

RETROACTIVE PROTECTION OF VISUAL ARTS PUBLISHED WITHOUT A COPYRIGHT NOTICE: A PROPOSAL

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I. INTRODUCTION

Over the last twenty years, as the United States has become the art capital of the world and the visual arts industry has exploded, legislation has been proposed on local and state levels to ameliorate the emerging problems. Consumers have been protected by state laws requiring disclosure of limited edition prints,¹ and by legislation imposing express warranty liability upon dealers who misrepresent the authenticity of works.² Artists have been protected by laws requiring galleries to hold receipts from sales in trust funds for the artists who consign the works,³ by laws intended to protect the integrity of their work,⁴ and by resale royalty laws.⁵ Similarly, art preservation laws have been enacted to benefit our cultural patrimony.⁶

Very little attention has been given, however, to a vestigial provision of American copyright law and its effect upon the visual arts: the statutory requirement that a work must bear a notice of copyright to be protected under the Copyright Act.

Every American federal copyright statute since 1790⁷ has contained a notice requirement. Since 1802, American copyright law has required that a notice of copyright be affixed to *published* copies of works in order to obtain federal statutory copyright protection.⁸ This is unlike most other nations, where copyright is

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¹ See, e.g. N.Y. ARTS & CULT. AFF. LAW §§ 15.01, .03 (McKinney 1984 & Supp. 1988).

² *Id.* at § 15.11.

³ See, e.g. *id.*, § 11.03(1)-(2); FLA. STAT. § 686.502(3) (1988).

⁴ See, e.g. CAL. CIV. CODE § 987 (West Ann. 1982 & Supp. 1988); MASS. GEN. L. 1982 & ch. 231, § 85S (1988); N.Y. ARTS & CULT. AFF. LAW §§ 13.03, .17, .19, 14.03 (McKinney 1984 & Supp. 1988).

⁵ See, e.g. FLA. STAT. § 265.282 (1988).

⁶ E.g., CAL. CIV. CODE § 986 (West 1988).

⁷ 1 M. NIMMER, NIMMER ON COPYRIGHT, § 1.01-.02 (1987) [hereinafter NIMMER]. "The notice requirement has been a part of every U.S. copyright statute since 1790." *Id.* at § 7.02 n.4.

⁸ See Roth, *Is Notice Necessary? An Analysis of the Notice Provisions of the Copyright Law*

not predicated on compliance with a notice requirement, but rather attaches to the work upon publication.⁹

To the visual artist, placement of notice of copyright on works of art is considered to be obtrusive at best, crassly commercial at worst.¹⁰ Many artists understandably object to placing notice on the front of their work.¹¹ However, notice on the backing of drawings, photographs, prints and watercolors might be futile since it could be permanently covered and would thus be inadequate.¹² One commentator has observed that notice on the back of the frame could be destroyed if the work were reframed, resulting in a subsequent innocent purchaser acquiring the work without any notice of copyright.¹³ The sculptor, meanwhile, faces the aesthetic dilemma of how to place the notice on his work so that it is both accessible and unobtrusive.

Since American artists invariably fail to place notice on their works,¹⁴ and artists in all other countries do not have the burden to do so, some of the most significant works created by American

Revision, 27 COPYRIGHT L. SYMP. (ASCAP) 245 (1982) (hereinafter Roth). See also Act of Oct. 19, 1976, 90 Stat. 2541, (codified at 17 U.S.C. 401(a) (1982)).

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.

Id. at § 401(a). See also *Krafft v. Cohen*, 117 F.2d 579, 580 (3d Cir. 1941) (copyright is secured on published material "by accompanying its publication with a copyright notice at the place and in the form required by the statute. . . . Publication without the proper notice is ineffective to secure . . . a copyright."); H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1907-1908); 2 NIMMER, *supra* note 7, at § 7.02-15.

⁹ See Roth, *supra* note 8.

¹⁰ Sheehan, *Why Don't Fine Artists Use Statutory Copyright? — An Empirical and Legal Survey*, 22 BULL. COPYRIGHT Soc'y 242, 250-61 (Oct. 1974), reprinted in 24 COPYRIGHT L. SYMP. (ASCAP) 157 (1980) [hereinafter Sheehan].

¹¹ *Id.*

¹² *Id. Cf. L. & L. White Metal Casting Corp. v. Cornell Metal Specialties Corp.*, 353 F. Supp. 1170, 1174 (E.D.N.Y. 1972) (the court acknowledged, in dicta, that notice which is permanently covered is inadequate because it fails to apprise anyone seeking to copy the work of the copyright; the court held that notice may have been permanently covered when a finished product was assembled; notice was sufficient where it was visible in raw metal castings which were to be copied).

¹³ Sheehan, *supra* note 10, at 260.

¹⁴ In a survey of 206 artists in 1973, approximately 72% acknowledged that they never placed a copyright notice on their work. Sheehan, *supra* note 10, at 249-250. Co-author Martin Bressler challenges these statistics. In most cases, despite a greater awareness concerning the formalities of copyright law, artists, nevertheless, do not place a notice of copyright on their work. To do so, artists maintain, would result in the defacement of their work, or in the public belief that their work was conceived as commercial. Although only 25% of the artists surveyed agreed wholeheartedly that a copyright notice on a work "defaces" it, 58% of the art gallery directors interviewed ascribed to this view. *Id.* at 256-57. Comments from these art professionals ranged from "people tend to think the work is a print or something commercial" to "the © symbol would debase an excellent artist." There is no reason to believe that the intervening years have caused this prevailing attitude to change. *Id.*

and European artists mingle in the public domain of the United States. Unfortunately for the artist, once a work is in the public domain, the artist or his estate loses both revenue from the work, and control over the nature and extent of reproductions made of his work.¹⁵

Until recently, the Copyright Act of 1976¹⁶ retained the notice requirement. While this requirement tempered the once severe and often fatal consequences to an author who omitted such notice,¹⁷ it did not eliminate the problems inherent in the technicalities of the requirement. As Professor Nimmer has said, "[t]hese formalities constitute a trap for the unwary . . ."¹⁸

A new effort at bringing our copyright law into the mainstream began when Senator Edward Kennedy (D. Mass.) introduced a bill in the Senate¹⁹ which amended the copyright law by exempting works of visual art from the requirement that they contain a notice of copyright in order to be protected. As this article went to press, the 100th Congress passed and the President signed legislation amending the copyright law, enabling the United States to adhere to the Berne Convention.²⁰ The Berne Convention Implementation Act follows the trend of bringing our copyright law into the mainstream by making the notice requirement for works of visual art optional.²¹

This paper takes the Kennedy bill and the Berne amendment one step further; it argues for its retroactive application to works

¹⁵ 2 NIMMER, *supra* note 7, at §§ 4.01(B) and 4.13(A).

¹⁶ 17 U.S.C. § 405 (1982).

¹⁷ Roth, *supra* note 8, at 245-46. This article includes a discussion of the legislative policies concerning the change in the notice of copyright provisions under the 1976 Act. The author takes the position that the new notice provision creates new problems, and that the best solution to these problems would have been to eliminate the notice requirement.

¹⁸ 2 NIMMER, *supra* note 7, at § 7.01.

¹⁹ Visual Artists Rights Act of 1987, S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. 11502 (daily ed. Aug. 6, 1987). This amendment to the copyright law would "secure the rights of authors of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration [or destruction] of such works." *Id.* The Act would also be compatible with the provision in the Paris text of the International Union for the Protection of Literary and Artistic Works [Berne Convention] concerning absence of notice. Art. 5(2) of the Paris Act states that: "[t]he enjoyment and the exercise of these rights shall not be subject to any formality. . . ." Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, art. 5(2), 828 U.N.T.S. 221, *reprinted in* 4 NIMMER, *supra* note 7, at §§ 27-1 to -14 [hereinafter Berne Convention].

²⁰ In the United States, the Berne Convention underwent minor legislative changes in the House before being passed on October 12, 1988. 134 CONG. REC. H10091 (daily ed. Oct. 12, 1988) (statement of Rep. Kastenmeier). The Senate ratified the Berne Convention, creating the Berne treaty, on Oct. 20, 1988. 134 CONG. REC. S16939 (daily ed. Oct. 20, 1988) (statement of Sen. Pell). The President signed the Treaty on October 31, 1988. *See generally* CONG. Q. 3135 (Oct. 29, 1988).

²¹ Sec. 7(a)(2), 134 CONG. REC. H10091 (daily ed. Oct. 12, 1988).

already published and in the public domain because of a failure to affix a notice of copyright. It is believed that the retroactive abolition of the notice requirement is more consistent with the Copyright Act's goal 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."²²

II. COPYRIGHT NOTICE: A HISTORY

The issue of proper notice of copyright has been a troublesome one, supported by a sketchy legislative history. Under the Copyright Acts of 1802²³ and 1831,²⁴ non-literary works were required to display a copyright notice on their face. The first explicit reference to the placement of a notice of copyright on literary and artistic works, whether completed or still in progress, appeared in the Copyright Act of 1870, which provided that notice had to be placed on some portion of the face or front of the completed work.²⁵ Under the Copyright Act of 1874, the stipulated location for notice on a work of art was omitted and replaced with the requirement that notice be affixed to some visible portion of the work.²⁶ This legislative liberalization of the notice requirement continued through the Act of 1882²⁷ to the 1909 Act, in which specific placement requirements applied only to "books or other printed publications, musical compositions, and periodicals."²⁸

In *Coventry Ware, Inc. v. Reliance Picture Frame Co.*,²⁹ the Second Circuit held that notice of copyright attached to the back of a wall plaque was sufficient. In the opinion written by Judge Clark, the court held that, except where specifically required by the Copyright Act of 1909, items (including works of art) were required to have a notice affixed to each copy. Thus, section 19 of the 1909 Act was held not to revive the requirements of frontal

²² U.S. CONST. art. I, § 8, cl. 8.

²³ Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

²⁴ Act of Feb. 3, 1831, ch. 16, 4 Stat. 436, 437.

²⁵ Act of July 8, 1870, ch. 230, 16 Stat. 198, 214.

²⁶ Act of June 18, 1874, ch. 301, 18 Stat. 78, 79.

²⁷ Act of Aug. 1, 1882, ch. 366, 22 Stat. 181.

²⁸ *Coventry Ware, Inc. v. Reliance Picture Frame Co.*, 288 F.2d 193, 195 (2d Cir.) cert. denied, 368 U.S. 818 (1961). See Copyright Act, ch. 320, 35 Stat. 1075, 1079 (1909) (codified as amended at 17 U.S.C. §§ 101-810 (1982 & Supp. 1986)).

²⁹ *Coventry Ware*, 288 F.2d at 195. (under 1909 Act, notice on back of a wall plaque was sufficient since no specific notice placement requirements were expressed by Congress for protecting works of art).

notice, absent an express legislative statement.³⁰

Consistent with the *Coventry* decision, the 1976 Copyright Act clearly indicates that copyright notice is not required to appear on the front of a work of art,³¹ so long as it is placed on some accessible portion of the work itself: on the margin, back, permanent base, pedestal, or on the substance on which the work is mounted,³² or affixed "in such manner and location as to give reasonable notice of . . . claim of copyright."³³ A copyright notice may also be placed on the underside of a three-dimensional work of art, provided that the underside is accessible to the observers.³⁴

What constitutes "reasonable" notice of copyright is generally an issue of fact. To be reasonable, notice need not be in a convenient or expected location (e.g., notice of copyright on the back of a painting that is hung on a wall and covered by a backing may be adequate).³⁵ Obscured notice may therefore be legally valid, even though it may frustrate the requirement's purpose. A work is unprotected, however, when notice is actually detached from the work. For example, in 1966, a sculpture by Pablo Picasso entered the public domain prematurely under the 1909 Act when a Chicago museum held press showings of a maquette of the sculpture, but placed the copyright notice on a wall in a separate part of the exhibition room.³⁶ The court held that such no-

³⁰ *Id.* See 17 U.S.C. §§ 10, 19, 20 (1909) (repealed 1978).

³¹ *Id.*

³² 17 U.S.C. § 401(c) (1982); see 17 U.S.C. § 19 (1909) (repealed 1978).

³³ 17 U.S.C. § 401(c) (1982).

³⁴ *Royalty Designs, Inc. v. Thriftcheck Service Corp.*, 204 F. Supp. 702, 704 (S.D.N.Y. 1962) (notice on bottom of plastic molded bank is valid under 1909 Act); *Prestige Floral, Societe Anonyme v. California Artificial Flower Co.*, 201 F. Supp. 287, 291 (S.D.N.Y. 1962) (notice on the underside of a polyethylene flower is valid under 1909 law); see also *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489-490 (2d Cir. 1960) (a copyright notice in the selvage or printed cloth did not constitute sufficient notice, as it was cut off or permanently concealed; However, the burden, according to Judge Learned Hand, was on the defendant-infringer, who was attacking the sufficiency of the notice, to prove that "'notice' could have been embodied in the design without impairing its market value"; due to the lack of evidence produced by defendant, the defense of insufficient notice failed).

³⁵ See generally Sheehan, *supra* note 10; see also 2 NIMMER, *supra* note 7, at § 7.10 [A], 7-53.

³⁶ *Letter Edged in Black Press v. Public Bldg. Comm'n of Chicago*, 320 F. Supp. 1303, 1308-09 (N.D. Ill. 1970). Cf. *Uneeda Doll Co. v. Goldfarb Novelty Co.*, 373 F.2d 851 (2d Cir.), *cert. dismissed*, 389 U.S. 801 (1967) (abbreviation of "U. D. Co. Inc. © 1965," copyright notice which appeared on the sole of a doll's foot, when read together with the "© Uneeda Doll Co., Inc. 1966" on the cardboard package, constituted sufficient notice), *superceded by statute as stated in* *Lifshivitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426 (9th Cir. 1986). *But cf.* *American Vitagraph, Inc. v. Levy*, 659 F.2d 1023 (9th Cir. 1981) (in contrast to the *Letter Edged* case, the court held that a one-week public screening of a motion picture, after which the film was returned for reediting, did not divest the work of its common law copyright under the 1909 Act).

tice was improper, especially since the press was not advised that copyright protection was being asserted. Since the pre-exhibition showing of the maquette constituted a general publication, copyright protection was lost and the finished sculpture was thrust into the public domain because the maquette from which it was derived lacked protection.

A. English Roots

The precursor of the copyright notice requirement can be found in sixteenth century England, where notice indicated that the printer of a publication had received from the Crown the exclusive right to print and sell copies of a work.³⁷ The purpose of royal patents and grants was not to protect an author's work from alteration or exploitation, but to enforce King Henry VIII's political and religious orthodoxy.³⁸

This form of censorship culminated with Queen Mary Tudor when she established a monopoly over the printing of books through a charter with the Company of Stationers, a group that was authorized by the Crown to seize and destroy works.³⁹ In addition to enforcing royal censorship, this effectively enabled the Company of Stationers to decrease and eliminate any competition with non-member printers.⁴⁰

After the passage of the Statute of Anne by Parliament in 1710,⁴¹ which provided statutory protection of works for a possi-

³⁷ Abrams, *The Historic Foundation Of American Copyright Law: Exploding The Myth Of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1135 (1983) [hereinafter Abrams]; see also 1 NIMMER, *supra* note 7, at § 4.02.

³⁸ 1 NIMMER, *supra* note 7, at § 4.02.

³⁹ Abrams, *supra* note 37, at 1135-36. EBENSTEIN, *Introduction to S. ROTHENBERG, COPYRIGHT LAW: BASIC AND RELATED MATERIALS* at xv (1956).

⁴⁰ Abrams, *supra* note 37, at 1135-39.

⁴¹ 8 Anne ch.19 (1710). The statute stated that it was:
An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.

WHEREAS Printers, Booksellers and other Persons have of late frequently taken the Liberty of printing, reprinting and publishing . . . Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to the [sic] their very great Detriment, and too often to the Ruin of them and their Families.

Id. at § I.

[It should be noted that the "8" in 8 Anne ch.19 represents the eighth year of Anne's reign. As to this, there is no historic confusion. However, one encounters different chapter numbers for the statute in question depending on which English statutory compilation one consults. The compilation most often cited, THE STATUTES AT LARGE (published in 1763), places the statute in question at ch.19. On the other hand, THE STATUTES OF THE REALM (published in 1822) identifies this statute as ch.21, substituting at ch.19 a statute regulating the "Price and Assize of Bread". The statute concerning bread appears at ch.18 in THE STATUTES AT LARGE. One reason sometimes given for the

ble twenty-eight year period, the issue of notice receded to the background as both English and American courts debated whether common law copyright protection existed. In *Donaldson v. Becket*,⁴² the House of Lords held that common law copyright did not exist, but if it did, such protection would be preempted by the Statute of Anne. However, in a subsequent six to five non-binding decision, an advisory court in *Donaldson* ruled that (1) perpetual common law copyright existed but could not protect a work longer than it would be protected under the Statute of Anne; and (2) that all remedies not statutorily provided were to be excluded, regardless of whether the work was published.⁴³ Although the decision of the House of Lords was binding as applied to American copyright law, this issue remained a source of debate.⁴⁴

Confronted by the conflict and uncertainty in the copyright law in England, American law attempted to reconcile these contradictions. Prior to the ratification of the Constitution, each state adopted its own copyright laws, stressing that copyright was the right of an author that attached upon the creation of a work.⁴⁵ After enactment of the Copyright Clause,⁴⁶ the Supreme Court, in *Wheaton v. Peters*,⁴⁷ acknowledged in dictum that copyright was a property right of an author that attached upon creation of the work until after its publication. The Court held, however, that American federal copyright was strictly a Constitutional and statutory creation that did not have a common law basis.⁴⁸ The principle in *Wheaton v. Peters* permitting state and federal copyright remained the law until enactment of the current statute.

B. The 1909 Act

The Copyright Act of 1909⁴⁹ recognized the co-existence of common law copyright under state law (which protected a work in perpetuity from its creation, or until the time of its divestive

differing chapter numbers in later statutory compilations as opposed to in earlier ones is that the subsequent discovery of local statutes was not presented in earlier compilations.]

⁴² 17 PARL. HIST. ENG. 953 (1774), 4 Burr. 2408 (1774).

⁴³ *Id.* See also Abrams, *supra* note 37, at 1163-71.

⁴⁴ Abrams, *supra* note 37, at 1135-40.

⁴⁵ *Resolution of May 2, 1783, Journals of Continental Cong. 1774-1789*, at 326-27 (1922), cited in Abrams, *supra* note 37, at 1173-74 and n.218.

⁴⁶ U.S. CONST. art. I, § 8, cl. 8.

⁴⁷ 33 U.S. (8 Pet.) 591, 657, 661 (1834); see also Abrams, *supra* note 37, at 1135.

⁴⁸ *Wheaton*, 33 U.S. (8 Pet.) at 660-62; see also Abrams, *supra* note 37, at 1185.

⁴⁹ Copyright Act of 1909, ch. 320, § 2, 35 Stat. 1075, 1076 (codified as amended at 17 U.S.C. § 2 (1947)) (repealed 1976; effective Jan. 1, 1978) [hereinafter 1909 Act].

publication),⁵⁰ and federal statute (which protected the work for a maximum term of fifty-six years from its publication).⁵¹ To secure federal protection under the 1909 Act, all published copies of the work had to bear the requisite notice of copyright.⁵² If copies of a work were published without notice, copyright would be forfeited under both the common law and federal statute.⁵³

The notice requirement for the protection of pictorial, graphic and sculptured works was more flexible under the 1909 Act than under the 1976 Copyright Act. Under the 1909 Act, copyright notice for visual works was not required to include the year of first publication or the copyright owner's name.⁵⁴ Instead, the copyright owner's initials, monogram or symbol with an encircled "c" (©) was sufficient, as long as it was on some accessible portion of the work, or on the material upon which it was mounted.⁵⁵ Under the 1976 Copyright Act, notice of copyright necessitates the © symbol, the author's name and the year of publication.⁵⁶

Under the 1909 Act, artists could forfeit their copyright if a work was published through an exhibition or offer of sale without any appropriate notice affixed to the work, except when the exhibitor actively enforced restrictions on reproducing the work on display,⁵⁷ or when it was tacitly understood by all that copying was prohibited.⁵⁸ There was also no divestment by publication if

⁵⁰ Publication with notice divested common law copyright and invested statutory copyright. Roth, *supra* note 8, at 250.

⁵¹ 1909 Act, *supra* note 49, at §§ 23-24, 35 Stat. at 1080-87, codified as 17 U.S.C. § 2 (1909) (repealed 1976).

⁵² 17 U.S.C. § 24 (1909) (repealed 1976). See also 17 U.S.C. § 19 (1909) (repealed 1976) (the year of the first publication had to appear in the notice of copyright only in the cases of printed literary musical and dramatic works).

⁵³ 17 U.S.C. § 21 (1909) (repealed 1976).

⁵⁴ 17 U.S.C. § 5(k) (1909) (repealed 1976) (under the 1976 Act, the year of first publication is required on notice of copyright for all copyrightable works, in addition to the copyright symbol, and the name of the owner of the work).

⁵⁵ *Id.*

⁵⁶ 17 U.S.C. § 401 (1982). However, "[t]he year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles. . . ." *Id.* See also Roth, *supra* note 8, at 264.

⁵⁷ Roth, *supra* note 8, at 246-47. See *Letter Edged in Black Press v. Public Bldg. Comm'n of Chicago*, 320 F. Supp. 1303, 1308-09 (N.D. Ill. 1970). In *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 300 (1907), the Supreme Court held that, under the predecessor to the 1909 Act, the public exhibition of a work of art without notice of copyright did not constitute a divesting publication where there was a prohibition against copying.

⁵⁸ *Scherr v. Universal Match Corp.*, 297 F. Supp. 107, 112 (S.D.N.Y. 1967) (government statue exhibited without visible notice of copyright and no restrictions regarding copying constituted a divestive publication), *aff'd on other grounds*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 428 F.2d 551 (2d Cir. 1970) (Section 21 of 1909 Act applied when copyright notice was

the notice was omitted by mistake, provided that the copyright owner sought to comply with the notice provision.⁵⁹

Although some courts provided judicial relief from the stringent notice provision by holding that substantial and good faith compliance with the statute was sufficient,⁶⁰ this was not always the case. In *Peter Pan Fabrics v. Martin Weiner Corp.*,⁶¹ for example, the Second Circuit held that notice of copyright on the selvage of a cloth was valid despite the plaintiff's knowledge that it would be cut off and that ultimate purchasers would not have notice of the copyright. Justice Learned Hand emphasized that the burden would be placed on the deliberate copyist to prove the absence of actual notice and that "'notice' could have been embodied in the design without impairing its market value."⁶² Another court held that a copyright owner could publish only one or two copies of his work without notice of copyright before a court would declare that a forfeiture of both statutory and common law copyright had occurred.⁶³ It was thought that anything less stringent would give the impression that courts found notice of copyright optional.⁶⁴

C. Copyright Act of 1976

In drafting the current copyright law, Congress walked a fine line between mitigating the potentially adverse results caused by the omission of notice of copyright under the 1909 Act, and re-

obscured on five out of 300 copies of a pin). For a discussion of the stringent application of this "accident or mistake" under section 21, see 2 NIMMER, *supra* note 7, at § 7.13[A], 7-88.2 to 7-93.

⁵⁹ See 17 U.S.C. § 21 (1909) (repealed 1976).

⁶⁰ See, e.g., *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960); see also, *Freedman v. Grolier Enterprises, Inc.*, 179 U.S.P.Q. (BNA) 476, 479 (S.D.N.Y. 1973) (copyright protection for a deck of playing cards existed even though notice of copyright was placed on only one card).

⁶¹ See *Peter Pan*, 274 F.2d at 490; see also *L & L White Metal Casting Corp. v. Joseph*, 387 F. Supp. 1349, 1355 (E.D.N.Y. 1975) (placement of notice of copyright on first page of supplement and not in the main text "render[ed] the notice defective and invalidate[d] the copyright protection."); *Sieff v. Continental Auto Supply, Inc.*, 39 F. Supp. 683 (D. Minn. 1941) (mere negligence or oversight would not be excused even if only one copy was published without notice of copyright); *Strauss v. Penn Printing & Publishing Co.*, 220 F. Supp. 977 (E.D.Pa. 1915) (smearing of printing plate resulting in defective notice excusable; omission of notice on most or all copies published not excused); 17 U.S.C. § 21 (1909) (repealed 1976).

⁶² *Peter Pan*, 274 F.2d at 490.

⁶³ *Transgo, Inc. v. Ajac Transmission Paris Corp.*, 768 F.2d 1001, 1019 (9th Cir. 1985) (citing 17 U.S.C. § 405(a)(1)(1982)). *But cf. Lopez v. Electrical Rebuilders, Inc.*, 416 F. Supp. 1133, 1135 (1976) (where copyright notice was omitted from eleven entire issues of automobile distributor catalogue, copyright proprietor was not entitled to protection of 17 U.S.C. § 21).

⁶⁴ S. REP. NO. 473, 94th Cong., 1st Sess. 47 (1975). See *Peter Pan*, 274 F.2d at 491.

pealing the notice requirement altogether.⁶⁵ Acknowledging that the United States was virtually the only country that imposed the notice requirement, authors, artists and scholars, including the late Professor Nimmer, lobbied for its elimination.⁶⁶

In addition to abandoning the distinction between state common law copyright and federal statutory copyright, and providing protection of a work for the life of the author plus fifty years,⁶⁷ the current law, like its predecessor, requires that a notice of copyright be placed on all publicly distributed copies whenever a work is published in the United States or elsewhere.⁶⁸ Under the 1976 Act, however, an omission of the notice of copyright will not automatically result in copyright forfeiture. Instead, there is a statutory grace period of five years within which one must register the published work with the Copyright Office and attempt to cure the inadequate notice within the United States.⁶⁹

Although the 1976 Act provides that a public display of a work does not in itself constitute a divesting publication — a provision beneficial to the artist — the definition of publication is nonetheless troublesome for the artist. Under the Act, a “publication” of a work is defined as the *offering or actual distribution of copies* of a work to a *group* of people for the purpose of further distribution, public performance, or public display.⁷⁰

One question that emerges is whether an original work of art is a “copy” which, if distributed, would be “published.” Copies are defined in Section 101 of the Copyright Act as including “the material object . . . in which the work was first fixed.”⁷¹ An original work of art thus constitutes a copy as the term is expressed in the definition of publication. Consequently, a notice of copyright must be affixed to an original if it were, for example, exhibited in a gallery to facilitate its sale. Under this definition, the law regarding what constitutes a divestive publication remains the

⁶⁵ Roth, *supra* note 8, at 246.

⁶⁶ *Id.* at 260-61. See also H.R. REP. NO. 1476, 94th Cong., 2d Sess. 143, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5662. (Nearly 100 witnesses testified before Rep. Kastenmeier.)

⁶⁷ 17 U.S.C. § 302(a) (1982).

⁶⁸ 17 U.S.C. § 104(b) (1982).

⁶⁹ 17 U.S.C. § 405 (a)(2) (1982).

⁷⁰ See 17 U.S.C. § 101 (1982) amended by 17 U.S.C. § 101 (Supp. IV 1987).

⁷¹ *Id.* See also Kunstadt, *Can Copyright Law Effectively Promote Progress in the Visual Arts?*, 25 COPYRIGHT L. SYMP. (ASCAP) 159, 183-85 (1980) [hereinafter Kunstadt] (the purpose of defining publication this way is to prevent the loss of profits by a copyright owner engaging in a single distribution, while simultaneously preventing the “would-be copiers,” like theater owners and television stations, from escaping the effect of “publication” by the author).

same.⁷²

Professor Nimmer has attempted however, to distinguish between a public display and a publication of an original work of art. According to his analysis, a display of a work of art that does not carry a copyright notice and is not concurrently offered for sale to the public with consent of the copyright owner, would not constitute a divestive publication.⁷³ Thus, a “publication” of an original work of art includes two elements: public display and a concurrent offer to sell the work.⁷⁴ This view differs from that of Representative Robert W. Kastenmeier (D. Wis.), Chairman of the House Copyright Subcommittee. Representative Kastenmeier has stated that the subcommittee did not intend to include the display of an original work of art for purposes of securing a sale as a divestive publication.⁷⁵

The current definition of publication apparently fails to reconcile the fact that the exhibition and sale of a work of art to the public are frequently intertwined in the same event. The pure exhibition of an artist’s work is often an unintended overture to sell the original as well as copies of that work.⁷⁶

⁷² Kunstadt, *supra* note 71, at 184 (quoting A. BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION (3rd ed. 1968)). See 1 NIMMER, *supra* note 7, at § 4.04. Nimmer discusses how Congress deliberately omitted a definition of “publication” because of the difficulty of defining the term with respect to works of art where no copies are reproduced. See also Kunstadt, *supra* note 71 at 186; cf. Hubco Data Products Corp. v. Management Assistance, Inc., 219 U.S.P.Q. (BNA) 450, 455 (D. Idaho 1983) (the distinction between general publication and “limited publication” is still valid under the current copyright act).

⁷³ See 17 U.S.C. § 101 (1982). See also 1 NIMMER, *supra* note 7, at § 4.04.

⁷⁴ 17 U.S.C. § 101 (1982) (definition of “publication”). See also 1 NIMMER, *supra* note 7, at § 4.04.

⁷⁵ 1 NIMMER, *supra* note 7, at § 4.09 n.2, quoting Chairman Kastenmeier’s statement:

I would like to discuss several questions which have been raised concerning the meaning of several provisions [of the copyright bill]. . . . One of these questions involves the meaning of the concept of ‘publication’ in the case of a work of art, such as a painting or statue, that exists in only one copy. It is not the committee’s intention that such a work would be regarded as ‘published’ when the single existing copy is sold or offered for sale in the traditional way — for example, through an art dealer, gallery, or auction house. On the other hand, where the work has been made for reproduction in multiple copies — as in the case of fine prints such as lithographs — or where multiple reproductions of the prototype work are offered for purchase by the public — as in the case of castings from a statue or reproductions made from a photograph of a painting — publication would take place at the point when reproduced copies are publicly distributed or when, even if only one copy exists at that point, reproductions are offered for purchase by multiple members of the public.

Id. (quoting 122 CONG. REC. H 10,874-75 (daily ed. Sept. 22, 1976)).

⁷⁶ One commentator questioned:

whether a commercial publisher of art reproductions, aware of the copyright statute’s provisions for curing the omission of notice [would] ever be able to establish that he was innocently misled by the omission notice on a work of

The consequences of the distinctions between "public display" and "publication" are more than academic in nature. As explained by the Court in *American Tobacco Co. v. Werckmeister*,⁷⁷ if an otherwise unpublished work of art (lacking copyright notice) was publicly exhibited for any purpose, such a display could, under certain circumstances, constitute divestive publication, and would inject the work into the public domain.

Under the proposed amendment,⁷⁸ a work of art, and copies of such works that have been unintentionally thrust into the public domain, would be afforded retroactive protection, regardless of whether a notice of copyright was affixed to the work. Thus, the distinction between a *public display* of an original work and a *publication* of the work would disappear.⁷⁹ Similarly, the concept of publication of works of art as a means of divesting copyright protection would, under the proposed amendment, cease to have any relevance.

As observed by the Supreme Court in *Werckmeister*, reliance on a notice of copyright is minimal when an original work of art is involved because:

It [is] clear that the real object of the [1909] statute is not to give notice to the artist or proprietor of the painting or the person to whose collection it may go . . . but [the object is] to notify the public who purchase the circulated copies of the existing copyright in order that their ownership may be restricted.⁸⁰

The policies underlying subsection 405(b) of the present statute provide the strongest argument for the need to eliminate the notice requirement.⁸¹ Recognizing the need to strike an equitable balance between the rights of the copyright owner and those of the subsequent user or buyer who may be misled by an omitted notice, Congress limited the remedies available against innocent infringers. According to the Act, an infringer misled by inadvertent absence of notice from a copy published under the copyright owner's authority is not liable for actual or statutory damages for any acts committed

art, especially if the work's style [clearly indicates] that the work is less than fifty years old.

Kunststadt, *supra* note 71, at 186. See 17 U.S.C. § 405 (1986).

⁷⁷ 207 U.S. 284 (1907), *superseded by statute as stated in* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1984).

⁷⁸ See *supra* note 19 and accompanying text.

⁷⁹ *American Tobacco*, 207 U.S. at 284.

⁸⁰ *Id.* at 294.

⁸¹ H.R. Doc. No. 1476, 94th Cong., 2d Sess. 148 (1976).

before receiving actual notice that the work has been registered.⁸² However, the infringer bears the burden of proving that he was misled by the omission of notice.⁸³ Even if the infringer meets this burden, the court can still enjoin further infringement and award the copyright owner profits attributable to the infringement.⁸⁴

Thus, under subsection 405(b), one who purchases or begins to use a work without knowing it is copyrighted "should ordinarily be able to assume that [the] work is in the public domain if there is no notice on an authorized copy . . ." ⁸⁵ The statute provides that good faith reliance on such an assumption will shield the infringer or purchaser from unreasonable liability.⁸⁶ This provision indicates how Congress has attempted to reconcile the right of an author to be compensated for copyright infringement with the right of innocent infringers not to be penalized for their good faith reliance on an omitted notice of copyright.⁸⁷ The Berne Convention Implementation Act further addresses the availability of the innocent infringement defense, and states that the presence of a notice of copyright constitutes such a defense.⁸⁸

D. Proposed Copyright Legislation

In recent years, visual artists and others have become more aware of the need to protect proprietary rights in their creations and reputations, beyond the confines of the current Copyright Act. Recent legislation in such states as New York⁸⁹ and California⁹⁰ provides a separate set of moral rights and remedies to art-

⁸² 17 U.S.C. § 405(b)(1986).

⁸³ *Id.* See S. REP. DOC. NO. 473, 94th Cong., 1st Sess. 131 (1975).

⁸⁴ *Id.*

⁸⁵ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 148, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 5659, 5764 (1976).

⁸⁶ *Id.*

⁸⁷ See *Ruskin v. Sunrise Management, Inc.*, 506 F. Supp. 1284, 1289 (D. Colo. 1981) (defendant failed to prove, as a matter of law, that he reasonably relied on an absence of notice on plaintiff's phonorecord).

⁸⁸ See H.R. 4262, 100th Cong., 2d Sess., 134 CONG. REC. 10091-94 (1988), § 301(d), § 7(b)(4)(d) 134 CONG. REC. H10093 (daily ed. Oct. 12, 1988) (statements of Rep. Kastenmeier).

⁸⁹ N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1988) (law gives artists exhibiting work within the state the legal right to claim or disclaim authorship of a work of art and to object to the display of their work if it has been altered, defaced, mutilated or modified without their consent).

⁹⁰ California Art Preservation Act, ch. 409, § 2, CAL. CIV. CODE § 987 (West 1988). The California statute serves both as an art conservation law, *id.* at (c), as well as a moral rights law. It protects works of art of "recognized quality" while the New York statute does not adopt this standard; the New York statute instead "conservatively approximates its European statutory counterparts [which contain a broad definition of art without a reference to quality]." Note, *The New York Artists, Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 160-73 (1984).

ists to redress damage to both their work and their reputation, independent of the current federal copyright law. These state-created rights are not contingent upon a work of art having copyright protection and are not preempted by federal copyright law.⁹¹ Indeed, our Congress has relied upon state law to avoid amending the copyright law to include a "moral rights" provision. In supporting the Berne amendment, Senator Dennis DeConcini (D. Ariz.) concluded that no new "moral rights" language was necessary since the existing U.S. and state laws are "adequate to conform to Berne."⁹² Apart from the current copyright law, all other attempts to enact federal legislation that recognizes the unique problems of visual artists have failed. Efforts to enact federal legislation establishing a *droit moral* ("moral right") for artists in the United States have been unsuccessful since 1940.⁹³

A new effort at bringing American copyright law into the mainstream is underway. Senator Edward Kennedy (D. Mass.) has introduced a bill in the Senate that not only provides for the moral rights of the visual artist, but also amends the copyright law by excepting works of visual arts from the notice requirement.⁹⁴

The Kennedy amendment provides: "The provisions of this section [regarding the requirement of notice of copyright] shall not apply to pictorial, graphic, or sculptural works."⁹⁵

Section 401 of the current copyright law provides in part: "[w]henever 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

⁹¹ See 17 U.S.C. § 104(c) (amended 1988):

Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

See also *Goldstein v. California*, 412 U.S. 546 (1973) (state anti-"record piracy" statute, as applied prior to the federal copyright law, was silent regarding federal protection of such recordings).

⁹² S. 1301, 100th Cong., 2d Sess., 134 CONG. REC. 14553 (1988).

⁹³ See, e.g., H.R. 1521, 98th Cong., 1st Sess., 129 CONG. REC. H578-79 (1983); H.R. 8261, 95th Cong., 1st Sess., 123 CONG. REC. 22,733 (1977). The 1977 bill was the first attempt to amend the 1976 Act. It was offered by Rep. Robert Drinan and would have provided express recognition of the rights of "paternity" and of "integrity" for American artists. Both bills have failed to move out of the House Judiciary Committee. See also S. 3043, 76th Cong., 3d Sess., 86 CONG. REC. 63-77 (1940).

⁹⁴ See *supra* note 19.

⁹⁵ S. 1619, 100th Cong., 1st Sess. § 5, 133 CONG. REC. S 11502-11503 (daily ed. Aug. 6, 1987).

publicly distributed copies"⁹⁶

Section 405(a) of the copyright law sets forth the consequences of failure to comply with section 401. It provides, in part, that:

[T]he omission of the copyright notice . . . from copies . . . 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 . . . distributed to the public; or

(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 . . . 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 . . . they bear the prescribed notice.⁹⁷

The policy behind section 405(a) is clear. It prevents an artist's work from being thrust into the public domain simply because the artist failed to place a copyright notice on it. Section 405 reflects a legislative intent to correct a defective or omitted notice so that work lacking proper notice will not enter the public domain,⁹⁸ however it only partially ameliorates this Draconian result. Not surprisingly, the cases interpreting this section are unclear and inconsistent.⁹⁹

Although the question is not addressed, one can assume that the notice provision of the Kennedy amendment is to be applied prospectively only, and thus does not go far enough to protect the rights of artists. Under our proposed amendment (see appendix), the notice provision of the Kennedy amendment would be applied retroactively to all works of art otherwise protected under the existing statute, but for the artist's failure to attach copyright notice. Constitutional arguments that retroactivity would violate both the *ex*

⁹⁶ 17 U.S.C. § 401(a) (1982) (emphasis added).

⁹⁷ *Id.* at 405(a).

⁹⁸ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 146-47, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5762-63.

⁹⁹ See *O'Neill Dev. Inc. v. Galen Kilburn, Inc.*, 524 F. Supp. 710, 713-15 (N.D. Ga. 1981) (copyright owners may cure an omission of notice, regardless of whether the omission was unintentional or deliberate, under 17 U.S.C. § 405 (a)(2)); *Cf. Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305, 1312-13 (S.D.N.Y. 1982) (§ 405(a)(2) can be properly used only to cure "mistaken or accidental omissions of notice.").

*post facto*¹⁰⁰ and due process¹⁰¹ clauses can be anticipated. But as demonstrated below, there are substantive rebuttals to those interpretations.¹⁰²

III. RETROACTIVITY AND DUE PROCESS

Before addressing the retroactivity of copyright provisions, it is necessary to review the constitutionality of retroactive legislation generally. The legislative disfavor for retroactive legislation is rooted in the constitutional prohibition of *ex post facto* laws which reach back to impose criminal liability on acts lawful at the time they were performed.¹⁰³ The ban on *ex post facto* criminal statutes, however, has no counterpart by which to evaluate the constitutionality of retroactive civil legislation.¹⁰⁴ The only provision potentially available to condemn retroactive (federal) civil legislation is the fifth amendment's Due Process Clause.¹⁰⁵

Many courts have rejected retroactive legislation because of its inherent unpredictability and disparate treatment of certain classes of people (*e.g.*, lawyers barred from practice for having given counsel under certain assumptions of law later declared invalid by the legislature).¹⁰⁶ The mere fact that a civil statute applies retroactively does not, however, render it unconstitutional. The Supreme Court has held that retroactively-applied legislation which readjusts parties' burdens and rights is not *per se* unconstitutional simply because it upsets otherwise settled expectations, or imposes new duties or liabilities on acts per-

¹⁰⁰ U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or *ex post facto* Law shall be passed.") (emphasis added).

¹⁰¹ *Id.* at amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

¹⁰² See *infra* discussion notes 103-131 and accompanying text.

¹⁰³ See *supra* note 100.

¹⁰⁴ Thus, prior to the enactment of the fourteenth amendment, a state law with retroactive effect could constitutionally operate to divest a property owner of his rights, unless it fell within other constitutional prohibitive clauses, such as the Bill of Attainder and Contract clauses. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, § 11.9 at 384 (3d ed. 1986); 16A AM. JUR. 2D, *Constitutional Law*, §§ 653, 666 (1979). Bills of Attainder were acts of Parliament that permitted a sentence of death or a term of exile against an accused person. There were also bills of "pains and penalties" which inflicted a milder punishment (*e.g.*, forfeiture of civil rights and property rights). Three elements collectively constitute a Bill of Attainder: (1) nonjudicial punishment; (2) lack of a judicial trial; and (3) specificity in identification of the individuals affected. See *United States v. Brown*, 381 U.S. 437 (1965) (a federal labor law which made it a crime for a Communist Party member to serve as an officer of a labor union was found unconstitutional as a Bill of Attainder).

¹⁰⁵ See *supra* note 101.

¹⁰⁶ See *Butcher v. Maybury*, 8 F.2d 155 (W.D. Wash. 1925); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866).

formed in the past.¹⁰⁷

In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,¹⁰⁸ Justice Brennan, speaking for a unanimous Court, held that a retroactively-applied federal pension statute did not violate the fifth amendment's Due Process Clause.¹⁰⁹ The Court observed that legislation affecting economic life is *presumed* to be constitutional, and that the party claiming a violation of due process bears the burden of proving that the legislature acted in an arbitrary and irrational manner.¹¹⁰ In addressing the constitutionality of federal, retroactive legislation, the Court stated that:

[There is] . . . the strong deference accorded legislation in the field of national economic policy [that] is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches

. . . [R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects But, that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.¹¹¹

In holding that retroactivity could be constitutional, the Court adopted a rational-basis test rather than the more restrictive four-prong test established by the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*¹¹² The Court observed that although

¹⁰⁷ See, *e.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (state statute requiring a plaintiff to post security in a shareholder derivative suit to cover reasonable court expenses was not unconstitutional merely because, by its terms, it was applicable to actions commenced prior to its enactment, as long as the suit was pending on the effective date of the statute); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-18 (1976). In establishing a test for evaluating the constitutionality of retroactive legislation, the Court observed that "[t]he retrospective . . . as well as the prospective aspects [of legislation] must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.* at 17.

¹⁰⁸ 467 U.S. 717 (1984).

¹⁰⁹ *Id.* at 720.

¹¹⁰ *Id.* at 729 (citing *Usery v. Turner Elkhorn Co.*, 428 U.S. 1 (1976)).

¹¹¹ *Id.* at 729-30. Cf. *Nachman v. Pension Benefit Guar. Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980).

¹¹² 592 F.2d 947, 960 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). According to the Seventh Circuit:

Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected; . . . whether the impairment of the private interest is effected in an area previously subjected to reg-

the more stringent standard of review in *Nachman* was applicable when evaluating the constitutionality of a state statute under the Contract Clause, it was not applicable when reviewing the constitutionality of federal legislation.¹¹³ Finally, the Court acknowledged that it was adopting the standard established in *Usery v. Turner Elkhorn Mining Co.*,¹¹⁴ stating that retroactive civil legislation offends due process only if it is arbitrary and irrational.

The *Gray* decision drew upon the Court's earlier opinion in *Turner Elkhorn*, which addressed the issue of how a retroactive statute affected a party's reliance upon the law prior to the enactment of retroactive legislation.¹¹⁵ In *Turner Elkhorn*, twenty-two coal mining operators challenged the constitutionality of a federal statute establishing a program to compensate victims of pneumoconiosis (Black Lung Disease). Under the statute, the coal mine operators were liable for claims filed after a certain date. The mine owners argued that requiring them to compensate former employees who had stopped working prior to the statute would impose liability for acts or omissions that were legal when committed.¹¹⁶ In addressing the reliance interests of the coal mine operators, the Court concluded that it was only one of several factors which must be taken into account when determining the constitutionality of retroactive legislation.¹¹⁷

In adopting the *Turner Elkhorn* rationale, the courts have generally emphasized such factors as the nature and strength of the policy interest served by the statute, the extent to which the new statute modifies or abrogates the asserted pre-enactment rights, and the nature of the right changed by the statute.¹¹⁸ The standard established in *Turner Elkhorn* is whether the effects of retroactive legislation are wholly unexpected, harsh and oppressive.¹¹⁹ In *Turner Elkhorn*, the Court deferred to Congress to assess the wisdom of the legislation since the operation and effect of the statute fell within the parameters of due process.

ulatory control, . . . the equities of imposing the legislative burdens, . . . and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens.

592 F.2d at 960 (citations omitted).

¹¹³ *Gray*, 467 U.S. at 733. (the Court decided to use the "less searching standards imposed on economic legislation by the Due Process Clauses.")

¹¹⁴ *Turner Elkhorn*, 428 U.S. 1, 14-20, cited in *Gray*, 467 U.S. at 733.

¹¹⁵ *Gray*, 467 U.S. at 728-29.

¹¹⁶ *Turner Elkhorn*, 428 U.S. at 14-20.

¹¹⁷ *Id.*

¹¹⁸ See Hochman, *The Supreme Court and The Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697 (1960); DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U.L. REV. 253, 255-59 (1983).

¹¹⁹ *Turner Elkhorn*, 428 U.S. at 17.

The question of whether a retroactive statute abrogates vested rights should be considered when determining whether a retroactive statute is arbitrary and irrational.¹²⁰ "[T]he term 'vested right' is conclusory — a right is vested when it has been so far perfected that it cannot be [divested] by statute."¹²¹ Upon further analysis, the concepts of vested rights and reliance appear to be intertwined because most vested rights are defined in terms of whether expectations were speculative (unreliable and not vested) or were reasonable (reliable and vested).¹²²

In functional terms, the question thus becomes whether the right in issue has been perfected, or whether it is merely vague and speculative, like a remote possibility of a reversion in real property.¹²³ Framing the inquiry in this way allows courts to put aside the conclusory label "vested rights," and instead inquire into the party's actual expectations and the reasonableness of those expectations.¹²⁴

A central question in challenging a retroactive statute is whether the plaintiff's conduct, or that of others in the same class, would have been different had the disputed law been applied from the outset,¹²⁵ and whether the law's retroactive application has put the plaintiff and others in a relatively worse condition.

In the wake of *Turner Elkhorn* and *Gray*, courts have placed less weight on the principle that retroactive statutes cannot abolish fifth amendment property rights, and instead emphasize the need to evaluate the elements of expectation.¹²⁶

In *United States v. Conservation Chemical Co.*,¹²⁷ for example, the

¹²⁰ *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977).

¹²¹ Hochman, *supra* note 118, at 696. Cf. *Fisch v. General Motors Corp.*, 169 F.2d 266, 270 (6th Cir. 1948) (termination of employees' prior rights to recover damages under the Portal-to-Portal Act held constitutional; person challenging the constitutionality of a statute has the burden of proof).

¹²² See Hochman, *supra* note 118, at 696; see also *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 602 (Fed. Cir.), modified on other grounds, 771 F.2d 480 (Fed. Cir. 1985) ("The frustration of reasonable, investment-backed expectations is a factor to be considered in Fifth Amendment analysis . . .").

¹²³ Hochman, *supra* note 118, at 696-97.

¹²⁴ *Id.* See *Mercado e Hijos v. Feliciano*, 260 F.2d 500 (1st Cir. 1958) (the federal government's exercise of eminent domain over Puerto Rican land, destroying one individual's right of reversion, held legally binding and constitutional, in accordance with the Foraker Act); *Fisch*, 169 F.2d at 270.

¹²⁵ See *Adams Nursing Home of Williamstown, Inc. v. Matthews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977) (the retroactive application of a regulation under the Medicare Act upheld as constitutional because only a small private interest was affected by the rule, and had the rule been established sooner, plaintiff and others like him would have acted in a substantially similar manner); *Fairfax Nursing Center, Inc. v. Califano*, 590 F.2d 1297, 1302 (4th Cir. 1979).

¹²⁶ *Adams*, 548 F.2d at 1081.

¹²⁷ 619 F. Supp. 162, 220-22 (W.D. Mo. 1985).

court held that the retroactive application of a federal statute allowing the United States to recover costs incurred in cleaning up hazardous waste sites was constitutional because the statute met the three-prong test for evaluating a substantive due process challenge. The test applied by the court provided "that the legislation have a rational purpose; be rationally related to a legitimate government objective; and not be 'arbitrary and capricious.'" ¹²⁸ The court held that once the retroactive statute passes this threshold, the burden shifts to the party challenging the constitutionality of the statute to establish its unconstitutional application. ¹²⁹ In following the *Gray* decision, the court in *Conservation Chemical* said that retroactive application of a statute should not be subjected to "some form of heightened judicial scrutiny . . ." ¹³⁰

In recent years, the standard under which the constitutionality of retroactive legislation is determined, has been relaxed. Under *Gray*, the Court will sustain retroactivity if a law is rationally related to a reasonable, legitimate legislative purpose. Such retroactive legislation violates the due process clause only if it is harsh or arbitrary. ¹³¹

IV. RETROACTIVITY AND COPYRIGHT

A. Generally

The concept of statutory retroactivity is not foreign to copyright law. The copyright statutes of such ideologically diverse nations as Guatemala, the Netherlands, Poland and South Korea have either implied or express retroactive provisions, especially for transitional periods between former laws and new or amended laws. ¹³² Argentina, in fact, enacted a copyright law

¹²⁸ *Id.* at 222. See also *Canisius College v. United States*, 799 F.2d 18, 25 (2d Cir. 1986) (college sought refund of employer and employee FICA for tax year consisting of amounts contributed to employee retirement annuity contracts; retroactive application of this curative statute under the 1984 Deficit Reduction Act was held not to violate due process); *Patlex*, 771 F.2d at 487.

¹²⁹ *Conservation Chemical*, 619 F. Supp. 162, 220-22; cf. *R.R. Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978) (involving judicial review of retroactive federal legislation affecting economic benefits and burdens).

¹³⁰ *Conservation Chemical*, 619 F. Supp. at 221.

¹³¹ *Gray*, 467 U.S. at 733.

¹³² See UNESCO I-III COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1984-86); Guatemala Copyright Act of 1954, art. 30 (protection for all works existing at the time of the statute's enactment, including those works which were previously unregistered, as well as those with expired terms of protection); Netherlands Copyright Act of 1912, ch. I, art. 50(c) (partial retroactivity extending the rights of distribution of works); Poland Copyright Act of 1952, art. 63 (1975) (contracts assigning the property rights of an author in a work created prior to July 22, 1944 were rescinded retroactively by operation of law, with a reversion of the property rights to the authors or his heirs); Korean Copy-

whereby works that entered the public domain reverted automatically to the private domain until completion of the copyright term. ¹³³ As discussed below, the United States copyright law has also contained provisions with retroactive effects. ¹³⁴

Retroactive provisions in copyright law are intended, in part, to provide equal copyright protection to all copyright claims whether raised under the original statute or the amended version. ¹³⁵ For example, if the amended statute lengthens the term of protection for a work created after enactment of the new law, provisions are frequently made to lengthen the term for the class of works that would otherwise fall into the public domain. The implementation of the current American copyright law is bot-tomed on such retroactive extensions. ¹³⁶

Arguably, the retroactive abolition of the notice requirement is consistent with the constitutional mandate that copyright laws "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." ¹³⁷ Certainly, an artist's interest in creating works is enhanced if his copyright in already existing works is protected against his inadvertent failure to adhere to the formalities of the notice requirement.

right Act of 1957 Supplementary provisions ("[c]ontracts of copyright assignment for works written in either Korean or Chinese prior to Aug. 15, 1945 [are rendered] null and void" (Supp. 1958)). See also 4 WORLD COPYRIGHT: AN ENCYCLOPEDIA, 66-83 (H.L. Pinner ed. 1957).

¹³³ Argentina Copyright Act of 1933, art. 84 (1973) (the rights in works which have entered the public domain, without a period of fifty years having expired, shall revert automatically to the private domain until the completion of the copyright term, without prejudice to any rights acquired by a third party in reproductions of these works made between the expiration of a term of thirty years and a twenty year statutory extension), reprinted in COPYRIGHT LAWS AND TREATIES, *supra* note 132.

¹³⁴ *Id.*

¹³⁵ See Act of Dec. 31, 1974, Pub. L. No. 93-573, 1974 U.S. CODE CONG. & ADMIN. NEWS (88 Stat.) 1873; H.R. REP. NO. 1581, 93rd Cong., 2d Sess. 5, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6849, 6853 (two year extension); Act of Sept. 19, 1962, Pub. L. No. 87-668, 1962 U.S. CODE CONG. & ADMIN. NEWS (76 Stat.) 555 (three year extension); Act of Aug. 28, 1965, Pub. L. No. 89-142, 1965 U.S. CODE CONG. & ADMIN. NEWS (79 Stat.) 581 (two year extension); Act of Nov. 16, 1967, Pub. L. No. 90-141, 1967 U.S. CODE CONG. & ADMIN. NEWS (81 Stat.) 464 (one year extension); Act of July 23, 1968, Pub. L. No. 90-416, 1968 U.S. CODE CONG. & ADMIN. NEWS (82 Stat.) 397 (one year extension); Act of Nov. 24, 1971, Pub. L. No. 92-170, 1971 U.S. CODE CONG. & ADMIN. NEWS (85 Stat.) 490 (one year extension); Act of Oct. 25, 1972, Pub. L. No. 92-566, 1972 U.S. CODE CONG. & ADMIN. NEWS (86 Stat.) 1181 (two year extension). See also *supra* note 132, for applicable foreign copyright law provisions; Arab Republic of Egypt Act of 1954, art. 50 (1975) (the statute applies to all works existing at the time of enactment, whether in the private or public domain).

¹³⁶ The implementation of these and interim transitional measures provide, in effect, the same result as if the current copyright law had been retroactively applied to pre-1978 works.

¹³⁷ U.S. CONST. art. I, § 8, cl. 8.

The proposed amendment¹³⁸ is drafted so as not to deprive anyone of any property right or significantly alter the obligations between two contracting parties. It is an effort to avoid injury to persons who may have relied upon the public domain status of works that would be retroactively protected by the amendment.¹³⁹ Therefore, if the retroactive abolition of the notice requirement were adopted by Congress, all works published without a notice of copyright and subsequent to a pre-determined date would be protected against unauthorized reproduction, except where a purchaser or user could prove that he acted in reliance upon its apparent public domain status. This is consistent with the Supreme Court's view in *F.H.A. v. Darlington, Inc.*¹⁴⁰ that "[t]he Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning."¹⁴¹

While the negative effect of such retroactive legislation is minimal, the benefit to the art community is great. The creator will not only be permitted to control the aesthetic integrity of his art, but will benefit financially from reproductions published with his consent. The detriment of retroactivity to the disseminators or publishers of a work who relied upon the public domain status appears to be minimal. For example, the fact that European publishers are required to pay fees for reproduction has apparently not hampered their publication of art books.

Neither the Supreme Court nor the lower federal courts have addressed the issue of retroactive application of copyright protection. However, in *Roth v. Pritikin*,¹⁴² the Second Circuit held that the "work for hire" provision of the Copyright Act of 1976 applies prospectively and not retrospectively. The plaintiff in *Roth* was a free-lance writer who provided recipes for the de-

¹³⁸ See *supra* notes 94-95 and accompanying text.

¹³⁹ See *Jefferson Disposal Co. v. Parish of Jefferson*, 603 F. Supp. 1125 (E.D. La. 1985). The court addresses the constitutionality of retroactively applying statutes that have been subject to legislative changes:

When . . . a legislative change alters the substantive rights of the parties the constitutional validity of applying the change to a pending case does become suspect. [W]hen a statute changes only remedies or procedures, and does not affect substantive rights, there is no constitutional barrier to applying it to a pending case.

Id. at 1136 (citations omitted).

The proposed amendment would not retroactively apply in a situation where an individual relied on a work's public domain status. Thus, an argument that the proposed amendment constitutes a taking barred by the fifth amendment would fail.

¹⁴⁰ 358 U.S. 84 (1958).

¹⁴¹ *Id.* at 91.

¹⁴² 710 F.2d 934 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983).

fendant's cookbook. The recipes were submitted in 1977, prior to the effective date of the current copyright law. The plaintiff asserted that a reading of the work for hire provision demonstrated a clear congressional intent to apply it retroactively to all works protected by copyright on January 1, 1978, regardless of when the work was created.¹⁴³

The court rejected this interpretation, stating that this provision could be applied only to work that was protected by copyright on or after the enactment of the 1976 Act, and thus, only applied prospectively.¹⁴⁴ The court also noted that this provision did not determine who holds the copyright for works created prior to the enactment date.¹⁴⁵ Relying on a pre-*Gray* Supreme Court decision, the Second Circuit observed that the absence of any discussion by Congress on the retroactivity issue precludes such application. The court stated "that a retrospective application would not be given [to] a statute . . . unless [it was] 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"¹⁴⁶

The retroactive application of the current work-for-hire doctrine¹⁴⁷ to a pre-1978 relationship directly impacts upon the issue of whether the property rights in a commissioned work belong to an employer or to the supposed employee. Reliance by the employer can be inferred from the status quo at the date of the contractual relationship, which would have been modified by the retroactively applied legislation.¹⁴⁸

However, retroactive abolition of the notice requirement does not contain a built-in divestiture of any definite possessory rights. At risk is only a speculative reliance interest, when and if

¹⁴³ *Roth*, 710 F.2d at 938; see 17 U.S.C. § 301(a): "On or after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . whether created before or after that date and whether published or unpublished, are governed exclusively by this title." *Id.* (emphasis added).

¹⁴⁴ *Roth*, 710 F.2d at 938.

¹⁴⁵ *Id.*

¹⁴⁶ *Roth*, 710 F.2d at 939 (quoting *Union Pacific R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)); see *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) (Bankruptcy Reform Act of 1978 interpreted not to apply retroactively to destroy preexisting rights; if the legislature does not state clearly that property rights will be destroyed retroactively, the Court will generally refuse to determine whether such a destruction of a property right violates the due process clause).

¹⁴⁷ The most recent work-for-hire decision, *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), held that the supposed employee may retain the copyright to a commissioned work but not the property rights in the original piece. The circuits are divided on the copyright issue, but none has held that the author of the work maintains the property rights. The work, produced at the request of the employer and completed under the employer's auspices, remains employer's property.

¹⁴⁸ See *supra* note 112 and accompanying text.

the claimant decides to exploit the art that is supposedly in the public domain. This risk is neither expressed nor anticipated prior to enactment of a retroactivity provision.¹⁴⁹

The issue of retroactivity also arose in *Morseburg v. Babylon*,¹⁵⁰ a case that challenged the California Resale Royalties Act.¹⁵¹ Under the Act, the seller of a work of fine art was required to pay the artist five percent of the sale amount if the gross sale price exceeded \$1000 or was greater than the price paid by the seller when they acquired the work.¹⁵² The statute, also required that the sale be the first sale of the work, and that legal title be vested in the artist.¹⁵³ The artist's royalties were payable through the California Arts Council directly to the artist, or to the Council's operating fund if the artist could not be located.¹⁵⁴ The court upheld the retroactive application of the statute, stating that the law did not violate the due process clause.¹⁵⁵ In applying the *Turner Elkhorn* analysis,¹⁵⁶ the court observed that unless the consequences of retroactivity were "harsh and oppressive," there was no constitutional violation.¹⁵⁷ The court found that the retroactive effect of the California statute resulted in only a moderate compromise of an art dealer's contractual rights vis-à-vis the artist.¹⁵⁸

Finally, although not a strictly retroactive provision, article 18 of the Berne Convention provides an automatic copyright in all acceding countries, for any work that has not entered the public domain in the country of origin *simply because of an expiration* of its copyright term.¹⁵⁹ Stated conversely, now that the United States has agreed to become a signatory to the Berne Convention, American artists who publicly distributed their work in the United States, without a notice of copyright, would arguably find

¹⁴⁹ See, e.g., *Adams Nursing Home*, 548 F.2d at 1081.

¹⁵⁰ 201 U.S.P.Q. (BNA) 518, 520 (C.D. Cal. 1978), *aff'd on other grounds*, 207 U.S.P.Q. (BNA) 183 (9th Cir. 1980).

¹⁵¹ CAL. CIV. CODE § 986 (West Supp. 1988).

¹⁵² *Id.* at §§ 986(a), (b)(2) and (b)(4).

¹⁵³ *Id.* at §§ 986(b)(1), (3).

¹⁵⁴ *Id.* at § 986(a)(5).

¹⁵⁵ *Morseburg*, 201 U.S.P.Q. (BNA) at 520. Cf. *Blodgett v. Holden*, 275 U.S. 142, 147 (1927), *modified*, 276 U.S. 594 (1928).

¹⁵⁶ See *supra* note 107 and accompanying text.

¹⁵⁷ *Morseburg*, 201 U.S.P.Q. (BNA) at 520.

¹⁵⁸ *Id.* at 521: "The public purpose of promoting participation in the arts and encouraging equitable financial treatment of artists outweighs any detriment suffered by [the] plaintiff."

¹⁵⁹ See Berne Convention, *supra* note 19, art. 18(1). See Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention (1985), reprinted in 33 J. COPYRIGHT SOC'Y 183, 248-49 (1986) ("the 'country of origin' is, generally, a Berne country of first or simultaneous publication."). See *supra* note 20 and accompanying text.

the work, at the time of accession, automatically protected in any Berne country. Since the artists never sought an American copyright, their work fell into the public domain because of their failure to abide by a formality, not because of the expiration of the copyright term. If, however, the artist obtained an American copyright and its term expired upon the artist's failure to renew, the work would *not* be subject to automatic copyright protection under Berne, since the work fell into the public domain after the artist took advantage of American copyright, and subsequently failed to renew it.¹⁶⁰

B. Early Attempts to Retroactively Eliminate Notice of Copyright

To understand the American aversion to both eliminating the notice requirement and recognizing the concept of an artist's "moral rights," past efforts to legislate these rights must be examined, particularly the Perkins and Vestal Bills.¹⁶¹

The Perkins Bill, introduced in 1924, proposed to prospectively eliminate the notice of copyright and the registration requirements, and provided that adherence to either formality

¹⁶⁰ Berne Convention, *supra* note 159, at art. 19(2).

¹⁶¹ The Perkins Bill, H.R. 11258, 68th Cong., 2d Sess. (1925), eliminated the notice of copyright requirement, providing:

That copyright is secured by this act for all the writings of authors from the time of the making of their works, whether unpublished or published, for the term of copyright protection hereinafter provided. Such copyright shall vest in the author of any such work immediately upon the making of the work and shall not depend upon the accomplishment of any conditions or formalities whatever. . . .

. . . No notice of copyright shall be required on any work subject to copyright under this act and the omission of such notice from any work shall not be taken as evidence that no copyright is claimed therein; but if desired a notice of the reservation of the copyright or of any right included in the copyright in any work may be placed on any or all copies of such work by the owner of the copyright or the assignee or licensee of any special right pertaining to the copyright in the work . . . [followed by a penalty provision for fraudulent notice]. (Emphasis added.)

The final Vestal Bill, H.R. 12549, 71st Cong., 2d Sess. (1930), provided that:

No notice of copyright shall be required on any work copyrighted under this act, nor after this act goes into effect, as to works copyrighted under previous acts. The omission of such notice from any work shall not be taken as evidence that no copyright is claimed therein nor affect the validity of the copyright therein. Nevertheless, a legible notice of copyright or a notice with reference to any right included in the copyright in any work may be placed on copies of the work by the owner of the copyright or an assignee or licensee. Such notice shall, if applied in the case of a book or other printed publication, be placed upon its title page or the page immediately following, or upon any of the first ten, or the last ten pages of text; or in the case of a contribution to a periodical, such notice shall be either placed as aforesaid or under the title or at the foot of the first page of said contribution. . . [followed by a penalty provision for fraudulent notice]. (Emphasis omitted.)

See 1 A. FISCHER, STUDIES ON COPYRIGHT 37-38 (1963).

would be optional.¹⁶² Therefore, copyright protection would automatically vest upon a work's creation.

The Vestal Bills, introduced in 1925, also proposed to eliminate the notice requirement.¹⁶³ The Vestal Bills provided that any works that were *previously copyrighted*, but which subsequently entered the public domain because of defective or inadvertent absence of notice on authorized copies, would be retroactively protected under the Copyright Act.¹⁶⁴ The Bills did not protect creators of *uncopyrighted* works lacking a notice requirement. They only protected innocent infringers or those who had mistakenly relied upon the omission of notice from a previously copyrighted work. A copyright owner's remedy for innocent infringement was limited, both retroactively and prospectively, to the fair and reasonable value of a license.¹⁶⁵ Under the new amendment,¹⁶⁶ the burden is on the defendants to prove that their infringement was innocent by showing that there was no copyright notice affixed to the work and that no copyright claim had been registered.¹⁶⁷ Although not required under the Vestal Bill, the registration of one's claim to copyright would constitute constructive notice to any alleged infringer in a copyright dispute.¹⁶⁸

The last of the four Vestal Bills passed the House of Representatives in 1931.¹⁶⁹ Although it was voted out of committee in the Senate, it never reached a floor vote.¹⁷⁰ In an effort to overcome resistance to the revolutionary concept of freeing copyrightable works from the notice requirement, proponents of the Bill argued that forfeiture of copyright often resulted in more profits for a work's publisher at the author's expense, rather than as a savings to the public.¹⁷¹

¹⁶² *Id.* at 37 (discussing § 44 of the Perkins Bill).

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 264-65; H.R. 11258, 68th Cong., 2d Sess., § 35 (1925).

¹⁶⁵ *See* H.R. 12549, 71st Cong., 2d Sess., § 15(d) (1930).

¹⁶⁶ *See supra* note 20 and accompanying text.

¹⁶⁷ H.R. 12549, 71st Cong., 2d Sess., § 36.

¹⁶⁸ 74 CONG. REC. 2080-81 (1931).

¹⁶⁹ Originally, four copyright revision bills were introduced to the House on December 29, 1929 by Representative Vestal of Indiana. 72 CONG. REC. 338 (1929). They were eventually consolidated into one bill, H.R. 12549, 71st Cong., 2d Sess., 72 CONG. REC. 10593 (1930).

The purpose of the consolidated bill, known as the "Vestal Bill," was "to amend and consolidate the acts respecting copyrights and to permit the United States to enter the International Copyright Union." 72 CONG. REC. 10593 (1929). H.R. 12549 was passed by the House on January 13, 1931, by a vote of 185 to 34. 74 CONG. REC. 2080-81. The bill was ultimately known as H.R. Res. 243.

¹⁷⁰ 74 CONG. REC. 10593-96 (1930).

¹⁷¹ 74 CONG. REC. H2010 (1931) (statement of Representatives Bloom and Connery).

Apparently the authors of the Vestal Bills could not come to grips with the total elimination of the notice requirement. The Bills offered protection only in the case of mistaken or inadvertent omission of notice, and this effectively made the copyright formalities optional. The authors reasoned that the individual who really valued his product would have it registered under this system or another.¹⁷²

Opponents of the Vestal Bills argued that an automatic copyright would place American businesses at the mercy of foreign authors who would claim that their works which did not carry notice were infringed upon by American companies.¹⁷³ They also asserted that automatic copyright perpetuated unlimited monopolies for both American and foreign authors.¹⁷⁴ Those opposed failed to recognize that a monopoly is specifically defined in the world of intangible rights as the essence of the rights available.¹⁷⁵ Who better than Renoir, for example, should

A proponent of H.R. 12549 said that to extend copyright protection in terms of its duration would increase the cost incurred by the public, "the people who support genius" activity. 74 CONG. REC. 10593-94 (1931) (statement of Rep. Connery).

¹⁷² 74 CONG. REC. 6460-61 (1931) (statement of Sen. Cutting). Acknowledging his approval of an automatic copyright provision, Senator Cutting of New Mexico observed: The Senate realizes that practically every other civilized nation on the face of the earth is operating to-day under the automatic-copyright provision, and most of them have been doing so for some time. . . . I think the United States and . . . a few minor powers are about the only ones who are now operating under the antiquated system of compulsory registration.

Id. at S6458.

¹⁷³ *Id.* at S6460.

¹⁷⁴ *Id.* at S6459. *See supra* notes 142-146 and accompanying text; 3 NIMMER, *supra* note 7, at § 13.09. *See also* McLain, *The Copyright Notice Requirement in the United States: A Proposed Amendment Concerning Deliberate Omissions on Notice*, 18 LOY. L.A.L. REV. 689, 726-730 (1985). McLain proposes an amendment to 17 U.S.C. § 405(a)(2) to place the burden of persuasion upon the copyright proprietor to prove that the omission was not deliberate. The author defines "deliberate omission" as an "omission by one who knows of the notice requirements, knows that they are applicable because a general publication of the work is occurring and the type of work being published falls within a copyrightable category . . . yet fails to take reasonable steps to comply with [the notice requirements]." *Id.* at 727. *Cf.* ABKCO Music, Inc. v. Harrisons Music, Ltd., 722 F.2d 988 (2d Cir. 1983), where a subconscious copying by a defendant acting in good faith still constituted copyright infringement. "[A]s a practical matter, the problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders." *Id.* at 999.

¹⁷⁵ *See, e.g.*, Senator Cutting's remarks:

I do not think copyright legislation creates a monopoly in the usual sense of the word [T]here is a very great distinction between the monopoly created by a patent and . . . a copyright

. . . . [A copyright] preserves the rights which the author originally had It does not bar other people from using the same idea. It merely bars them from using the particular form which the author used. It is a matter of the actual form and not the substance.

74 CONG. REC. S6459. The classic expression of the special, intangible character of

have a monopoly on the works of Renoir? As observed in the 1931 Senate hearings, "[a] man who creates a literary work or a work of art has a right to the product of his own labor."¹⁷⁶ Moreover, a copyright, unlike a patent, does not create a true monopoly, because a copyright only protects the expression, not the underlying idea which is itself available for any future author or artist to use.

Finally, in a rebuttal to those opposing the Bills, a proponent argued that even if a foreign author could prove infringement of his copyright by an American, the American would be liable solely for the fair and reasonable value of a license, thus putting a cap on damages.¹⁷⁷ Although the *retroactive* elimination of notice of copyright regarding uncopyrighted works never came up in hearings on the Vestal Bills, such an "innocent infringer" cap on damages would apply to one: (a) who prior to enactment, had relied in good faith on the absence of notice on a work of art and (b) who had been placed in a defensive posture due to his reliance.

In response to criticism of the proposed amendment, it is suggested that once potential users become aware of the elimination of the notice requirement in the visual arts, they will realize that the onus is on them to seek out the necessary information to substantiate a defense to an infringement claim, such as an experi-

copyright as property is perhaps Justice Holmes' concurrence in *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908):

[I]n copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned It restrains the spontaneity of [those who] but for it there would be nothing of any kind to hinder their doing as they saw fit. [Copyright] is a prohibition of conduct remote from the persons or tangibles of the party having the right. . . .

The ground of this . . . right is that the person . . . has invented some new collocation of visible or audible points. . . . The restraint is directed against reproducing this collocation The restriction is confined to the specific form. . . .

Id. at 19 (emphasis added).

From the artist's perspective:

[An author] is no more a monopolist—in the antitrust sense—than millions of other Americans A monopoly exists when someone . . . has enough economic power to control an industry or to prevent competition. The author . . . controls only the rights to use it—not the publishing industry or the market in novels. . . . [The author's work] must compete in the marketplace with thousands of other copyrighted and uncopyrighted works.

Copyright Law Revision, 1965: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Judiciary Comm., 89th Cong., 1st Sess. (1965) (statement of Rex Stout, then President of the Authors League of America), reprinted in 1 N. HENRY, COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD 308 (1978).

¹⁷⁶ 74 CONG. REC. 6459 (1931) (statement of Sen. Cutting).

¹⁷⁷ *Id.* at 6509-17.

ration of a term of copyright.¹⁷⁸

Procedural safeguards exist under the current act to help an individual research the status of a copyright. Under the current copyright law for example, if the date of an author's death is unknown, the Register of Copyright is directed to keep either records relating to an author's death or records showing that the author had lived on a given date.¹⁷⁹ This minimizes the possibility of misplaced reliance upon the absence of a notice of copyright.

Criticism can be expected regarding the proposed amendment's impact on individuals who have relied on existing law. It is important to note that the current test for innocent infringement is not substantially different from the test for good faith reliance on the absence of notice under the proposed amendment. The innocent infringement test can thus be construed as a precedent for the proposed reliance test concerning retroactive copyright protection.¹⁸⁰

Furthermore, under the proposed amendment,¹⁸¹ the burden imposed by subsection 405(b) on users claiming innocent reliance on such omission is easily satisfied.¹⁸² In order to meet their burden, the purchasers or users would be required to show that they relied upon the fact that the work was in the public domain when it was purchased or reproduced. Standard methods for determining reliance would apply, such as examining user re-

¹⁷⁸ See S. 2796, 99th Cong., 2d Sess. § 3 (1986).

¹⁷⁹ See 17 U.S.C. § 302(d) (1985).

¹⁸⁰ Two sections of the Copyright Act delineate the criteria for innocent infringement. 17 U.S.C. § 405(b) (1982) provides:

Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice.

§ 406(a) provides:

Where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of the copyright . . . [A]ny person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if such person proves that he or she was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun (1) the registration for the work had been made in the name of the owner of copyright; or (2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.

To qualify as an innocent infringer, the person's "reliance" or "good faith" must be reasonable. See 2 NIMMER, *supra* note 7, at §§ 7.14[B][1][b][ii][2][b].

¹⁸¹ See *supra* notes 19-22 and accompanying text.

¹⁸² See proposed 17 U.S.C. § 401(c), *supra* notes 32-33.

production costs before the retroactive statute's enactment. As discussed earlier, this standard is consistent with the Supreme Court's test in *Gray*,¹⁸³ holding that the retroactive application of a statute is constitutional.¹⁸⁴ It is also in keeping with the new Berne enabling amendment, pursuant to which an infringer "who was not aware and had no reason to believe that he was infringing" could assert his innocent infringement and thus avoid paying damages.¹⁸⁵

V. ABSENCE OF NOTICE OF COPYRIGHT AND EXTENDED PROTECTION

Despite both the stringent, formalistic approach of American copyright law to an author's ability to protect his creation, and the constitutional constraints governing retroactive legislation, precedent exists for the retroactive treatment afforded works of visual art.

Congress has recognized that the federal copyright requirements restriction on the length of common law copyright might constitute a partial or total preemptory divestiture of one's copyright, thus possibly violating the due process clause.¹⁸⁶ It justified this limitation on the duration of common law copyright by concluding that the new copyright law was simply removing subsisting common law rights and substituting statutory rights for a reasonable period, a procedure which was in full harmony with the constitutional requirements of due process.¹⁸⁷ It declared that "it is within [its] power . . . under the [supremacy clause] to cut off existing [state] common law rights in a work as long as it accords the work protection . . . for a reasonable time."¹⁸⁸ Conversely, the retroactive protection of a work without notice would result in an extension of copyright for a reasonable time in order to protect artists from being divested of their rights. Such protection, however, would not be absolute. A buyer would have an opportunity to rebut the presumption of retroactive constitu-

¹⁸³ 467 U.S. 717 (1984); see *supra* notes 108-11 and accompanying text.

¹⁸⁴ 467 U.S. at 731.

¹⁸⁵ See *supra* note 88 and accompanying text.

¹⁸⁶ See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 139 (1976); U.S. CONST. amend. II; U.S. CONST. art. I, § 8, cl. 8:

The Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

¹⁸⁷ See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 139 (1976).

¹⁸⁸ SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 6 at 93 (Comm. Print 1965) (emphasis added).

tional protection by proving that the effects of their good faith reliance were actual and substantial in nature.¹⁸⁹

In addition to restricting common law copyright, Congress has, in the past, extended the term of protection under subsisting copyrights. During the hearings prior to the final revision of the Copyright Act, Congress extended the term for works subsisting in their second term from anytime between December 31, 1976, the date of the enactment of the new law, to December 31, 1977.¹⁹⁰ The legislative intent behind this interim extension was to prevent works with existing copyrights from expiring and entering the public domain while copyright legislation was being finalized. This final extension, for example, prevented approximately 153,500 copyrighted works from entering the public domain in 1976.¹⁹¹ The eight prior extensions, which commenced in 1962, probably prevented millions of other works from entering the public domain in 1976.¹⁹²

Through these extensions, any work in which the twenty-eight year renewal term would have otherwise expired under the 1909 Act was granted an extension until December 31, 1976.¹⁹³ Thus, any work with a subsisting copyright during the sixteen year period prior to the new Act received the same seventy-five year protection (and *not* the prior original and renewal copyright term) from the date of publication afforded those works upon the effective date of the proposed Act.¹⁹⁴ This series of extensions afforded extended protection of at least three years to a work that was in its fifty-sixth year of protection in 1962, and seventeen years for a work in its fifty-sixth year in 1978. By granting this parity of treatment, Congress acknowledged the inequity involved in depriving works that would otherwise have fallen into the public domain of the benefit of extended copyright afforded in the new statute. It reasoned that copyright holders should not suffer simply because of long delays in the legislative process, while benefits were being conferred upon other works which were still within their renewal term as of the enactment date of

¹⁸⁹ See *United Christian Scientists v. Christian Science Board of Directors*, 227 U.S.P.Q. (BNA) 40 (D.D.C. 1985) (the extended retroactive copyright protection of all editions of Mary Baker Eddy's book, many of which were in the public domain, was declared unconstitutional solely on First Amendment grounds of violation of Church and State).

¹⁹⁰ 1976 U.S. CODE CONG. & ADMIN. NEWS 5755-56.

¹⁹¹ H.R. REP. NO. 93, 93rd Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6853-54.

¹⁹² For list of extensions, see *supra* note 135.

¹⁹³ 1976 U.S. CODE CONG. & ADMIN. NEWS 5755-56; 17 U.S.C. § 304(b) (1982).

¹⁹⁴ See 4 NIMMER, *supra* note 7, at app. 2-107.

the 1976 Act.¹⁹⁵

Although these interim copyright extensions were made during the period of already existing protection and *not* when works were already in the public domain, as suggested in the proposed amendment, such a distinction does not have a legal basis.¹⁹⁶

Although there is precedent for retroactively extending the term of copyright protection for works with subsisting copyrights (*i.e.*, works that were initially afforded statutory protection), retroactive protection under the proposed amendment would not be given to those works that have entered the public domain because of an author's failure to renew. To give unrenewed works protection through revival or automatic renewal, retroactive amendments to the Copyright Act would entail more extensive legislative revisions than those contemplated in the proposed amendment.

Thus, under the proposed amendment, for a work to be eligible for retroactive protection, it must have been published no more than twenty-eight years prior to the effective date of the proposed amendment. This time limitation excludes from coverage works that could have fallen into the public domain because of a failure to renew the copyright during the first term.

To maintain parity of copyright treatment under the proposed amendment between works protected by statutory copyright because of an affixed notice and those works lacking such notice, the duration for protection must be the same for both. Under the current Copyright Act, a work in its first term as of January 1, 1978 is to have an *initial* term of twenty-eight years and a renewal term of 47 years.¹⁹⁷ The duration of any copyright in its *renewal* term, or which is registered for renewal before January 1, 1978, is seventy-five years from the date the copyright was originally secured.¹⁹⁸ It is suggested that the burden of persuasion be placed upon the artists to prove that their work was published within the twenty-eight year period prior to the effective date of the proposed amendment.

VI. NOTICE AND INTERNATIONAL COPYRIGHT TREATMENT

Under the Universal Copyright Convention ("UCC"), works

¹⁹⁵ See *Id.*

¹⁹⁶ 2 *id.* at § 9.01[C]. Note that 17 U.S.C. § 304(b) became effective on October 19, 1976, (prior to the expiration of the interim extensions) rather than upon January 1, 1978, the effective date of the 1976 Act.

¹⁹⁷ 17 U.S.C. at § 304(a), (b).

¹⁹⁸ *Id.* at § 304(b).

by nationals of the United States (including all works first published in the United States) must be granted at least the same copyright protection in other UCC signatory nations as the other state grants to their own nationals.¹⁹⁹ Such equality of protection for foreign authors is usually called "national treatment."²⁰⁰ If the UCC-prescribed copyright notice is utilized, UCC protection is automatically available to all authors regardless of where the work was published.²⁰¹

Although the UCC does provide a form of notice of copyright,²⁰² the use of such notice is *not* a prerequisite to UCC protection. Instead, the purpose of this notice provision is to *excuse* any other formalities (*e.g.*, deposit, registration, notice) "which a country might . . . require as a matter of its own domestic law."²⁰³

By affixing the UCC notice, formalities under another country's domestic copyright law are deemed satisfied, such as deposit registration, notarial certificates, payment of fees for manufacture or publication.²⁰⁴ It is thus prudent to place a UCC notice on all copies of a published work since many copyright laws require one or more formalities.²⁰⁵

If the proposed amendment were adopted and notice of copyright were retroactively eliminated, the use of UCC notice would appear to be unnecessary for the protection of works outside the United States.²⁰⁶ However, Nimmer has observed that several UCC countries which claim to require domestic first

¹⁹⁹ 3 NIMMER, *supra* note 7, § 17.04[A], at 17-9 n.2. The United States is not a member of the Berne Convention. Their treaty obligations prohibit the seventy-four member nations from imposing formalities as a condition for copyright protection for works by nationals of other Berne countries and works first or simultaneously published in a Berne country. Berne Convention, *supra* note 19, art. 5(2). The United States, however, is a member of the Universal Copyright Convention. Under intense pressure from the American delegates, the U.C.C. provides for a minimal "notice" requirement for those signatory nations which impose such formalities (*e.g.*, Austria, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Japan, Lichtenstein, New Zealand, Sweden, Switzerland and Yugoslavia). See Universal Copyright Convention, July 24, 1971, art. III, 25 U.S.T. 1341, 1345, T.I.A.S. No. 7868, at 5, 943 U.N.T.S. 178, 195. See Cary, *The United States and Universal Copyright: An Analysis of Public Law 743* in UNIVERSAL COPYRIGHT CONVENTION: ANALYZED 86 (T. Kupferman & M. Fomer eds. 1955).

²⁰⁰ U.C.C., *supra* note 199, art. II.

²⁰¹ *Id.*, art. III.

²⁰² 2 NIMMER, *supra* note 7, § 7.07[B], at 7-21 to 22.

²⁰³ 3 *id.* § 17.08, at 17-32.

²⁰⁴ U.C.C., *supra* note 199, art. III. See also A. BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION 35 (1958).

²⁰⁵ BOGSCH, *supra*, at 35-36.

²⁰⁶ *Id.* See Kaminstein, *Key to Universal Copyright Protection (Article III: Formalities)* in UNIVERSAL COPYRIGHT CONVENTION: ANALYZED, 23, 32-33 (T. Kupferman & M. Fomer eds. 1955); House Panel Takes Up Implementation of Berne, 34 Pat. Trademark & Copyright J. (BNA) 209 (June 25, 1987).

publication as a condition of domestic copyright protection would provide copyright to the American work despite absence of notice of copyright.²⁰⁷

A further problem occurs when works have been injected into the public domain by American publications without notice. Under the rule of the shorter term,²⁰⁸ UCC countries may, in their discretion, deny protection to a work for a period longer than that fixed by the UCC country in which the work has been published, for the class of works to which it belongs.²⁰⁹ One can argue that the period of protection fixed by United States copyright law for such a work published without notice may be zero (by reason of immediate injection into the public domain under the 1909 Act) or up to five years from publication (under the 1976 Act).²¹⁰ However, the mere fact that a work first published in the United States enters the public domain in the United States does not preclude protection in other UCC countries despite the failure to affix notice under American law.²¹¹ The reasoning behind this proposition is that the rule of the shorter term under the UCC applies only with respect to a class of works, and not simply to a particular work within that given class.²¹² Therefore, the failure of an author to comply with domestic formalities should not release the country in which protection is claimed from the duty to protect the work since the class to which the works belong is protected in its country of origin.²¹³

As stated above, efforts to revise the Copyright Act are not limited to the Kennedy Bill. The 100th Congress passed, and the President signed, legislation amending the copyright law enabling the United States to adhere to the Berne Convention.²¹⁴ On October 31st the President signed the ratified Berne Treaty.

²⁰⁷ 3 NIMMER, *supra* note 7, § 17.08, at 17-33. See also *Arnoldo Mandador E.S.P.A. v. La Opinion*, (Decision of the Argentinian National Court of Appeals in Civil Matters, Buenos Aires, June 30, 1978), reprinted in 11 T.I.C. 692 (1980) (despite failure to fully comply with U.C.C. notice provisions, protection was accorded and domestic deposit and registration requirements were excused).

²⁰⁸ 3 NIMMER, *supra* note 7, at § 17.08, 17-34. Note that under the Berne Convention, unlike the U.C.C., the rule of the shorter term is applicable to individual works rather than to classes of works. Berne Convention, *supra* note 19, art. 7(8). In a U.C.C. country which invokes this rule, a work first published in the United States or an unpublished work by an American national will be protected in such country for a period equal to either the copyright term adopted in the U.S. or the copyright term adopted in such country, whichever is shorter.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 17-35 n. 19 (citing to authorities in five countries).

²¹² *Id.* at 17-35 (citing U.C.C. art. IV (4)).

²¹³ U.C.C., *supra* note 199, art. IV(4).

²¹⁴ See *supra* note 20.

The amendment eliminates notice of copyright as a mandatory condition of copyright protection in conformance with the Berne Convention.²¹⁵ The affixation of copyright notice is voluntary under the amendment to section 401. The absence of such notice, however, permits an infringer to raise a defense of innocent infringement "in litigation of actual or statutory damages."²¹⁶

The Berne amendment squares with the proposed Kennedy amendment in that each reflects a burgeoning trend of de-emphasizing the formalistic need for notice of copyright as a condition of copyright protection. The Berne amendment is prospective only. The new treaty specifically provides that copyright protection would not be extended to any work in the public domain in the United States on the date of its enactment.²¹⁷

Article 18 of the Berne Convention precludes copyright protection for any work that has fallen into the public domain due to an expiration of a term of copyright.²¹⁸ The Berne Convention, however, does not preclude retroactive protection for works that were in the public domain from the date of publication.²¹⁹

VI. CONCLUSION

The history of American copyright law has shifted from inflexibility and formalism to liberality and pragmatism. In keeping with the current trend, Congress must realize that the burdensome technicality of copyright notice in the visual arts carries with it a burden to the artist (even under the more flexible current law) which clearly outweighs its value to users and third parties.²²⁰

The constitutionality of retroactive copyright protection for all current and past works of art lacking notice of copyright

²¹⁵ H.R. 1623, 100th Cong., 1st Sess., reprinted in 33 Pat. Trademark & Copyright J. (BNA) 550-55 (Mar. 26, 1987). H.R. 1623, § 10(a)(1) would amend 17 U.S.C. § 401(a) to read:

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 . . . may 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.

²¹⁶ Berne Convention Implementation Act of 1987, S. 1301, 100th Cong., 1st Sess. (1987); Berne Convention Implementation Act of 1987, H.R. 2962, 100th Cong., 1st Sess. (1987). The House effort resulted in the unanimous passage of H.R. 4262, co-sponsored by Representatives Kastenmeier and Moorhead.

²¹⁷ See section 13 of the Kastenmeier Bill. H.R. 4262, 100th Cong., 1st Sess., 134 CONG. REC. H3079, H3081 (daily ed. May 10, 1988).

²¹⁸ See Berne Convention, *supra* note 19, art. 18(2).

²¹⁹ See *id.* at art. 18.

²²⁰ See *supra* notes 10-15 and accompanying text.

passes muster under the *Gray* decision²²¹ concerning retroactive federal civil legislation.

This article's examination of the history of American copyright law reveals that there is both policy and precedent for extending and reducing copyright protection retroactively, both in the United States and several foreign nations, whether it is in the form of interim copyright extensions or by express retroactive legislation.

Finally, in keeping with the practicality and flexibility of modern copyright law, those who can prove a good faith, substantial reliance on the fact that a work was in the public domain shall have their interest protected under a special exception to this proposed amendment. This retroactive provision will give an artist control, but not a monopoly, over the fruits of his labor for seventy-five years for works of art published within twenty-eight years²²² prior to the enactment of the proposed amendment.

²²¹ See *supra* notes 108-14 and accompanying text.

²²² This is the equivalent of a renewal term under the 1909 Act. See Copyright Act of 1909, *supra* note 28, at § 23.

Appendix

S.1619

A BILL

Preamble:

This is a bill to amend the copyright law, to secure the rights of authors of pictorial, graphic, or sculptural works; to prevent the distortion, mutilation, or other alteration of such works; to provide for resale royalties; and to *ameliorate the negative effect upon such artists of the requirements of copyright notice in the present or predecessor copyright law*. Section 401 of title 17, United States Code, is to be amended by adding at the end thereof the following:

(d) The provisions of this section shall not apply to pictorial, graphic, or sculptural works.

(e) The provisions of paragraph "d" above shall apply to all works of art which, but for the notice requirements of section 401 of the title 17 or of section 10 of the Copyright Act of 1909, would be subject to protection under the copyright laws of the United States.

(f) This section shall apply to works of art, as described in paragraph "e" above, published within twenty-eight (28) years prior to the effective date of this statute and shall endure for a period of seventy-five (75) years from that date of publication.

(g) In applying the provisions of this section to works of art published without a notice of copyright prior to the effective date of this statute, the burden in establishing economic injury by reason of reliance upon such absence of copyright notice shall be upon the person claiming such injury.

ADDITIONAL