ART & L. 15 (1984) (analysis of copyright as inherently biased toward the protection of literary rights, and as misapplied to visual arts).

<sup>25</sup> See NIMMER, *supra* note 13, § 1.10[C][2], at 1-81 to -82. See also *Krofft Television*, *supra* note 24, 562 F.2d at 1168 ("When idea and expression coincide, there will be protection against nothing other than identical copying of the work . . . . Therefore, the scope of copyright protection increases with the extent expression differs from the idea.").

<sup>26</sup> NIMMER, *supra* note 13, § 1.10[C][2], at 1-82. See also *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1180-1181 (5th Cir. 1980) (Brown, J., concurring in part and dissenting in part).

trepreneurial interest in disseminating the original work,<sup>27</sup> paintings, sculptures, and other works of fine art are not intended to be reproduced. They are collected for their intrinsic value and their potential to appreciate in value over time. Because the work itself is the vehicle by which the public learns of the ideas expressed in visual art, whoever controls the work controls the public access to the ideas expressed in visual art. When artists part with the copyright to their works,<sup>28</sup> they lose whatever right they may have had to circulate or display<sup>29</sup> the work to a larger audience.<sup>30</sup> Therefore, in the case of visual arts, the effect of proprietary entitlements upon the distribution of ideas raises serious first amendment concerns. This problem is highlighted when proprietary entitlements are concentrated in the hands of owners who have little or no economic incentive to distribute the works to the public.<sup>31</sup> The treatment of proprietary rights in visual arts must therefore be carefully scrutinized to protect the important public educational interest embodied in the first amendment.

In order to mediate the competing interests of the first amendment and copyright in the context of the visual arts, it is especially important to balance the legal entitlements created by a grant of copyright. By virtue of new moral rights recognition in several states, artists (as opposed to subsequent owners) are now guaran-

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<sup>27</sup> In the case of literary works, the copyright owner's interest is to disseminate as many copies of the work as possible in order to maximize profits.

<sup>28</sup> 17 U.S.C. § 202 (1982) states that: "[o]wnership of a copyright . . . is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object."

<sup>29</sup> The display of visual arts is the only effective way to disseminate the ideas embodied in them. See Part II(B) of this Article, *infra*.

<sup>30</sup> 17 U.S.C. § 106 lists the exclusive rights of a copyright holder. Subsection 5, added in 1976, includes the right to display copyrighted works publicly.

<sup>31</sup> See *supra* notes 20-21 and accompanying text. The issue of the artist's control over his or her own work may not be as pressing as that of the independent, unrelated entrepreneurial control over protected works, because control by the artists is intimately bound up in his or her right to privacy. This is due to the fact that 17 U.S.C. § 202, in conjunction with § 204(a) and § 301, requires a specific written conveyance of rights to accompany any sale, if it is to transfer the copyright. In effect, this overrules the common law doctrine established in *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942). Arguably, the copyright laws already recognize this principle in a limited way by providing the artist/author with absolute control over his or her work so long as it is not transferred to a subsequent owner. See also *Harper & Row, Publishers v. Nation Enter.*, 471 U.S. 539, 555 (1985) ("The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one . . . . The Copyright Act, which accords the copyright owner the 'right to control the first public distribution' of his work . . . echoes the common law's concern that the author or copyright owner retain control throughout this critical stage."). In the separation of transfers of copyright from the material object, the preservation of the artist's control over dissemination may be the functional analogue of the moral right of divulgation.

teed greater protection from alteration or modification of their works.<sup>32</sup> In addition to benefiting the artists, greater protection also promotes the public interest by preserving the integrity of the artistic works.<sup>33</sup> Granting artists greater control over the conditions under which their work will be publicly displayed does not conflict with the public's first amendment interest.<sup>34</sup> Although such moral right legislation does not mandate greater public access, it does ensure that the works will be displayed in the way the artist intended.

### III. WAYS OF ACCOMMODATING MULTIPLE INTERESTS IN A SINGLE WORK OF ART

Three distinct interests may be joined together in any work of visual art: the owner's, the artist's, and the public's. The owner's right to physical possession of a work is recognized and protected by virtually all legal systems. In the United States, the copyright holder's financial interest in duplicating a work, preparing derivative works and displaying a work of fine art is protected under the copyright clause of the United States

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<sup>32</sup> Nine states have passed some form of moral rights legislation. See California Art and Public Building Act, CAL. GOV'T. CODE § 15813.5 (West 1980); California Preservation Act, CAL. CIV. CODE § 987 (West 1989); Artists' Authorship Rights Act, LA. REV. STAT. ANN. §§ 51:2151-2156 (West 1987); Massachusetts Arts Preservation Act, MASS. LAWS ANN., ch. 231, § 85 (West 1988); Maine Preservation of Works of Art Act, ME. REV. STAT. ANN. tit. 27, § 303 (1988); New Jersey Artists' Rights Act, N.J. STAT. ANN. §§ 2A:24A-1 to A-8 (West 1987); New York Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW § 11.01 (McKinney 1989); Artists' Rights Act, R.I. GEN. LAWS §§ 5-62-1 to -6 (1987); PA. STAT. ANN. tit. 73, § 2101 (1987); Artists' Consignment Act, N.M. STAT. ANN. §§ 56-11-1 to -3 (1986).

The Supreme Court has stated that it is less concerned with the rewards to an owner or entrepreneur than it is with creators. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

<sup>33</sup> For example, works of visual art attached to real property, such as murals and stained glass windows, are accorded special protection under the California Arts Preservation Statute. CAL. CIV. CODE §§ 987-89 (Deering 1982). This statute, to some extent, diminishes the exclusive rights of owners of the real property to do with it as they wish. The act provides that an owner who wishes to alter or destroy these works, for whatever reason, must provide the artist, or his heirs or legatees, with notice and an opportunity to remove the works, provided these works can be removed without substantial harm. *Id.* § 987(h)(2).

The purpose of this statute is to "preserv[e] the integrity of cultural and artistic creations." *Id.* § 987(a). Similarly, artists who create paintings, sculptures or graphic works of art are given protection in California from alteration or destruction of their works of art. *Id.* § 987(c).

While these statutes provide assurances that works of art displayed in public will remain authentic and unchanged, they do little to encourage such works to be shown in public after their sale to a private owner.

<sup>34</sup> Cf. Patterson, *supra* note 6, at 17. The first amendment clearly expresses "what the copyright clause implies: that Congress cannot make a law for the promotion of learning that also can be used to inhibit learning." *Id.* Similarly, statutes which allow the exercise of greater control by artists over the conditions under which their work is displayed cannot be unconstitutional.

Constitution.<sup>35</sup>

Several civil law systems recognize and protect the artist's reputational interest in a work of art as an extension of the creator's persona.<sup>36</sup> There is a determined minority trend in the United States towards the recognition of moral rights under the federal copyright law<sup>37</sup> and under state laws.<sup>38</sup>

As the scope of property rights for a painting, sculpture, or graphic work of art expands, the potential for decreased accessibility to ideas contained therein increases.<sup>39</sup> Therefore, one possible consequence of the trend toward recognition of moral rights in the United States might be diminished access to ideas.<sup>40</sup> Such limited access should not be allowed to subvert the marketplace of ideas, to remove sources of artistic inspiration from the

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<sup>35</sup> 17 U.S.C. § 106 (1982) provides that the owner of the copyright has the exclusive rights to do or authorize any of the following: "to reproduce the copyrighted work in copies . . . to prepare derivative works based upon the copyrighted work . . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending."

<sup>36</sup> See A. LETARNEC, *MANUEL DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 25 (1966).

<sup>37</sup> See, e.g., S.1619, 100th Cong., 2d Sess. (1988).

<sup>38</sup> Several states have enacted statutes which create rights comparable to moral rights.

<sup>39</sup> See Patterson, *supra* note 6, at 7.

<sup>40</sup> Despite the language of the first amendment which provides in part: "Congress shall make no law . . . abridging the freedom of speech . . .," no one contends that any law regulating speech or expression is automatically unconstitutional; see, e.g., NIMMER, *supra* note 13, § 1.10[A], at 1-64. Instead, the U.S. Supreme Court has created two different analyses for distinguishing between constitutionally protected speech and unprotected speech. If government interference aims at the "communicative" impact of speech or expression, that is the effect of the dissemination of particular ideas, the government may regulate the expression only if it presents a "clear and present danger", is defamatory, or is within another class of unprotected expression such as obscenity or falsehood. If government interference aims at the "non-communicative" impact of speech or expression, the government has more discretion to regulate it, so long as the interference does not unreasonably impede the flow of information and ideas. That balance is determined on a case-by-case basis. See, TRIBE, *supra* note 15, § 12-2, at 791-792. An example of how courts may view the constitutionality of government interference with expression embodied in a work of visual art is found in *Serra v. United States General Svcs. Admin.*, 847 F.2d 1045 (2d Cir. 1988). Sculptor Richard Serra sought to prevent the removal of his sculpture, *Tilted Arc*, from a federal plaza in Manhattan where it had been installed under a commission from the defendant, General Services Administration. Serra argued, among other theories of liability, that removal of the sculpture infringed upon his first amendment rights. Judge Newman, speaking for the Second Circuit, decided that the government — as owner of the sculpture — was itself the "speaker" for purposes of first amendment interests. The artist, by selling the sculpture without reservation of his constitutional interests, had relinquished those interests in the piece. *Id.* at 1049. Furthermore, the government had acted well within its own right to censor its own speech in deciding to remove the sculpture from the public plaza. *Id.* at 1048-1049. In dicta, the court went even further, assuming that even if the artist had reserved his first amendment interests, the removal of the sculpture was still a reasonable interference with the non-communicative content of the sculpture (which was not destroyed but only removed pending relocation in a more suitable forum), and therefore a "permissible time, place and manner restriction." *Id.* at 1049 (footnote omitted).

public eye,<sup>41</sup> or to concentrate control of creative expression in the hands of art owners with little to gain by the dissemination of art work.

The joint and collective work doctrine, the fair use doctrine, and compulsory licensing embody the French approach to balancing competing values of dissemination and proprietary rights.<sup>42</sup> Each offers an alternative method to reconcile the public interest in access to ideas with protection of the economic incidents of property ownership. It is this author's contention, however, that the only truly workable means of reconciling these conflicting ideas is through the treatment accorded to joint and collective works.

A. *The French Solution for Balancing the Competing Values of Dissemination and Proprietary Rights*

French moral rights legislation recognizes the economic and non-economic proprietary interests of artists more extensively than does American law. These laws give artists the right to control the "integrity" of their works, and recognize personal rights related to the artists' reputational interest.<sup>43</sup> French law also recognizes more extensive economic entitlements for visual artists. The author is entitled to "proportionate participation in the receipts resulting from the sale or exploitation of the work;" or, in specified cases, a lump sum representing compensation. In addition, some authors may collect an automatic royalty for some resales of original works of visual art.<sup>44</sup> This economic entitlement, called the "*droit de suite*" or "resale royalty," exists as a supplement to the other copyright laws.

In the case of collaborative and collective works which draw together the efforts of many individual artists, French law has maintained its theoretical commitment to protect the moral rights of each individual artist.<sup>45</sup> Staging, production, perform-

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<sup>41</sup> ARTS REV. (1987), *supra* note 1, at 78 (interview with Hilton Kramer, Editor of the New Criterion) ("[F]or a young artist, developing artist, the really serious talent that's maturing, there is no substitute for knowing what's going on and for knowing the contents of the great museums. Art is, in part, developed out of other art.")

<sup>42</sup> See *infra* notes 45-54 and accompanying text.

<sup>43</sup> See *id.* at art. 35. In the United States, these rights are known as "paternity rights."

<sup>44</sup> See *id.* at art. 42. This article gives authors of graphic or plastic works an inalienable right to a share of the proceeds from the resale of their work by public auction or through a dealer.

<sup>45</sup> See Lewis, *The "Droit Moral" in French Law — Part I*, 5 EUR. INTELL. PROP. REV. 341, 342-343 (1983), and *The "Droit Moral" in French Law-Part II*, 6 EUR. INTELL. PROP. REV. 11, 12 (1984) (citing cases protecting the moral rights of screenwriters, directors, composers and actors in their films and discussing moral rights in collaborative and composite works). See also *Robert v. Societe Crehallet-Folliott-Recherche et Publicite*, 1987

ance, or the display of collaborative and collective works under such a regime of ownership rights can become problematic if each contributing artist is given control over the total work by virtue of his or her individual contribution. For example, Fernand Leger designed several sets for an original production of the opera, *Bolivar*, by Darius Milhaud. When the opera was produced again two years later, one of the scenes, and consequently two of his set designs, were omitted. Leger sued the producer for violation of his moral rights and won the right to provide a notice to the public which explained the missing sets. However, the court refused Leger the right to control the staging of the collaborative production as a whole.<sup>46</sup> This case illustrates how entrepreneurs who hold the rights to collaborative and collective works in their entirety may find their interests in wide dissemination frustrated by the demands of contributing artists.

French legislators have considered the tension between the moral rights of artists and the right of the copyright holder of a collective or collaborative work to disseminate that work. Recent French legislation prioritizes these competing interests by providing that "no disposition . . . shall be interpreted so as to limit the exercise of rights of the copyright holder."<sup>47</sup> In effect, this elevates the entrepreneur's interest over that of the artist.

This legislation exemplifies the intent of the French legislature to limit the moral rights of artists in order to facilitate both the dissemination and production of collective and collaborative works for the public.<sup>48</sup> Although the French have led the expansion of artists' rights, their express preference for the entrepreneurial interests of copyright holders will inevitably result in the wider dissemination of creative works. This preference promotes public access to ideas contained in collaborative and collective works. While the methods differ somewhat, American copyright jurisprudence shares this same hierarchy of interest: "copyright . . . is a monopoly to be strictly construed and to be shaped to serve the public interest over that of the copyright owner."<sup>49</sup>

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F.S.R. 537, 1987 E.C.C. 322 (Fr. Cour de Cassation, April 15, 1986) (available March 31, 1988, on LEXIS, prive library, Cass file).

<sup>46</sup> *L'eger v. Reunion des Theatres Lyriques Nationaux* (1954) 6 R.I.D.A. 146 (Tribunal Civil de la Seine).

<sup>47</sup> Ginsburg, *Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985*, 10 COLUM. J.L. & ARTS 83, 106 (1985).

<sup>48</sup> *Id.*

<sup>49</sup> Patterson, *supra* note 6, at 5. See also *United States v. Bily*, 406 F. Supp. 726 (E.D. Pa. 1975):

Civil copyright law is a compromise between competing social policies — one

The move to have the United States join the Berne Convention was expected to force the United States government into enacting some version of the French moral rights provision, as provided under the Berne Convention.<sup>50</sup> Article 6 *bis* specifically states that: "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."<sup>51</sup> These property rights attach to works of art under the intellectual property laws in most civil law countries. Nevertheless, because the Berne Convention is not self-executing, claims for relief under this provision will not arise unless the signatory nation enacts a domestic law to that effect.<sup>52</sup> The United Kingdom, for example, declared that this provision was not binding.<sup>53</sup> Congress, on the other hand, has decided that existing United States copyright law, including state statutes and common law adequately conforms to the moral rights requirement of the Berne Convention.<sup>54</sup>

#### B. *The Approach of the Joint and Collective Work Doctrines*

When a single author produces a copyrightable work, the author is vested with all of the intangible property rights.<sup>55</sup> Owners, on the other hand, are given only the five following exclusive rights to copyrighted property: (1) the right to reproduce copyrighted works,<sup>56</sup> (2) the right "to prepare derivative works based upon the copyrighted work,"<sup>57</sup> (3) the right to distribute copies to the public,<sup>58</sup> (4) the right to perform the copyrighted work,<sup>59</sup>

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favoring the widest possible dissemination of new ideas and new forms of expression, and the other giving writers and artists enough of a monopoly over their works to ensure their receipt of fair material rewards for their efforts. The first policy predominates. . . .

*Id.* at 730.

<sup>50</sup> Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971, reprinted in 4 NIMMER, *supra* note 13, App. 27.

<sup>51</sup> *Id.*, art. 6 *bis*.

<sup>52</sup> 134 CONG. REC. S.1455 (daily ed. Oct. 5, 1988).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (statement of Sen. DeConcini). See also COPYRIGHT L. REP. (CCH) para. 20 (statement of the director of the World Intellectual Property Organizations (WIPO) that it is not necessary for the United States to enact a moral rights law to comply with Berne requirements).

<sup>55</sup> 17 U.S.C. § 201(a): "[c]opyright in a work protected under this title vests initially in the author or authors of the work."

<sup>56</sup> 17 U.S.C. § 106(1).

<sup>57</sup> 17 U.S.C. § 106.

<sup>58</sup> *Id.* at § 106(3).

<sup>59</sup> *Id.* at § 106(4).

and (5) the right to exhibit or display the copyrighted work publicly.<sup>60</sup> These limitations mean that the author is usually the one initially given the exclusive right to exploit the economic value of the copyrighted work by sale or rental. However, once the author sells or otherwise transfers his rights to a subsequent owner, that owner then becomes entitled to exploit the five enumerated rights, thereby extinguishing the author's rights.<sup>61</sup>

When a work is considered to be either a joint work or a collective work, copyright law requires authors to relinquish a certain amount of control in order to facilitate publication and performance of that work, even though their economic interest in the publication or performance remains protected. "A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"; for example, a song and lyric simultaneously composed constitute a joint venture.<sup>62</sup> "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."<sup>63</sup>

When individual creators of copyrighted work contribute to a collective work, the rights to the economic benefits from that work belong to the copyright holder of the collective work.<sup>64</sup> The creators of the individual contributions have no rights or entitlements to the collective work, but they do maintain a copyright in their own contributions. Therefore, the owner of the copyright to the collective work has the right to all economic benefit derived from the distribution of the collection as a whole, and the owners of the individual contributions may only control dissemination of their separate contributions. In this way, collectors have an economic incentive to exploit a new market by circulating the collective work, while the creator of the individual contri-

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<sup>60</sup> *Id.*

<sup>61</sup> The rights comprised in "copyright" accrue to whomever is the copyright owner, notwithstanding that he or she may not be the author. See 17 U.S.C. § 201(a)-(e).

<sup>62</sup> 17 U.S.C. § 101.

<sup>63</sup> *Id.* See also *Harris v. Coca-Cola, Co.*, 73 F.2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935).

<sup>64</sup> See 17 U.S.C. § 201(c):

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

bution may continue to disseminate his or her contribution separately.

Justice Learned Hand remarked in 1915 that he had been able to find "strangely little law regarding the rights of joint authors of books or dramatic compositions."<sup>65</sup> That lament has continued to be heard as late as 1982.<sup>66</sup> While relatively few cases exist in this area, the following survey attempts to highlight the competing claims of authors, entrepreneurs, and the public.<sup>67</sup>

In *Yale University Press v. Row, Peterson & Co.*,<sup>68</sup> Yale University had previously issued a multivolume reference work containing approximately 9,000 illustrations. Yale claimed that the defendant published textbooks containing pirated illustrations from its work. It sought to enjoin the defendants by restraining publication of the textbooks until trial. However, the defendants showed that their independent efforts had produced all but forty-four of the allegedly infringing illustrations. The court refused to issue the injunction; instead, it required the defendants to post a bond sufficient to compensate plaintiff's loss of market share if the alleged infringement was proven at trial. The defendants were also ordered to file monthly statements of profits from the sales of the allegedly infringing books until the court reached a determination on the merits. If the defendants failed to provide the requested profit statements, the court indicated that it was willing to issue a preliminary injunction, restraining publication and sale of the textbooks until the defendants removed the forty-four allegedly infringing pictures from their textbooks. In this case, the Second Circuit applied the concept of a compulsory license to the collective work in order to preserve both the first amendment interest and the marketplace interest of the copyright owners. Clearly, the public interest in learning could have been impaired had the court issued the preliminary injunctions restraining the dissemination of the textbooks.<sup>69</sup>

In *Harris v. Coca-Cola Co.*,<sup>70</sup> the author of the Uncle Remus stories<sup>71</sup> licensed the tales to a publisher, who then illustrated

<sup>65</sup> *Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

<sup>66</sup> See *Copyright Ownership of Joint Works and Termination of Transfers*, 30 U. KAN. L. REV. 517, 518 (1982).

<sup>67</sup> One scholar has argued that courts tend to view copyright cases in terms of the proprietary entitlements of the individual litigants, rather than directly addressing the underlying policy problem of how the public benefits from resolution of the issues involved. *Patterson*, *supra* note 6, at 5-6, 9, n.29.

<sup>68</sup> 40 F.2d 290 (S.D.N.Y. 1930).

<sup>69</sup> NIMMER, *supra* note 13, at § 14.06[A].

<sup>70</sup> 73 F.2d 370 (5th Cir. 1934).

<sup>71</sup> The case was brought by Esther Larose Harris. Plaintiff was the widow of Joel

them and sold the illustrated book as a separately registered and copyrighted work.<sup>72</sup> When the publisher authorized use of the illustrations by the defendant, Coca-Cola Co., the plaintiff claimed an interest in the use of those illustrations. The court held that even though the author of the written contribution could maintain a separate copyright in his writing, he could never maintain control over the work of others (i.e. the illustrator) in the composite or joint work.<sup>73</sup> Therefore, the court held, the plaintiff had no right to economic benefits from the use of illustrations joined with his writings in the illustrated book.<sup>74</sup>

The *Harris* decision gave separate protection to the contributions of creators whose work was united by a third party for the creators' economic and proprietary interests without diminishing the incentive to make full economic use of the individual contributions. The entrepreneur's distribution of the individual contributions benefited the public through increased accessibility to the works.

In *Quinto v. Legal Times of Washington, Inc.*,<sup>75</sup> a law student wrote an article comprised mainly of lengthy quotations by other law students about their summer internships with wealthy Washington, D.C. law firms. The article was originally printed in the Harvard Law Record, a daily law student newspaper. The defendant, Legal Times of Washington, reprinted ninety-two percent of the plaintiff's article without permission. The court found that the plaintiff was entitled to the economic benefits of his copyright in the compiled quotations of others.<sup>76</sup> The court refused to find that the newspaper was entitled to claim a first amendment right to use the plaintiff's copyrighted form of expression of facts<sup>77</sup> and it awarded the plaintiff statutory damages and attorney's fees.<sup>78</sup>

Because the plaintiff in *Quinto* did not seek an injunction, the

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Chandler Harris, author of "Uncle Remus, His Songs and His Sayings; the Folklore of the Old Plantation." *Id.* at 370.

<sup>72</sup> The rebound and reillustrated book was titled "Uncle Remus, His Songs and His Sayings, By Joel Chandler Harris; New and Revised Edition with 112 Illustrations by A.B. Frost." *Id.* See *supra* note 70.

<sup>73</sup> "Composite works, that is, those composed of the copyrightable work of several . . . are put on a special basis, in that the right of renewal is given to the proprietor of the original copyright rather than to the several contributing authors." *Id.* at 371.

<sup>74</sup> "We think no right to the exclusive use of the . . . pictures came to Mrs. Harris with the extension which the law gave her of the copyright on her husband's literary work." *Id.* at 372.

<sup>75</sup> 506 F. Supp. 554 (D.D.C. 1981).

<sup>76</sup> *Id.* at 559.

<sup>77</sup> *Id.* at 560.

<sup>78</sup> *Id.* at 564.

court did not address the issue of dissemination. Indeed, the article had already been circulated and would probably be so again for compensation in the future. Moreover, because the work at issue was literary, it was easier to separate the public's interest in ideas from the expression of those ideas in the print medium. Consequently, protection of the compiler's market interest in his compilation<sup>79</sup> did not undermine the public interest nor the interests of any of the authors of the quotations who had not sought copyright protection for their individual contributions.

In the early case *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*,<sup>80</sup> a composer sued the owner of the renewal rights for the right to all of the economic benefits of the song. The Second Circuit held that the defendant owned the renewal rights to the song as a joint work,<sup>81</sup> and that he as well as the composer was entitled to a pro rata share of the profits from the song for the period of the renewal term.<sup>82</sup> Any other interpretation of the relative rights to such a work might deprive a co-owner of his share of the profits.

In another joint works case, *Crosney v. Edward Small Productions*,<sup>83</sup> the defendant owned one-quarter of the motion picture rights to a play called "Friendly Enemies." The plaintiff also owned one-quarter of the motion picture rights. When the defendant produced the movie without the plaintiff's consent, the plaintiff sought both an accounting for profits and a constructive trust over his fair share of the motion picture profits utilizing the theory of joint ownership. The court held that the plaintiff's complaint stated a cause of action.<sup>84</sup> The court noted, however, that the plaintiff had not sought to enjoin distribution of the movie.<sup>85</sup> An injunction would have raised first amendment concerns about the ability of the joint owners to limit public access to the expression embodied in the motion picture itself.

At some level, each of these cases concerning collective and joint works has confronted courts with the task of balancing several competing interests. By enhancing the market for collective

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<sup>79</sup> Section 101 includes collective works in compilations. See 17 U.S.C. § 101.

<sup>80</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Cop.*, 221 F.2d 569, 570 (2d Cir. 1955); see also *Shapiro, Bernstein and Co. v. Jerry Vogel Music Co.* 73 F. Supp. 165, 167 (S.D.N.Y. 1947) (new version of copyrighted song with additional chorus and different tempo did not constitute copyrighted "new work;" therefore, composer and author were co-owners).

<sup>81</sup> 221 F.2d at 570.

<sup>82</sup> *Id.* at 571.

<sup>83</sup> 52 F. Supp. 559 (S.D.N.Y. 1942).

<sup>84</sup> *Id.* at 560.

<sup>85</sup> *Id.* at 561.

works, the collective work doctrine structures copyright law to perform a dual function: it protects the public's first amendment interests in accessibility to collective works and the economic interest of owners of the original copyrights. The collector or editor does not acquire control over the individual contributions insofar as the owners continue to enjoy the right to disseminate their individual works.

Similarly, where works are produced as joint works and are not intended to have separate identities, each joint owner has a right to his pro rata share of economic benefits derived from the exploitation of the joint work. Neither joint owner may control his or her co-owner's right to exploit and disseminate the work. This demonstrates how to effectuate the public interest in broad distribution of copyrighted work without diminishing the property rights of either copyright owner. Because "joint works" benefit co-owners equally,<sup>86</sup> control issues cannot deadlock distribution. As a practical matter, this gives each co-owner the entrepreneurial incentive to exploit the work's economic value (subject to the duty to account for profits to the other co-owner or co-owners).<sup>87</sup> This approach of reconciling competing interests, public and private, in the same work of art promotes the proprietary interests of both creators and the public. The joint and collective work doctrines achieve a balance between proprietary and public interests by enhancing the economic incentive to disseminate the work. These doctrines assure the property owner of financial remuneration and, in the case of collective works, maintain a parallel right to remuneration in the author of the original contribution. These doctrines avoid control struggles between multiple authors or copyright owners which might make dissemination impractical or impossible. Finally, this doctrine does not concentrate control over the work in the hands of one party, nor does it subordinate the proprietary interests in the works to the public benefit.<sup>88</sup> In providing accessibility and remuneration, these doctrines balance copyright and first amendment goals without destroying or diminishing interests in the benefits of authorship or ownership.

These approaches indicate that Congress and the courts have repeatedly limited and restructured copyright law in ways that are more solicitous of first amendment concerns, accessibil-

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<sup>86</sup> 17 U.S.C. § 201(a) ("The authors of a joint work are co-owners of copyright in the work.").

<sup>87</sup> NIMMER, *supra* note 13, §§ 6.10-6.12, 6-22 through 6-30.

<sup>88</sup> See *infra* notes 95-105 and accompanying text.

ity, and wide dissemination of ideas than of protection of property rights.<sup>89</sup>

### C. *The Fair Use Doctrine*

The fair use doctrine preserves access to copyrighted materials for the public benefit with little provision for the economic interests of the copyright holder.<sup>90</sup> Originally a common law

<sup>89</sup> One exception to this preference has been carved out in the work for hire doctrine. In the case of works made for hire, copyright vests initially in the employer or commissioning party who paid for the creative work, not in the author or artist who created the work. 17 U.S.C. § 201(b).

A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . . *Id.* at § 101. The legislative intent in shifting authorship benefits away from the actual creators in the case of works made for hire was to give the employer the full economic benefits of the work including the complete right to control its financial exploitation. See Hamilton, *Commissioned Works as Works Made for Hire under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, n.16 (1987) [hereinafter Comment, *Works Made for Hire*]. In this way, the work made for hire doctrine concentrates control and all economic benefits in the hands of the entrepreneur who commissions the work. This deprives artists and authors of any reward for creativity apart from their salary or commission. So long as the entrepreneur has an economic incentive to disseminate the work, the public will be assured of some access to the artists' ideas embodied in the work, provided the entrepreneur does not alter or suppress those ideas.

One way to rationalize this doctrine with the economic incentives of the copyright clause is to assume that the person who paid for the creation of the work has paid enough to the artist so that he or she has the incentive to produce more work; this rationale equates salary benefits with the benefits of copyright. See *supra* Comment, *Works Made for Hire*. Such an assumption is only warranted when both the commissioning party and the artist are of equal bargaining strength. However, the reality is that most works made for hire agreements are not made between parties of equal bargaining power. See Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, J. ARTS MGMT. & L. 23 (Fall 1987); Comment, *Works Made for Hire*; Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U. L. REV. 373 (1987); Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987).

Visual arts organizations have lobbied in Congress for legislation that would modify work for hire treatment and alter treatment of contributions to collective works as works made for hire. A bill introduced in the Senate by Senator Tadd Cochran eliminates most contributions to collective works from work made for hire treatment, with the exception of those contributions made as part of a motion picture. S. 1223, 100th Cong. 1st Sess., 133 CONG. REC. S6737-6739 (daily ed. May 19, 1987) (introductory statement of Sen. Cochran). See, e.g., *Community For Creative Non-Violence v. Reid*, 57 U.S.L.W. 4607 (U.S. June 6, 1989) (No. 88-293) (sculptor deemed independent contractor, not employee, under 17 U.S.C. § 101 due to lack of general control over work by hiring party).

<sup>90</sup> See 17 U.S.C. § 107. The fair use doctrine expressly recognizes that "the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." H.R. REP. NO. 1476, 94th Cong. 2d Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5679.

doctrine, the fair use doctrine immunizes certain acts which might otherwise infringe upon the exclusive property rights of the copyright owner.<sup>91</sup> Fair use protects infringing acts so long as they are done "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."<sup>92</sup> No remuneration is charged for these uses, as opposed to the rules concerning compulsory licenses.<sup>93</sup>

If a use is determined to be "fair," the owner is not entitled to compensation for the use of the work. The fair use doctrine weighs the copyright owner's market interest against the potential deprivation to society of ideas and expressions important for learning. The fair use doctrine, in essence, creates a free compulsory license for those uses which fall within its definition.

While the market for literature or performances may be considerably broader because these works are intended to be exploited by reproduction, the market for works not intended for reproduction, or the market for graphic works, usually having a much smaller circulation, may be severely impaired by such a "free" compulsory license. The courts and legislature have, however, used the fair use doctrine to insure wide public access to important information inextricably linked to visual works, such as news photographs. In *Time Inc. v. Bernard Geis Assocs.*,<sup>94</sup> photographs of the assassination of President Kennedy pitted the public interest in the news event against the proprietary interests of the owner of the photographs.<sup>95</sup> Time Magazine reprinted the photographs, which were widely circulated at the time, without the permission of the copyright holder. The court found that the public interest in access to the most complete information possible outweighed any detriment to the copyright owner, and would be diminished by any other method of expressing the ideas cap-

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<sup>91</sup> In determining whether this limited privilege should apply to a specific use, four factors are considered:

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

17 U.S.C. § 107.

<sup>92</sup> *Id.*

<sup>93</sup> See *infra* notes 103-119 and accompanying text.

<sup>94</sup> 293 F. Supp. 130 (S.D.N.Y. 1968).

<sup>95</sup> The *Time Inc. v. Bernard Geis Assocs.* case involved the film taken by Abraham Zapruder of the assassination of President John F. Kennedy.

tured so graphically by the photographs. The court denied the owner compensation for the news magazine's use of the pictures, finding the magazine's use of these photographs fair use and not an infringement. One scholar has suggested that the *Time Inc.* case represents a situation where the first amendment's public interest concerns and copyright's proprietary entitlements were incompatible.<sup>96</sup> The court favored the first amendment concerns by finding this use of the photographs to fall outside copyright protection. However, by denying the owner any compensation for the use of his works, this decision may have some undesirable effects. "If such photographs are to be treated as outside the scope of copyright protection, will this not tend to diminish . . . the news photography industry . . .?"<sup>97</sup> Certainly this would appear to eliminate entrepreneurial incentive from this field of creative work. Professor Nimmer has suggested that the application of a concept such as the compulsory license would achieve a more equitable result.<sup>98</sup> This would provide the creator and subsequent owners of the copyrighted work with protection of their economic and proprietary interests by assuring them the right to receive the equivalent of a "reasonable royalty."<sup>99</sup> This right would permit broadcasters to simultaneously distribute the copyrighted work without depriving the public of access to this important visual information.

The copyright doctrine of fair use upon which *Time Inc. v. Bernard Geis Assocs.* was decided strikes a very different balance from the compulsory license approach. The fair use doctrine may unfairly and unnecessarily penalize creative persons whose ideas are "wedded"<sup>100</sup> to expression by denying them compensation when circulation to the public will diminish the value of the copyrighted work.

The public interest does not justify a "wholesale" deprivation of visual artists' proprietary interests in copyright.<sup>101</sup> Com-

<sup>96</sup> "The result in the *Bernard Geis* case can be defended, if at all, not on the ground of fair use, but rather because of the previously described free speech elements inherent in the film." NIMMER, *supra* note 13, § 1.10[D], at 1-88 (citation omitted).

<sup>97</sup> *Id.*, § 1.10[C], at 1-84.

<sup>98</sup> *Id.* at 1-85.

<sup>99</sup> *Id.* at 1-86. One proper remedial device could be based on a quasi-contractual theory of unjust enrichment. The appropriate measure of recovery would be restitution rather than compensatory damages. Quasi-contractual recovery is often measured in terms of the fair market value or fair rental value of the property. Recovery based on quasi-contract is therefore comparable to the implied duty to pay a reasonable royalty suggested by Professor Nimmer.

<sup>100</sup> *Id.* at 1-85, n.65.1.

<sup>101</sup> *Id.*, § 1.10[D], at 1-86. "Graphic works per se should not be deprived of full copyright protection." *Id.* § 1.10[C], at 1-84.

pulsory licensing presents a more equitable solution. It could provide the conceptual foundation for protecting the public interest in graphic and visual expression of ideas, which are a unique part of news transmissions and publications,<sup>102</sup> without extinguishing the proprietary entitlements of copyright.

#### IV. THE CONCEPT OF COMPULSORY LICENSES

In 1908, the United States Congress significantly limited the exclusive rights granted to copyright owners by fashioning the first compulsory license for the right to make and distribute copies of sound recordings of non-dramatic musical works.<sup>103</sup> The statute requires that the copyright holder of non-dramatic musical works permit others to make and distribute phonorecords<sup>104</sup> of the works, provided that the licensee's "primary purpose in making phonorecords is to distribute them to the public for private use."<sup>105</sup> The statute also requires the licensee to pay the copyright holder for the use of the work.<sup>106</sup>

In enacting this compulsory license, Congress intended to prevent copyright holders of musical works from monopolizing their circulation.<sup>107</sup> While the compulsory license grants the

<sup>102</sup> Other kinds of visual arts have been part of political speech and debate. See J. MERRYMAN & A. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS* 293-303 ("Political and Social Censorship of Art") (2d ed. 1987).

<sup>103</sup> The exclusive rights of the copyright holder in 17 U.S.C. § 106(1) ("to reproduce the copyrighted work in copies or phonorecords") and § 106 (3) ("to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending") are limited by the compulsory license established by 17 U.S.C. § 115 (1982 & Supp. IV 1988). See also Ringer, *Copyright Law in the 1980's*, 23 BULL. COPYRIGHT SOC'Y. 299, 304 (1976) (sixth Donald C. Brace Memorial Lecture delivered at New York University School of Law, March 25, 1976).

<sup>104</sup> "Phonorecords" are defined under 17 U.S.C. § 101 to include audio tapes and discs:

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed. . . . The term "phonorecords" includes the material object in which the sounds are first fixed.

<sup>105</sup> 17 U.S.C. 115(a) (1982). See also 2 M. NIMMER ON COPYRIGHT § 804[D], at 8-57 to -58; Note, *The Socialization of Copyright: The Increased Use of Compulsory Licenses*, 4 CARDOZO ARTS & ENT. L.J. 105, 107 (1985).

<sup>106</sup> The rate charged is set by statute and administered by the Copyright Royalty Tribunal. The debate over compulsory licenses focuses primarily upon the rate at which the statutory royalty rate should be fixed. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 107, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5722. But cf. Ringer, *supra* note 103.

<sup>107</sup> H.R. REP. NO. 2222, 60th Cong., 2d Sess. serial no. 5384, at 7, as reprinted in CIS U.S. Serial Set Index, 1907-1909.

The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the com-

copyright owner neither the "power to decide if others should have access to his work nor the power to bargain for a price,"<sup>108</sup> compulsory licenses still provide financial remuneration to the copyright owner and create economic opportunities for other entrepreneurs to disseminate the work.<sup>109</sup> Thus, by offering economic incentives to other artists, the compulsory license provides an alternative means of increasing public access to protected works.

Congress has enacted compulsory licenses in several other areas of the performing arts. These include certain kinds of secondary transmissions,<sup>110</sup> performances by coin-operated phonorecord players (juke-boxes),<sup>111</sup> and the use of certain materials by a public broadcasting entity.<sup>112</sup> By providing an economic incentive for entrepreneurs other than the copyright holder, the compulsory license increases the numbers of performances of a work and, consequently, the wider dissemination of such works.

This approach is particularly effective with regard to musical and videotaped performances, since the repeated performance or transmission of the work is the economic incident which generates profit for the entrepreneur. However, unless a painting or sculptural work is part of a privileged transmission,<sup>113</sup> visual artists do not benefit from compulsory licenses in the same way that

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poser an adequate return . . . and at the same time prevent the formation of oppressive monopolies . . . .

See *Id.* NIMMER, *supra* note 13, § 8.04[C], at 8-56; see, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (A local broadcasting station, licensed by ASCAP to perform petitioners' copyrighted songs, transmitted the songs, and a radio in respondents' food shop received them; petitioner sued for copyright infringement, claiming respondent had no license to perform the songs. The Supreme Court held that respondent had not infringed upon petitioners' exclusive rights under the Copyright Act); *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3d Cir. 1974), *cert. denied*, 421 U.S. 1012 (1975) (music publishing companies sued for copyright infringement of their respective musical works by unauthorized manufacture and sale of recordings); *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263 (2d Cir. 1959) (copyright owners sought damages for infringement from record manufacturer who reproduced copyrighted musical compositions on records without complying with statutory requirements of notice and payment of royalties).

<sup>108</sup> Note, *supra* note 105, at 111 & n.37.

<sup>109</sup> See Patterson, *supra* note 6, at 8: ("Copyright, therefore, originally functioned to encourage not creation, but distribution. In this regard, copyright's function is essentially the same today").

<sup>110</sup> 17 U.S.C. § 111 (1982 & Sup. IV 1986) (categorically limiting exclusive rights with regard to secondary transmissions).

<sup>111</sup> 17 U.S.C.A. § 116 (b) (1982 & Supp. 1989) (regulating public performances by means of coin-operated phonorecord players)

<sup>112</sup> 17 U.S.C. § 118 (providing for use of certain works in connection with noncommercial broadcasting).

<sup>113</sup> A painting or sculptural work is part of a privileged transmission if, for example, it appears in the course of a educational television broadcast.

performance artists do.<sup>114</sup>

A compulsory license for visual artists who create works not intended for reproduction<sup>115</sup> could benefit both the artist and the public.<sup>116</sup> Owners of visual art characteristically do not have any profit motive in the circulation of the work. Rather, these owners reap profits (to the extent that they are holding these works for profit) upon the resale of the work if the piece appreciates in value over time.<sup>117</sup>

The artist is the person with the most significant economic and political interest in presenting his work to the public. Greater public exposure of an artist's work may strengthen the artist's reputation, and in turn, increase sales of current works. However, artists rarely retain the right to display their works because it might depress sales of original works of art. Therefore, the public may never gain access to the ideas contained in a work of art after it is sold by the artist. Consequently, while artists have a great interest in distributing their works through public display,<sup>118</sup> the public display right does not necessarily guarantee their financial success.

Congress could enact another type of limited compulsory license for the benefit of painters, sculptors, or graphic artists whose works are not intended for reproduction. Such a license would enable those artists to have continued access to their works for public display, contingent upon payment of necessary costs plus a royalty to the owner of the work. Such a scheme would create a permanent yet limited display right for the artist

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<sup>114</sup> [A] public broadcasting entity may, upon compliance with the provisions of this section, . . . engage in the following activities with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works: (1) performance or display of a work by or in the course of a transmission made by a noncommercial educational broadcast station. . . .

17 U.S.C. § 118(d)(1).

<sup>115</sup> See *supra* note 29 and accompanying text.

<sup>116</sup> As a practical matter, however, most visual artists do not retain copyright in their works. See Sheehan, *Why Don't Fine Artists Use Statutory Copyright? — An Empirical and Legal Survey*, 24 COPYRIGHT L. SYMP. (ASCAP) 157 (1974); but cf. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976).

<sup>117</sup> See, e.g., N. Y. Times, Nov. 23, 1986, § 4 (The Week in Review), at 26, col. 1 (sale of a work by contemporary artist Jasper Johns, "Out the Window" for \$3.63 million by original owners, Ethel and Robert Scull, who had purchased the painting twenty-six years earlier for \$2,250.00).

<sup>118</sup> In *Serra v. United States General Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988), the sculpture, "Tilted Arc," was a highly confrontational piece designed to comment upon its location in Federal Square Plaza in Manhattan, where it would be seen by judges, lawyers, and clients involved in the legal system. The artist's intent was to combine artistic form with the location of the display to comment upon his vision of the justice system. The intensity of the artist's message was diminished drastically by the removal and relocation of the sculpture by its owner, the U.S. Government.

commensurate with both the moral rights doctrine and the public interest in maintaining access to these works.

With the proper regulatory provisions, this type of compulsory license need not interfere with the owner's exercise of his or her display right. The compulsory license would include: 1) a notice requirement specifying the particular time period during which the artist wishes to display the work; 2) a sufficient period of time before which the artist must notify the owner of his intent to display the work; 3) resolution of any conflict between the owner's good faith use of the work and the artist's display right in favor of the owner; 4) a requirement that the owner allocate a minimum period of time for the artist to display his work if the artist so chooses; 5) a maximum length of time during which the artist may exercise this display right; 6) payment of a fee by the artist covering any costs incurred by the owners; 7) in cases where the display generates a predetermined amount of income to the artist, the owner shall be entitled to a royalty payment; and 8) the owner shall also be allowed to terminate this display right upon the artist's failure to pay the required fee. Finally, this display right should be interpreted narrowly and thus should not include the right to copy the piece or make changes to the work.

This type of compulsory license should, arguably, be extended to museums and public art institutions. Allowing such licensees could permit access to the works of deceased artists whose ideas are still of significant public interest. For example, the works of Mark Rothko were sold to many private owners against the wishes of the artist, who committed suicide in 1970. Public interest in his vision of abstract expressionist painting has never diminished, however, since his collection has been broken up, the cohesion and scale that the artist originally envisioned are now difficult to appreciate. Consequently, the attempt to mount a retrospective of Rothko's work by the Tate Gallery of London in 1984 required truly heroic efforts to both locate significant portions of the artist's collection and to negotiate permission to borrow the works from the many owners involved.<sup>119</sup> Unfortunately, agreements could not be reached with all of the owners and the exhibit failed to provide a complete and cohesive display of his artistic progression and vision. The extension of this display right to public art institutions would be of paramount im-

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<sup>119</sup> MARK ROTHKO: 1903-1970. This is an exhibition catalogue for the June 17 - September 1, 1987 exhibition in London's Tate Gallery. Twenty-four lenders, most of whom were museums or private foundations, donated ninety-one works for the exhibition.

portance to American museums in assembling future exhibitions of American artistic achievement.

## V. CONCLUSION

The debate over expansion of the proprietary entitlements for artists under the Copyright Act is part of a larger trend towards widening the scope of copyright and enlarging property rights in creative works.<sup>120</sup> To many artists involved in advocating legal change, the expansion of property rights in art has a powerful emotional appeal.<sup>121</sup> Yet it is necessary to consider the consequences of such an expansion upon public access to the ideas embodied in protected works.

The problem of intellectual property rights in the visual arts stems from the fact that copyright law lacks any vehicle for encouraging public access to works which are not themselves intended for reproduction. One way to promote public access is through compulsory licenses. These licenses have been used in copyright law to prevent copyright owner from monopolization of non-dramatic musical works. Similarly, a compulsory license could be established to prevent a monopoly over visual art. The compulsory license suggested in this article would grant the artist access to his work for the purpose of displaying that work to the public at reasonable intervals and for reasonable lengths of time. This would both increase public access to visual art while permitting artists, during their lifetimes, to publicly display their work. While such a right to access may diminish the exclusivity of an owner's property rights in a work of art, the artist would compensate the owner through the payment of royalties and costs associated with public display. This diminution of the owner's property rights in a creative work is consistent with past applications of the copyright law. Finally, compulsory licensing contributes to elevating the proprietary rights of artists so as to satisfy

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<sup>120</sup> See Patterson, *supra* note 6, at 7. Outside of copyright law, there is also an international trend to expand recognition of various proprietary entitlements in art. See also Bator, *An Essay on the International Trade In Art*, 34 STAN. L. REV. 275 (1982); J. MERRYMAN & H. ELSSEN, *LAW, ETHICS & THE VISUAL ARTS* 157-71 (2d ed. 1987) (discussing expanding claims of national ownership of art and archaeological treasures).

<sup>121</sup> See Patterson, *supra* note 6, at 8. The powerful emotional appeal of artists' rights derives mainly from the idea that artists have a fundamental personal interest inextricably embedded in their creations. Their reputations, their professional identities, and even part of their individual personae are part of the fabric of the created work. Therefore, it is urged that they should have more control over the aesthetic and economic fate of their works. Similarly, certain countries have maintained that they too have a special relationship to their own art, and that their archaeology and ethnological treasures embody a national identity and a national cultural persona.

the moral rights provision of the Berne Convention.<sup>122</sup>

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<sup>122</sup> Recent adoption of legislation incorporating some of the copyright standards of the International Convention for the Protection of Literary and Artistic Works, (better known as the Berne Convention) may force Congress to consider how expanding artists' proprietary interests in their works affects the public interest in the dissemination of ideas embodied in the art. Although the Berne Convention recognizes moral rights of authors, it remains to be seen to what extent, if any, the United States will recognize these rights in its efforts to provide copyright protection consistent with that provided under the Berne Convention. The Convention itself provides some exceptions to protection of authors' moral rights for the public interest. See Phillips, *The Berne Convention and the Public Interest*, 11 COLUM. J. L. & ARTS, 165-67 (1986). It is not clear, however, whether these exceptions are coextensive with the first amendment rights guaranteed under the United States Constitution. The Preliminary Report of the Ad Hoc Working Group on United States Adherence to the Berne Convention expresses the opinion that "there are substantial grounds for concluding that the totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with [Article] 6bis [of the Berne Convention which recognizes these moral rights], as it is applied by various Berne countries." Preliminary Report of the Ad Hoc Working Group on United States Adherence to the Berne Convention, Ch. 6, *quoted in* Geller, *Comments on Possible U.S. Compliance with Article 6 Bis of the Berne Convention*, 10 COLUM. J.L. & ARTS 513, 665 (1986).