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Righting the Titled Scale: Expansion of Artists' Rights in the United States

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RIGHTING THE "TILTED SCALE"[1]: EXPANSION OF ARTISTS' RIGHTS IN THE UNITED STATES*

I. INTRODUCTION

The scales of judicial decision in the United States traditionally have been tilted toward the interests of the owners of copyrights or works of art. This imbalance has operated to the detriment of the creative artists who wish to maintain some degree of control over the artistic integrity of their creations, or to enjoy some measure of the artwork's

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[1] Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539, 1542 (1972). This Note's author observes that the "tilted scale", which favors copyright proprietors, and not creators of artwork, "has never been leveled [in the United States] by weight of statutory revision, judicial recognition of the doctrine of moral right, or adoption of the Berne Convention." The Berne Convention, an international copyright agreement with more than seventy signatories, defines minimum, mandatory copyright standards for its members. In addition, the Berne Convention gives formal recognition to the artists' rights doctrine of moral right. Moral rights survive the sale of works of art and grant to the artist certain restraints on the owner's disposition of the artwork. The United States has refused membership in this organization.

increased worth. Over the past decade there has been a groundswell of support developing in the United States for the expansion of artists' rights both of an economic and personality[2] nature. The Copyright Act of 1976[3] offers increased protection to creative artists,[4] and proposals have surfaced to further artists' economic rights through doctrines of resale royalties,[5] public lending rights,[6] increased tax breaks for artists,[7]

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[2] Personality rights refer to those rights which arise from the unique creative relationship between an artist and his work. The personality rights, for purposes of this Note, encompass not only the right of paternity, which allows an artist to claim authorship of one of his creations or disclaim authorship if the work has been altered and the artist no longer acknowledges it as his own, but also the right of integrity, which allows the artist to object to any distortion, alteration, mutilation, or destruction of his work. The personality rights survive the transfer of ownership of the artwork. L. DUBOFF, THE DESKBOOK OF ART LAW 797-803 (1977). The terms "personality right" and "moral rights" are used interchangeably throughout this paper.

[3] The 1976 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810) (1982).

[4] The 1976 Copyright Act has demonstrated a heightened sensitivity to the needs of the creative artist. Barbara Ringer, former Register of Copyrights and a participant in the drafting of the 1976 Act, has written that the Act as a whole "mark[s] a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author." Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 490 (1977). For example, the right of termination allows an author or his heirs to reclaim, after a specified period, any work other than a work made for hire, which was granted under transfer or license of a copyright. *See* 17 U.S.C. §§ 203, 304 (1982). In addition, under §§ 203(a)(5) and 304(c)(5) the author or his heirs is guaranteed the right to terminate a grant and any right under it "notwithstanding any agreement to the contrary." In Mills Music, Inc. v. Snyder, 105 S. Ct. 638 (1985), the United States Supreme Court held that the purpose of these sections was

> to provide added benefits to authors. The extension of the duration of existing copyrights to 75 years, the provision of a longer term (the author's life plus 50 years) for new copyrights, and the concept of a termination right itself, were all obviously intended to make the rewards for the creativity of authors more substantial. More particularly, the termination right was expressly intended to relieve authors of the consequences of ill-advised and unrenumerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product.

Id. at 650.

The 1976 Copyright Act also recognizes the composer's right to have the "basic melody" or "fundamental character" of his composition undistorted by a subsequent recording of the work. *See* 17 U.S.C. § 115 (1982). This appears to be the first formal recognition of the personality right on the federal level. *See* Rosen, *Droit Moral for Musical Compositions: Section 115 of the New Copyright Act*, 5 ART & L. 88 (1980).

For a discussion of the copyright system and how it can be used by artists to secure many of the rights available under the moral rights doctrine, see Stroup, *Practical Guide to the Protection of Artists Through Copyright, Tradesecret, Patent and Trademark Law*, 3 COMM/ENT 189 (1981); Tondro, *The Copyright Act as Governmental Policy*, J. ARTS MGMT. & L., Spring 1983, at 149.

[5] Only one state has ever recognized the right of the artist to share in the increased market value of his work after its initial sale. The Resale Royalty Act, ch. 1228, § 1, 1976 Stat 5544 (1976) (codified at CAL. CIV. CODE § 986)(West 1986), sets aside for the original

artist of a work of fine art a five percent royalty on the gross price of each subsequent sale within the terms of the Act if the seller resides, or the sale is executed, in California. However, a subsequent amendment in 1982, § 986(b)(2), (4) limited application of the Act to the resale of those works of fine art with a gross sales price of $1,000 or more and to resales for a price the same or in excess of the purchase price paid by the seller.

Fine art for the purposes of the Act means "an original painting, sculpture, or drawing, or an original work of art in glass." *Id.* § 986(c)(2). Section 997 of the Civil Code added porcelain painting and stained glass artistry to the classification of fine art in 1983.

The right to collect the royalty fee cannot be waived unless by a written contract to receive in excess of five per cent of the amount of sale. The right to collect the royalty may, however, be assigned. *Id.* § 986(a). This right to royalties inures to the artist's heirs, legatees or personal representatives until the twentieth anniversary of the artist's death. *Id.* § 986(a)(7). Failure to pay the royalty may result in an action for damages within three years from the date of the sale, or one year after its discovery, whichever is longer. The artist may bring an action for damages, and the prevailing party is entitled to reasonable attorney fees. *Id.* § 986(a)(3). It is the responsibility of the seller to locate the artist, or, within ninety days, deposit the amount of the royalty with the state Arts Council for the artist's benefit. *Id.* § 986(a)(2). If, after seven years from the date of sale the artist has not been located, the money is transferred to the council for the use of acquiring fine art pursuant to the Art in Public Buildings Program. *Id.* § 986(a)(5).

The California statute reflects the French theory of *droit de suit*, or follow-up right, and in effect ensures to visual artists a right parallel to the royalty rights of writers and composers. It is basically an economic right but reflects the personality right premise that the artist maintains a unique relationship with his creation.

Controversy has greeted passage of the Act and its constitutionality was challenged in Morseburg v. Balyon, 201 U.S.P.Q. (BNA) 518, *aff'd*, 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980). The district court rejected plaintiff art dealer's arguments of preemption, impairment of the right to contract, and violation of the due process clause and praised the legislation as "the very type of innovative lawmaking that our federalist system is designed to encourage." 201 U.S.P.Q. (BNA) at 520. District Judge Takasugi held as follows:

> The California legislature has evidently felt that a need exists to offer further encouragement to and economic protection of artists. That is a decision which the courts shall not lightly reverse. An important index of the moral and cultural strength of a people is their official attitude towards, and nurturing of, a free and vital community of artists. The California Resale Royalties Act may be a small positive step in such a direction.

Id.

Presently, a purchaser of fine art in California acquires it *res transit cum suo onere*, *i.e.*, the artwork passes with the burden of future royalty fees to the artist in case of resale. For a discussion of the impact of this legislation vis-a-vis property rights, see *infra* text accompanying notes 120-29.

[6] Proceeding on the assumption that an author should be compensated for any use of his intellectual creation, the public lending right requires payment of a fee to the author each time a book is lent out by a library or, in some jurisdictions, used in a reference room. This right is generally given only to native authors in recognition of an encouragement for their contributions to the national culture and identity. Funds for these payments are raised by government appropriation and are distributed by collecting societies. The countries of Denmark, Norway, Sweden, Finland, Iceland, The Netherlands, New Zealand, West Germany, Australia, and Great Britain have adopted the public lending right. *See* Seemann, *A Look at the Public Lending Right*, 30 COPYRIGHT L. SYMP. (ASCAP) 71, 116-17

regulation of dealings between dealers and artists,[8] and the public purchase and display of artworks.[9] Such activity has prompted commentators to refer to this movement as a "turn to populism" in the arts.[10] Professor Goetsel, a board member of the Bay Area Lawyers for the Arts in San Francisco, stated: "I don't want artists to be the only socialists in a capitalistic society."[11]

In the area of personality rights, courts have displayed a more sluggish but growing sensitivity to the needs of the creative artist and a willingness to protect artists' rights through the use of traditional common law doctrines and the innovative application of statutes. Most important to the growing body of artists' rights, however, is the legislation recently

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(1983). Although a bill designed to study this concept was introduced in the House of Representatives by Ogden Reid of New York in 1973, it died in committee. H.R. 4850, 93rd Cong., 1st Sess., 119 CONG. REC. 1067 (1973). For a complete discussion and history of this concept and the feasibility of its accommodation into the American copyright laws see Seemann, *supra*.

Apart from the bookkeeping and other paperwork involved in carrying out an endeavor of this magnitude in the United States, it would not be wise to open the door on such an amorphous area. The theory behind the public lending right could be logically extended to reimburse artists whose works are viewed by spectators strolling through museums. It might be further extended to works of sculpture displayed in public places. An effort to reimburse every creative artist each time his artwork is viewed or enjoyed would be an administrative nightmare.

[7] Seven states, Arkansas, California, Kansas, Maryland, Michigan, Oregon, and South Carolina, have enacted legislation allowing artists to deduct from their state income tax the fair market value of all artworks which they donate to museums, in contrast to previous allowance for costs of materials only. Flaherty, *Art Law: Novel Legal Initiatives Are Changing the Practice of an Unusual Specialty*, Nat'l L.J., Sept. 3, 1984, at 24, col. 1.

The Internal Revenue Code, 26 U.S.C. § 170(e) (1982), allows an artist deduction only for the cost of materials, even though other individuals who donate works of art are allowed to deduct the artwork's fair market value. *See* Maniscalo v. Commissioner of Internal Revenue, 632 F.2d 6 (T.C. 1980).

[8] *E.g.*, The Art Dealer Relations Act, CAL. CIV. CODE § 1738 (West 1986). This Act regulates consignment sales of artworks. Under the terms of this statute, art dealers are held strictly liable for all loss or damage to works accepted on consignment. In addition, consigned works and proceeds from their sales are considered "trust property" not subject to claims of dealers' creditors.

[9] Maine, for example, has enacted the Percent for Art Act, ME. REV. STAT. ANN. tit. 27 §§ 451-459 (Supp. 1984), which states its purpose as follows: "Recognizing the need to enhance culture and the arts and to encourage the development of artists, it is the intent of the Legislature to provide funds for and authorize the acquisition of works of art for certain public buildings and other facilities." Section 453 of the Act established a minimum amount of one per cent of the total building appropriation or allocation, or $25,000, whichever is less, to acquire such works.

The California Art in Public Building Program mandates allocation of monies for purchase of works of art in public buildings. This statute also provides that artists whose works are placed in public buildings have the right to claim authorship and retain and exercise reproduction rights. *See* CAL. GOV'T CODE § 15813.5 (West 1980).

[10] *See* Flaherty, *supra* note 7, at 1, col. 1.

[11] *Id.* at 24, 26.

enacted in California and New York[12]—legislation which openly recognizes the "personality" interests of an artist in his work and his right to protection of these interests, even after the sale of the artwork. While the statutes of both states make significant strides in expanding artists' rights, it is the California legislation which should be adopted as the prototype of future legislation in this area since it stands as a unique embodiment of the interests of the creative artist and the societal goal of cultural preservation. Artists' rights legislation in the United States is not comprehensive. It is highly probable and desirable that, as more states enact legislation, the federal government will recognize the need for uniformity in this area and will react by appending relevant federal legislation to the Copyright Act. Furthermore, continued expansion of artists' rights and control over artworks after sale will necessarily mandate a new concept of art ownership and a reevaluation of traditional property concepts in this area. A close examination reveals, however, that the restrictions on ownership of artworks necessitated by artists' rights legislation are not alien to American concepts of property ownership and can be integrated into existing ownership expectations with a minimum of adjustment.

This Note focuses on the expansion of artists' rights in the United States, specifically the moral rights of paternity and integrity. It explores the history of judicial denial of moral rights and the attempt to gain protection through traditional causes of action. The Note then analyzes barriers to adoption of the moral rights doctrine, with emphasis on the challenge to traditional property concepts. The California Art Preservation Act of 1980 and the 1984 Artists' Authorship Act of New York are discussed and evaluated. This Note recommends adoption of the California statute as the model for future artists' rights legislation and defends property rights restrictions imposed by the Act on the basis of support of legal precedent and the justification of protection of the public interest.

II. Moral Rights Background

Artists' rights in the United States have been traditionally conceived in terms of pecuniary interest,[13] and as such have been protected by the

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[12] Cal. Civ. Code §§ 986, 987, 989 (West 1986); N.Y. Arts & Cultural Aff. Law § 14.03 (McKinney Supp. 1986). The California legislation became effective in 1977, 1980, and 1983, respectively. The New York statute went into effect in 1984. The New York statute originally enacted as N.Y. Arts & Cult. Aff. Law §§ 14.51-.59 (McKinney 1984) was repealed December 31, 1984 and simultaneously reenacted as § 14.03 (McKinney Supp. 1986). Due to policy statements contained in the original enactment this author will occasionally cite to it.

[13] The Copyright law rewards authors economically for their contribution to society. "By giving authors a means of securing the economic reward afforded by the market, copyright

1976 Copyright Act, which derives its authority from the U.S. Constitution.[14] The American judiciary has not recognized personality or moral rights. Yet, various other societies *have* recognized a complementary set of rights deriving from the creative artist's unique relationship with his intellectual creation—a relationship which survives the transfer of the physical object of art.[15] The creative artists enfuses a part of his own personality and vision into his creation, thereby forming an indissoluble bond between himself and his work. These rights are referred to by different names. For example, in Germany they are termed *Urheberpersönlichkeitsrecht*, or right of the author's personality, and in France as the *droit moral*, or moral right. Because France has been the most hospitable home to the development of these rights, the term moral right has generally come to be designated in popular usage to represent artists' personality rights, and has been incorporated into the language of the Berne Convention,[16] and hence the art world.

The moral rights of the author[17] may be divided into the two categories of paternity and integrity which were recognized and adopted by the Berne Convention at the time of its 1928 Rome revision.[18] At that time, Article 6bis of the Berne agreement articulated the concept of moral rights as follows:

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stimulates their creation and dissemination of intellectual works." A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES, 12 (1981).

[14] U.S. CONST. art. I, § 8, Cl. 8. "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right in their respective writings and discoveries."

[15] This relationship was described within the context of a discussion of the California Art Preservation Act as the "legal expression of an umbilical cord that attaches the artist to his or her work." Gantz, *Protecting Artists Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 874 n.6 (1981).

[16] The Berne Convention is a multilateral treaty which mandates certain standards for the protection of artistic and literary works. Melville Nimmer has said of the Berne Convention: "It represents one of the earliest and in some ways most successful ventures into world law." Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the U.S. Copyright Law*, 19 STAN. L. REV. 499 (1967).

[17] The term "author" is used interchangeably with "artist" throughout this paper to designate the creator of literary, musical, or artistic works.

[18] Berne Convention for the Protection of Literary and Artistic Works, Rome Revision (1928), 123 L.N.T.S. 233, 249-51.

Additional moral rights have been recognized under French law. The right of divulgation establishes the artist as the sole arbiter of whether a work is ready to be presented to the public. He or she may refuse to fulfill a contract on the ground of lack of inspiration and may enjoin others from publishing an artwork which he or she has discarded. The 1957 French codification of artistic and literary law established the right of an author involved in a published contract to withdraw a work *after* publication provided he pay for all sold copies of the work which he withdraws and pay damages to the publishers. *See* A. DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 69-72 (1978); L. DUBOFF, THE DESKBOOK OF ART LAW 797-806 (1977); Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 511-14 (1955).

> (1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work, which would be prejudicial to his honour or reputation.[19]

These rights were further expanded at the Stockholm revision of the Berne Convention in 1967 and an additional provision was appended.[20] Article 6bis currently states:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation. (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.[21]

The third provision of 6bis addresses methods of safeguarding the rights delineated in the article and states that the "means of redress . . . shall be governed by the legislation of the country where protection is claimed."[22] This provision grants signatory countries discretion in their approach and enforcement of moral rights and accounts for the latitude of interpretation that exists among member countries.

The rights of paternity and integrity have been defined variously in different countries,[23] but the paternity right generally includes the right

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[19] *See* Berne Convention, *supra* note 18, at 249-51.

[20] Berne Convention for the Protection of Literary and Artistic Works, Stockholm Revision (1967), 828 U.N.T.S. 221, 135.

[21] *Id.*

[22] *Id.*

[23] For a discussion of moral rights in Germany, see Marcus, *The Moral Right of the Artist in Germany*, 25 COPYRIGHT L. SYMP. (ASCAP) 93 (1980). For an analysis of the right in France, see Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADE-MARK REP. 244 (1978); Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. INT'L LAW & ECON. 627 (1975); Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 COPYRIGHT L. SYMP. (ASCAP) 1 (1962).

to credit the author, the right of protection of anonymity or of a pseudonym, the right to protection against a false attribution, and the right to object to excessive criticism and other attacks on the author's personality and professional standing.[24] The right of integrity includes the right of the artist to modify the work and to prevent its mutilation or distortion.[25]

There is also a divergence of practice concerning the duration of the author's moral rights. While French law declares the right to be "perpetual, inalienable and imprescriptible" and capable of being conferred on heirs or third parties,[26] German law ties the exercise of moral rights to the author's copyright and such rights expire a fixed number of years after his death.[27]

Although many commentators trace the initial development of moral right concepts to French jurisprudence,[28] these concepts are actually more deeply rooted in Western culture. The sages of Jewish law were conscious of the paternity rights of authors in very early times. The right of an author to have his authorship recognized was first articulated in the admonition to acknowledge one's sources;[29] one who did not identify his sources was considered a thief under Jewish law, for by donning the garb of another he made "the wise man no better than a fool."[30] During the second century B.C., Aristophanes the Grammarian, while judging a composition contest, noted that the contestants who plagiarized their works were brought before a tribunal, sentenced as robbers, and thrust out of the city. In considering this incident one commentator remarked: "We now see in historical retrospect that, since the beginning of written history, there has existed a moral or natural right of ownership to

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[24] *See, e.g.*, A. DIETZ, *supra* note 18, at 66-75; L. DUBOFF, *supra* note 2, at 797-803; A. LATMAN & R. GORMAN, *supra* note 13, at 10-11; Comment, *supra* note 1, at 1540-45.

[25] The right of integrity has been further expanded in California. Under the new California Art Preservation Act, the artist may object to and obtain relief for destruction of an artwork within the guidelines of the Act. CAL. CIV. CODE § 987 (West 1986). The Act for Preservation of Cultural and Artistic Creations gives standing to a non-profit organization in existence for at least three years at the time an action is filed to move for injunctive relief to preserve or restore the integrity of a work of fine art of recognized quality and of substantial public interest. CAL. CIV. CODE § 989 (West 1986).

[26] *Statutory and Case Law Concerning the Protection of Works of Applied Art, Designs, and Models*, 12 BULLETIN DU DROIT D'AUTEUR 17, 35 (citing French law, Copyright Statute, Article 6).

[27] *Id.* at 40 (citing German law, Federal Republic of Germany, Federal German Copyright Law, Article 6).

[28] *E.g.*, Diamond, *supra* note 23, at 245; Comment, *supra* note 1, at 1540.

[29] Gabay, *Israel Adopts Moral Rights Law*, 29 J. COPYRIGHT SOC'Y U.S. 462 (1982).

[30] *Id.*

intellectual property, which manifests itself in different ways at different times—but exists."[31]

As for more modern origins, the French regard the moral rights of authors as natural rights originating from the principles of the French Revolution. The judicially-created doctrine of *droit moral* "arose from the spirit . . . and philosophy of individualism which accompanied the French Revolution."[32] French law reflects the reasoning that if the creative artist shares the fruits of his genius with the larger society he has the prerogative to receive the respect which accompanies recognition of his paternity and integrity rights. On the other hand, the United States has recognized, with the rest of the nations of the world, the artist's material interests, but has not promulgated federal laws in the area of moral rights, despite the recognition of this concept by over seventy signatories of the Berne Convention.[33]

III. Judicial Tradition of Denial of Moral Rights

Some courts have demonstrated a willingness to provide remedies to artists attempting to assert moral rights, but traditionally they have opposed any attempt to seek judicial recognition of the doctrine. In *Vargas v. Esquire, Inc.*,[34] the plaintiff, artist Alberto Vargas, contracted with *Esquire Magazine* to produce drawings of women which became known as the "Varga Girls."[35] In the beginning of the business relationship, the drawings were reproduced and published with Mr. Vargas' name thereon. This practice continued for six years.[36] After cancellation of the contract, the defendant possessed twenty drawings by the artist which had not been published. *Esquire* proceeded to publish these drawings, entitling them "The Esquire Girl."[37] Vargas brought suit to enjoin the reproduction of the pictures, alleging that they were wrongfully used as credit of authorship was not given and their publication constituted a misrepresentation since the pictures appeared to be the work of someone other than the plaintiff.[38]

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[31] Streibich, *Moral Right of Ownership to Intellectual Property, Part I: From the Beginning to the Age of Printing*, 6 Mem. St. U.L. Rev. 1, 35 (1975).

[32] DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the U.S.*, 28 Bull. Copyright Soc'y Am. 1, 7, 9 (1980).

[33] As of March 1, 1978, there were seventy signatories to the Berne Convention. *See* Berne Convention for the Protection of Literary and Artistic Property, v (United International Bureau for the Protection of Intellectual Property)(1980).

[34] 164 F.2d 522 (7th Cir. 1947).

[35] *Id.* at 524.

[36] *Id.* at 523-24.

[37] *Id.* at 524.

[38] *Id.*

The Seventh Circuit found that Vargas' contract had completely divested him of "every vestige of title and ownership of the pictures, as well as the right to their possession, control and use."[39] Vargas' claim of paternity under the moral right doctrine was dismissed as one "which need[ed] little discussion."[40] The court reasoned that although "these so-called 'moral rights' . . . are recognized by the civil law of certain foreign countries,"[41] the plaintiff's brief conceded that the doctrine had not received acceptance in the United States and that neither legislation nor previous court decisions had conferred such a right upon artists.[42] The court further held as follows:

> What plaintiff in reality seeks is a change in the law in this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.[43]

In *Crimi v. Rutgers Presbyterian Church*,[44] plaintiff, Alfred Crimi, won a competition to design a fresco mural on the wall of the defendant church.[45] His sketches were approved by a selection committee, and he subsequently completed the work.[46] Pursuant to the contract which governed the painting, the mural would become part of the church building, and the mural's copyright was assigned to the church.[47]

Six years later Crimi returned to the church to check the effect of the climatic conditions on the paints, but was barred from entering the building.[48] He was informed by the minister that the congregation had been offended by Crimi's presentation of a bare-chested Christ and had painted over the mural.[49] Crimi neither received notification of the decision to obliterate his work of art nor was he offered any opportunity to retrieve it.

Crimi filed suite against the church seeking one of three forms of equitable relief: removal of the paints covering the mural; permission to remove the mural from the church at the expense of the defendant; or

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[39] *Id.* at 525.
[40] *Id.* at 526.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] 194 Misc. 570, 89 N.Y.S.2d 813 (1949).
[45] *Id.* at 570, 89 N.Y.S.2d at 814.
[46] *Id.*
[47] *Id.*
[48] This fact was not included in the opinion. For a discussion of the circumstances of Crimi's discovery of the destruction of his work, see Cernik & Feuer, *Artists Have Rights Too*, Nat'l L.J., Aug. 16, 1982, at 13, col. 1.
[49] 194 Misc. at 571, 89 N.Y.S.2d at 815.

damages if the mural could not be removed.[50] He asserted, in addition to the traditional argument of breach of custom and usage, that the destruction of his mural violated his integrity interest. His integrity right was protected by a limited proprietary interest in his work after sale to the extent reasonably necessary to protect his honor and reputation.[51]

In a decision reminiscent of *Vargas v. Esquire*, the New York Supreme Court held that an artist retains no rights in his work after its sale, absent a contractual provision to the contrary.[52] The court was not convinced by Crimi's reference to the right of integrity offered in civil law countries[53] and tersely commented that such a position "is not supported by the decisions of our courts."[54]

Another more recent case which attempted to assert moral rights, *Geisel v. Poynter Products*,[55] involved the manufacture, promotion, and sale of dolls based on drawings by plaintiff Geisel, better known as Dr.

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[50] *Id.*

[51] *Id.* at 572, 89 N.Y.S.2d at 816.

[52] *Id.* at 577, 89 N.Y.S.2d at 819. This holding is consistent with the majority of jurisdictions. In all states except California and New York, an artist must secure his paternity and integrity rights after sale by means of a contract. In response to this need for a contract protecting artists' interests after sale, the Artist's Reserved Rights Transfer and Sale Agreement was developed in 1971. Better known as the Projansky contract, after its draftsman-attorney Robert Projansky, the contract was the result of interviews with hundreds of artists, lawyers, collectors, and dealers. Under the terms of the Projansky contract, the artist receives fifteen per cent of the appreciated value of the artwork if it is alienated by the buyer, passes by operation of law, or is destroyed and insurance proceeds are collected. The purchasing party to the contract must also agree to procure any subsequent purchaser's agreement to the contract. Under the terms of the contract, the artist reserves the right to receive notice and consent to the work's exhibit, to copy or reproduce it, and after 120 days' notice to the owner to take temporary custody for exhibition. The artist is also entitled to fifty per cent of any monies which the owner receives from exhibition. The agreement is binding upon the parties for the lives of the artist and his spouse plus twenty-one years, and the buyer agrees not to destroy, damage, alter, modify or change the work. Gill & Solomon, *Federal and State Resale Royalty Legislation: "What Hath Art Wrought?"*, 26 *UCLA L. Rev.* 322, 327-32 (1978).

While this is undoubtedly a favorable contract for the creative artist, most do not have sufficient bargaining power to demand its use and in the competitive atmosphere of the art world works so encumbered may go begging for a purchaser. The number of possible contractual arrangements is only limited by the imaginations of the artist and his attorney, but the obvious drawback of buyer resistance remains. The final verdict on private contracts as a means of protecting artists' rights has been summarized as "rarely obtained, fairly ineffective, but better than nothing." *Id.* at 331. One commentator has suggested that the use of contracts would be a more effective tool for the creative artist if the courts would reverse their traditional tendency both to "interpret narrowly the rights retained by the author . . . [and] read broadly the rights which he conveys." *See* Comment, *supra* note 1, at 1557.

[53] 194 Misc. at 573-75, 89 N.Y.S.2d at 816-19.

[54] *Id.* at 576, 89 N.Y.S.2d at 819.

[55] 295 F. Supp. 331 (S.D.N.Y. 1968).

Seuss. Geisel claimed that the dolls created by defendant were "tasteless, unattractive and of an inferior quality," and destroyed the artistic integrity of his original work.[56] Geisel invoked section 43(a) of the Lanham Act,[57] which regulates unfair trade practices, to protect his moral right. He argued that tags bearing the name "Dr. Seuss," which were affixed to the dolls, mislead the public as to their origin and damaged his artistic reputation.[58]

The state court held that plaintiff's reliance on the Lanham Act did not afford him protection. The defendant's tag, which read "Based on Liberty Magazine Illustrations by Dr. Seuss" did not mislead the public as to the true origin of the dolls. In fact, the tags clearly identified that Geisel's illustrations had provided only the inspiration for the final product.[59] Although acknowledging the existence of the doctrine of moral right and its integrity component in many European and Latin American countries,[60] the court very accurately summarized the position of the doctrine in the overwhelming majority of American jurisdictions when it stated: "[T]he doctrine of moral right is not part of the law in the United States [citations omitted] except insofar as parts of that doctrine exist in our law as specific rights—such as copyright, libel, privacy and unfair competition."[61]

Artists have used the more traditional causes of action to protect their moral rights, and these analogues are deemed sufficient for that purpose by many commentators. However, specific rights such as copyright, libel, privacy, and unfair competition do not always accommodate themselves to the unique needs of artists.

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[56] *Id.* at 333 (quoting plaintiff's complaint).

[57] The Lanham Act, ch. 540, 1946, 60 Stat. 441 (codified at 15 U.S.C. § 1125) (1985). This federal statute prescribes misrepresentation and misdescription of the origin of goods and services. Any false statement of fact as to origin may provide grounds for a § 1125(a) civil action, since that section provides in part:

> Any person who shall affix, apply, or annex or use in connection with any goods or services . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

Id.

[58] 295 F. Supp. at 351.

[59] *Id.* at 353.

[60] *Id.* at 340 n.5.

[61] *Id.*

IV. The Analogue Approach

A. Justification

Many commentators have argued that it is not necessary to enact moral rights legislation in the United States, as the rights of artists can be adequately protected by traditional Anglo-American causes of action. All that is needed, assert proponents of the analogue approach, is to put familiar doctrines to novel uses,[62] such as employing the right to publicity to protect the use of one's name as a property right.[63] For example, one advocate of this approach asks: "Should not the right to publicity also include the author's right to prohibit another from restraining growth of his reputation by exploiting his work without giving him authorship credit?"[64] He further suggests that integrity rights could be protected if art works were sold by a contract containing a clause which granted the author a reversionary interest in his work and this would afford him a protected right.[65] The doctrine of waste could be invoked in order to strike "'an ideal balance between conflicting desires of successive owners.'"[66]

B. Weaknesses

It appears that while these suggestions have all the positive attributes of creativity and invention, they represent an unnecessary contortionist act. By following the lead of California and New York, and openly acknowledging artists' personality rights, attorneys and courts could avoid linguistic gymnastics and accomplish the goal of granting equitable

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[62] *See, e.g.*, Strauss, *The Moral Right of the Author*, 4 Am. J. Comp. L. 506, 538 (1955).

> [C]ommon law principles, if correctly applied, afford an adequate basis for protection of such rights. . . . There is a considerable body of precedent in the American decisions to afford to our courts ample foundations in the common law for the protection of the personal rights of authors to the same extent that such protection is given abroad under the doctrine of moral right.

Id.

Comment, *supra* note 1, at 1545 ("[T]he right to claim paternity and the right of integrity of the work can be secured in this country without the necessity of adopting the French doctrine of moral right as a foreign import package. Instead these rights can be secured by extension of existing American legal doctrines."). *But see* Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 Copyright L. Symp. (ASCAP) 31 (1983); Hathaway, *American Law Analogues to the Paternity Element of the Doctrine of Moral Right: Is the Creative Artist in America Really Protected?* 30 Copyright L. Symp. (ASCAP) 121 (1983); Note, *The Americanization of Droit Moral in the California Art Preservation Act*, 15 N.Y.U. J. Int'l L. & Pol. 901 (1983) [hereinafter cited as Note, *Americanization*].

[63] Comment, *supra* note 1, at 1545-46.

[64] *Id.* at 1546.

[65] *Id.* at 1550-54.

[66] *Id.* at 1551 (quoting 5 R. Powell & P. Rohan, The Law of Real Property § 636, at 6 n.1 (5th ed. 1971)).

relief to the artist. It is beyond the scope of this Note to explore in detail the various American analogues to the moral right,[67] but it is apparent that this band-aid approach to the protection of artists' rights does not squarely meet their needs. By employing various traditional actions, artists have been able to secure some protection for what in practice are their moral rights, but only when they can fit the facts of their particular cases into a framework acceptable to the courts.[68] Those cases which are successful in protecting moral rights through analogous causes of action are more often indicative of creative presentation on the part of the lawyer than of a positive step for the recognition of artists' rights. As one commentator stated: "[A]n artist should not be solely dependant upon novel arguments by both bar and bench."[69] The analogue approach has been described both as "patchwork relief"[70] and a "melange of doctrine and statutes whose goals are not specifically those of giving recognition to such interests [protection of artists' rights]."[71]

This approach excludes too many potential artists' rights claims and affords artists no opportunity to assert their paternity or integrity rights in our present judicial system. "The view that common law analogues are capable of providing protection equivalent to that of moral rights statutes is a comfortable but falsely optimistic belief in the adequacy of the present system . . . a huge abyss separates *droit moral* from the feeble 'functional equivalents' found in American law."[72]

C. *Gilliam v. American Broadcasting Cos.*

A consideration of the seminal case, *Gilliam v. American Broadcasting Cos.*,[73] is enlightening in terms of demonstrating the weaknesses of restricting recognition of moral rights to traditional causes of action or, in this instance, innovative interpretation of statute. Plaintiffs, a group of British writers and performers professionally known as "Monty Python," sought a preliminary injunction in the Southern District Court of New York to restrain the American Broadcasting Companies (ABC) from

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[67] *See generally* Hathaway, *supra* note 62 (American law analogues to the paternity element of moral right are inadequate. A personal rights section should be added to the 1976 Copyright Act.); Treece, *American Law Analogues of the Author's "Moral Right", 16* AM. J. COMP. L. 487 (1968) (A wider application of recognized causes of action will ensure artists' personality rights.); Comment, *supra* note 1 (A study of common law copyright, publication and unfair competition offer comparable security to moral rights doctrine.)

[68] The judiciary has seemed reluctant to deal with any arguments couched in "moral rights" terms. *See* Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (1949); Shostakovich v. Twentieth Century Fox, 196 Misc. 67, 80 N.Y.S.2d 575 (1948).

[69] Gantz, *supra* note 15, at 880.

[70] *Id.* at 901.

[71] Amarnick, *supra* note 62, at 61.

[72] Note, *supra* note 62, at 904.

[73] 538 F.2d 14 (2d Cir. 1976).

broadcasting edited versions of three separate programs originally written and performed by the group for broadcast by the British Broadcasting Corporation (BBC).[74]

Pursuant to an agreement between Monty Python and BBC, there was a detailed procedure to be followed in the case of any script changes prior to recording of a program.[75] Although BBC retained final authority to make changes, Monty Python was to exercise "optimum control over the scripts consistent with BBC's authority and only minor changes were allowed without prior consultation with the writers."[76] There was nothing in the agreement granting BBC any authority to alter a program once it had been recorded.

In 1973 Time-Life Films acquired the right to distribute in the United States a selection of BBC programs, including Monty Python.[77] Pursuant to the distribution agreement between BBC and Time-Life, the latter was allowed to edit the programs for purposes of commercials, censorship, and time segment requirements.[78] Such a clause was not part of the agreement between Monty Python and BBC.

In the first showing of the Monty Python program in the United States,

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[74] *Id.* at 17.

[75] *Id.* at 17 n.2. The Agreement provided in part:

> V. When script alterations are necessary it is the intention of the BBC to make every effort to inform and to reach agreement with the Writer. Whenever practicable any necessary alterations (other than minor alterations) shall be made by the Writer. Nevertheless the BBC shall at all times have the right to make (a) minor alterations and (b) such other alterations as in its opinion are necessary in order to avoid involving the BBC in legal action or bringing the BBC into disrepute. Any decision under (b) shall be made at a level not below that of Head of Department. It is however agreed that after a script has been accepted by the BBC alterations will not be made by the BBC under (b) unless (i) the Writer, if available when the BBC requires the alterations to be made, has been asked to agree to them but is not willing to do so and (ii) the Writer has had, if he so requests and if the BBC agrees that time permits if rehearsals and recording are to proceed as planned, an opportunity to be represented by the Writers' Guild of Great Britain . . . at a meeting with the BBC to be held within at most 48 hours of the request (excluding weekends). If in such circumstances there is no agreement about the alterations then the final decision shall rest with the BBC. Apart from the right to make alterations under (a) and (b) above the BBC shall not without the consent of the Writer or his agent (which consent shall not be unreasonably withheld) make any structural alterations as opposed to minor alterations in the script, provided that such consent shall not be necessary in any case where the Writer is for any reason not immediately available for consultation at the time which in the BBC's opinion is the deadline from the production point of view for such alterations to be made if rehearsals and recording are to proceed as planned.

Id.

[76] *Id.* at 17.

[77] *Id.*

[78] *Id.* at 18.

twenty-four minutes of the original ninety minutes of the recording were omitted due to time requirements for commercial and editing of material deemed offensive or obscene.[79] After viewing this edited version the group initiated negotiations with ABC and finally sought injunctive relief to stop broadcast of the second special.[80] After the evidentiary hearing, Judge Lasker conceded that "'the plaintiffs have established an impairment of the integrity of their work' which 'caused the film or program . . . to lose its iconoclastic verve'. . . . '[T]he damage that has been caused to the plaintiffs is irreparable by its nature.'"[81] However, the injunction was denied for overriding reasons of questionable copyright ownership and the possibility of financial injury to the defendant.[82] The court granted limited relief by requiring the broadcast of a disclaimer during the special so that Monty Python could disassociate itself from the edited broadcast.[83] The order was stayed pending appeal to the Second Circuit and ABC was permitted to broadcast the special with a brief legend that the show had been edited by ABC.[84]

As a result of the subsequent appeal and the reversal of the district court's decision by the Second Circuit, a new forum for vindication of artists' rights emerged: section 43(a) of the Lanham Act.[85] Concurring with the lower court's holding that the injury to plaintiff's reputation was irreparable, the Second Circuit acknowledged the intertwining nature of economic and moral rights, and recognized that in this case the protection of the paternity right would have significant impact on the subsequent

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[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] 538 F.2d at 24-25. For an explanation of § 1125(a) of the Lanham Act, see *supra* note 57.

One of the first hints that a court might see fit to accommodate a moral right concept under the Lanham Act was articulated in Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274 (1971)(Plaintiff, a foreign film director, attempted to recover from an American film distributor for alleged garbling and distortion of the English version of the film.) While denying injunctive relief in this instance the court suggested that the plaintiff might have a cause of action under the federal trademark law if he could establish that his work had been mutilated. The court stated:

> Whether or not there is any square counterpart in American law of the "moral right" of artists assertedly recognized on the European continent, there is enough in plaintiff's allegations to suggest that he may yet be able to prove a charge of unfair competition or otherwise tortious behavior in the distribution to the public of a film that bears his name but at the same time severely garbles, destroys or mutilates his work.

Id. at 278. It was not until five years later in *Gilliam*, however, that relief for distortion of an artwork was granted under the auspices of the Lanham Act.

pecuniary interests of the group.[86] The court reasoned that by adversely misrepresenting the quality of work produced by the group, many potential fans would be unimpressed and refrain from supporting the group's further activities in the United States. "The subsequent injury to appellant's theatrical reputation would imperil their ability to attract the large audience necessary to the success of their venture."[87] The court was careful to articulate that a minimal level of editing would not constitute an infringement of the copyright, but drew the line at some point prior to the twenty-seven per cent in the instant case.[88] At this level of editing, the court found that an "actionable mutilation" had occurred.[89]

It is significant to proponents of artists' rights that *Gilliam* acknowledged the concept of moral right as the basis for action which seeks redress for deformation of an artist's work, and recognized the non-commercial, personal interest involved.[90] Although the court first conceded that "American copyright, as presently written, does not recognize moral rights or provide a cause of action for their violation since the law seeks to vindicate the economic, rather than the personal, rights of authors,"[91] it deftly acknowledged the importance and interrelationship of both interests. It stated: "Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."[92] This recognition of the dual nature of copyright underscored the deficiency of the copyright system, which afforded protection only to economic interests. It also pointed out the need for alternative methods of protection for artists' rights.

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[86] 538 F.2d at 19.

[87] *Id.*

[88] *Id.* at 23. The court then cited previous decisions which established the right of limited editing: Stratchborneo v. Arc Music Corp., 357 F. Supp. 1393, 1405 (S.D.N.Y. 1973) (A licensee has the right so to alter a copyrighted work to suit his own style and interpretation); Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363, 267 N.Y.S.2d 594 (N.Y. Sup. Ct.), *aff'd*, 25 App. Div. 2d 830, 269 N.Y.2d 913, *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 73 N.Y.2d 80 (1966)(When owner of moving picture authorized picture company to show film on television without forbidding cutting, owner and producer-director could not prohibit making of minor cuts for television exhibition. Custom in trade left discretion to station as to which minor cuts were appropriate.)

[89] 538 F.2d at 23-24.

[90] Krigsman, *Section 43(a) of the Lanham Act as a Defender of Artists' Moral Rights*", 73 TRADE-MARK REP. 251, 269 (1983). It is notable that in its effort to accommodate the personality rights of the artist in the Lanham Act, the majority opinion "is almost entirely free of any residual trademark language, focusing instead on the artist's personal right protectible under its provision." *Id.*

[91] 538 F.2d at 24.

[92] *Id.*

The court recognized the availability of analogous causes of action based on contract law and prohibitions against unfair competition, and interpreted positive decisions in such cases as a proper vindication of "the author's personal right to prevent the presentation of his work to the public in a distorted form."[93] The court's holding in *Gilliam*, however, seems to indicate an awareness of the inadequacies attendant upon these more traditional causes of action. The court offered the artist another avenue by which to protect his integrity and paternity rights—section 43(a) of the Lanham Act.[94]

In the instant case, the editing by ABC resulted in a product which the court characterized as a "mere caricature" of the group's talent.[95] The court reasoned that presentation of such a mutilated version to the public would create a false impression of the product's origin.[96] By the novel utilization of the Lanham Act in this case, the court was able to recognize that "a valid cause of action for such distortion exists." The edited representation of the program created by Monty Python amounted to a misidentification of origin.[97]

The decision in *Gilliam* is in many ways a victory for the artist in his assertion of personality rights, yet it must be noted that the case stands for something less than total recognition of integrity and paternity rights. The court clearly points out that Monty Python retained copyright of the underlying script and was therefore within its rights in objecting to any copyright infringement.[98] The BBC was also bound under clear contractual terms vis-a-vis any alteration of editing rights.[99] The BBC had obviously exceeded the scope of its license by granting to ABC greater rights than it owned. There is no clear indication that the court would have been willing to recognize the Monty Python claim if the group had not owned the underlying copyright and had not been protected by the terms of the contract. Therefore, this holding offers only limited protection under these enumerated circumstances, but offers no protection to fine artists who have sold their physical artwork and its copyright, yet still wish to prevent is mutilation or destruction.

Although hailed for its enduring significance due to its "recognition that the American legal system can accommodate the vigorous assertion of artists' rights,"[100] the *Gilliam* decision has conversely been termed

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[93] *Id.*

[94] *See supra* note 57.

[95] 538 F.2d at 25.

[96] *Id.* at 24.

[97] *Id.* at 25.

[98] *Id.* at 19.

[99] *Id.*

[100] Note, *The Monty Python Litigation—Of Moral Rights and the Lanham Act*, 125 U. PA. L. REV. 611, 634 (1977). Also supportive of this point of view is Krigsman, *supra* note 90, at

inadequate. The Lanham Act can be applied only where work has been both distorted and subsequently misrepresented as that of the original artist's product.[101] While *Gilliam* and subsequent decisions[102] demonstrate a willingness on the part of some courts to expand the range of actions available to assert personality rights, something more concrete is needed to accomplish even-handed protection. For example, Judge Gurfein, in his concurrence in *Gilliam*, repeatedly pointed out that the Lanham Act is a trademark not a copyright statute.[103] There was no need, he argued, to envoke the Lanham Act in this case when breach of contract and copyright infringement provided adequate grounds for reversal.[104] He recognized the majority's decision for what it was—an attempt to give some recognition to moral rights. He saw no need to extend the parameters of the Act and insisted that "the Lanham Act does not deal with artistic integrity," but rather with misdescription, which can be easily remedied by labeling.[105]

Judge Gurfein's resistance to the use of the Lanham Act in the *Gilliam* context is indicative of the checkered response that the analogue approach will continue to receive. One commentator, observing the accommodation of the unique needs of the artist in the *Gilliam* case, noted: "The wolf dressed in sheep's clothing gets his dinner. The resourceful attorney who can find a justiciable costume to disguise his client's moral wounds can enter the courthouse to redress the harm inflicted on the artist."[106] Be that as it may, dependence on a novel argument is too shaky a foundation upon which to build a lasting structure of artists' rights. Legislative

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275 (The Lanham Act, because of its dual regard for plaintiff and consumer "is especially adaptable to protect the public interest in the national cultural heritage.").

[101] Note, *Monty Python and the Lanham Act: In Search of Moral Right*, 30 RUTGERS L. REV. 452, 474 (1977).

[102] *See* Noone v. Banner, 398 F. Supp. 260, 262 (S.D.N.Y. 1975) (Former lead singer of "Herman's Hermits" brought suit under Lanham Act and common law of unfair competition to enjoin group from using the name "Herman's Hermits." District Judge Metzner suggested a claim for relief pursuant to 15 U.S.C. § 1126(b), which grants reciprocal benefits under the trademark law to persons from countries who are a party to any treaties or conventions relating to trademarks, to claim relief under the Lanham Act.); National Lampoon v. American Broadcasting Cos., 376 F. Supp. 733, 746-47 (S.D.N.Y. 1974) (Publisher of collegiate satirical humor magazine sought to enjoin national television network from using portion of title for a television pilot or program. Court held that plaintiff had cause of action under Lanham Act, common law of unfair competition and New York anti-dilution statute.); Jaeger v. American Int'l Pictures, 330 F. Supp. 274, 278 (1971) (Plaintiff German film director attempted to recover from American film distributor for alleged garbling and distortion of his film. The court suggested that plaintiff might have a cause of action under the federal trademark law if he could establish that his work had been mutilated.)

[103] 538 F.2d at 26.

[104] *Id.*

[105] *Id.* at 27.

[106] *See* Krigsman, *supra* note 90, at 256.

guidelines are necessary to clearly establish the rights and duties of creative artists. The analogue approach of "[a]pplying a number of unrelated doctrines to an intrinsically homogeneous subject matter conceals the basic needs of visual artists."[107]

Recognition and acceptance of the unique relationship between an artist and his creation necessitates a reevaluation of the rights of property ownership. There are numerous barriers, however, to adoption of the doctrine of moral rights in the United States.

V. Barriers to Adoption of Artists' Moral Rights

A. Secondary Barriers

There are many feasible explanations for the United States' reluctance to embrace the concept of moral right. At times, commentators and the courts have demonstrated an almost phobic aversion to adoption of "this so-called 'moral right'" from the continent,[108] and have called for an "Americanized" version of the concept.[109] This stance, and the America's resultant refusal to join the Berne Copyright Convention, might be viewed as a reflection of the spirit of isolationism which has played such a large part in America's history of international relations.[110] Our reluctance to adopt the idea might also be traced to a feeling of Anglo-American superiority. Such an approach is articulated in Adolph Monta's rather condescending treatment of French *droit moral* in a

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[107] *See* Note, *Americanization*, *supra* note 62, at 909.

[108] *Vargas*, 164 F.2d at 526. *See generally* Amarnick, *supra* note 62, at 73 (moral rights doctrine "foreign and inappropriate"); Treece, *supra* note 67, at 505 ("Whatever may be the prospect for interaction between the French and American systems of protection for literary, musical and artistic works, it seems clear that the phrase 'moral right' is the wrong phrase for heralding American law developments"); Comment, *supra* note 1, at 1545 (doctrine of moral rights is an unnecessary "foreign import package").

[109] *See* J. Whicher, The Creative Arts and the Judicial Process 23 (1965) (The American equivalent of moral right should be developed not by "importing Moral Rights concepts wholesale from abroad, but by developing them from native roots, in accordance with our own common law traditions."); Merryman, *The Refrigerator of Bernard Buffet*, 27 Hastings L.J. 1023, 1042-43 (1976) (The author argues against "rote adoption of the civil law moral right." He states that "[i]nternational experimentation with the transplantation, as distinct from the adaptation, of legal institutions has not been encouraging." We in America should "develop our own method."). *Accord* Note, *Americanization*, *supra* note 62, at 910 (The California Art Preservation Act is praised as "[i]t attempts to integrate, rather than merely append, various characteristics of the moral rights doctrine into American law.").

[110] *See* Garland, *Our Copyright Law: Growing Pains in International Society*, 6 Copyright L. Symp. (ASCAP) 82 (1962) (The commentator points out that our accession to the Universal Coyright Convention on September 16, 1955, marked the "first time that we had joined in a major international agreement on Copyright."); Nimmer, *supra* note 16, at 547 ("The reluctance to enter into international agreements is perhaps partly a product of the isolationist tenets which guided American policy from the time of George Washington's farewell address through the post WWI refusal to join the League of Nations.").

speech delivered to the Los Angeles Copyright Society.[111] He stated: "[H]ere are two great concepts of copyright, each one with its merits; we, as Anglo-Saxons tend to be rational and logical and more concerned with practical considerations; the French are revoluntionary, emotional and irremedially attached to idealistic principles."[112]

Opposition to expanded artists' rights has also emanated from "user" groups such as the motion picture and television industries. They have resisted the creation of any residual rights which are not capable of being contractually modified,[113] and view such expansion as seriously hampering their efforts to conduct business. In a call for a recognition of moral rights in the form of a "national scheme," a commentator noted that apprehension of antagonizing user industries within their state might cause legislative bodies to be "fearful of enacting such legislation" even though "those are the very states in which such laws are most needed."[114] Such apprehension has not resulted in total restraint, however, as both California and New York, centers of the motion picture and art communities in the United States, have enacted legislation expanding artists' rights.[115] A close look at the scope of the respective state statutes does reveal, however, a certain accommodation to the interests of the user groups,[116] and testifies to the powerful influence that these groups have been able to wield in their opposition to the concept of moral rights.

Another obstacle to judicial recognition is the fact that, even in the civil law countries of Europe such as France, West Germany, Italy and The Netherlands, there is no *one* body of law consistently applied to the area of moral rights.[117] The extent and duration of protection of the rights of integrity and paternity differ from country to country and absent these kinds of guidelines any court is placed in a difficult position.[118] The

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[111] Speech by R. Monta to Los Angeles Copyright Society (Feb. 9, 1959), *reprinted in* Monta, *The Concept of "Copyright" Versus the "Droit D'Auteur"*, 32 S. CAL. L. REV. 177 (1959).

[112] *See supra* note 111, at 185.

[113] Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPYRIGHT SOC'Y U.S. 202, 213 (1979).

[114] *See* Amarnick, *supra* note 62, at 77.

[115] CAL. CIV. CODE §§ 986, 987, 989 (West 1985); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1986).

[116] Both CAL. CIV. CODE § 987(b)(2) and N.Y. ARTS & CULT. AFF. LAW §§ 11.01(9), 14.03(1) exclude from the boundaries of their artists' rights legislation motion pictures and literary works, those properties most utilized by the powerful entertainment industry.

[117] J. WHICHER, *supra* note 109, at 12 n.13 ("Earlier assumptions that civil law countries apply a sort of uniform code of 'Moral Right' have raised unnecessary difficulties in American discussions of these concepts.").

[118] *See, e.g.*, Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (1948), *aff'd*, 275 App. Div. 692, 87 N.Y.S.2d 430 (1949). This case involved four internationally famous Soviet Russian music composers who attempted to enjoin the producer of a motion picture from using their music and their names in credit lines in a

American judiciary might well wonder just which version of moral right it is being asked to adopt.[119] Faced with this quandry, the courts have responded in a predictable and even reasonable manner—they have waited for direction from legislative bodies.

B. Primary Barrier

The greatest stumbling block to the adoption of moral rights in this country, and the one which will continue to challenge head-on any expansion of the paternity and integrity rights, is the traditional concept of what constitutes ownership. It has indisputably been accepted in our nation that bona fide owners of property possess it *jus abutendi*.[120] By this phrase is understood "the right to do exactly as one likes with property,

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picture with an anti-Soviet theme. Since the music was in the public domain, it did not have the benefit of copyright protection. The composers based their rights to relief on four grounds; 1) the provision for injunctive relief contained in § 51 of the state Civil Rights Law which afforded right of privacy; 2) the injunctive power of court to restrain publication of defamatory matter; 3) deliberate infliction of injury without just cause; and 4) violation of plaintiff's moral rights as composers. *Id.* at 69, 80 N.Y.S.2d at 577. After rejecting the first three grounds, the court turned to the question of moral right. It conceded that in "a proper case" the court conceivably could "prevent the use of a composition or work in such a manner as would be violative of the author's right." *Id.* at 70, 80 N.Y.S.2d at 578. However, it then confronted the troubling problem of standards and questioned, "Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? *Id.* at 71, 80 N.Y.S.2d at 579. While seemingly acknowledging that there was such a thing as moral right, the court concluded that this case demonstrated no clear showing of infliction of a willful injury or an invasion of a moral right. *Id.* The court succinctly stated the difficult position of the judiciary in this matter by commenting: "In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined." *Id.*

[119] *See, e.g.*, Granz v. Harris, 198 F.2d 585, 590-91 (2d Cir. 1952) (Frank, J., concurring) ("'Moral right' seems to indicate to some persons something not legal, something meta-legal . . . It includes very extensive rights which courts in some American jurisdictions are not yet prepared to acknowledge . . . Finally, it is not always an unmitigated boon to devise and employ such a common name."); J. WHICHLER, *supra* note 109, at 18 ("no-one has ever undertaken to say *which* foreign country's legal concepts of this nature [moral rights] should be selected for importation."). Whichler goes on to state:

> The real danger inherent in the use of the 'Moral Right' label is . . . that there are so many enthusiasts for the uncritical adoption into American law of all the rights gathered under this broad label abroad . . . that any use of the label will lead many to suppose that just such a substantive adoption of foreign concepts has taken place.

Id. at 31.

[120] *See* Note, *Americanization*, *supra* note 62, at 901 n.1. (Six metal sculptures by Alexander Calder were purchased by the Fourth National Bank and Trust Co. of Wichita, Kansas. When questioned concerning the bank's action of painting three of the artworks, the Bank Chairman stated that as the bank owned the sculptures "we could paint them any damn color we wanted to.").

or having full dominion over [it]."[121] Blackstone, in his *Commentaries*, argued that such property rights were necessary "to maintain peace and harmony" and promote "the great ends of civil society."[122] He stated that "the public good is in nothing more essentially interested than in the protection of every individual's private rights."[123] According to this philosophy, there is no conflict between private rights and general welfare, for the protection of the first benefits the latter.[124] History has borne ample testimony that this result is not always the reality, and on many occasions the state has found it necessary to restrict the property rights of individuals in the futherance of the public interest.[125] Nevertheless, the traditional concept of property recognizes ownership of private property as a "formal right of the individual; secure from the attacks of society even when it clearly conflicts with the public interest. The end, the common good, can never justify the means—the violation of individual's rights."[126] Thus, the American legal tradition has long cherished the two principles of free alienability of property and free transferability of resources. "These two principles are designed to maximize the possible economic applications of property by giving the new owner the right to exclusive use and enjoyment of the property sold or otherwise transferred to him."[127] Evolving from the common law limitations on restraints on alienation emerged the "first sale doctrine" which cut off any subsequent control by a seller over property he had sold.[128]

In the realm of artists' rights, it is necessary in certain instances to restrict the property rights of owners. The question remains whether these restrictions on property rights engendered by artists' rights legislation can be accommodated in the American system of jurisprudence, or whether such interference with property rights is alien to our system.[129]

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[121] BLACK'S LAW DICTIONARY 770 (5th ed. 1979).

[122] 1 W. BLACKSTONE, COMMENTARIES *138.

[123] *Id.* at *139.

[124] R. SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 170 (1951).

[125] *See* Gantz, *supra* note 15, at 875. "The Anglo-American legal system has long recognized that society may impose some restraint on an individual's freedom to dispose and use his property."

[126] R. SCHLATTER, *supra* note 124, at 170.

[127] Gantz, *supra* note 15, at 875.

[128] *See* Nolan, *All Rights Not Reserved After the First Sale*, 23 BULL. COPYRIGHT SOC'Y 79 (1975).

[129] *See generally* Merryman, *supra* note 109, at 1043 ("It should be emphasized, first, that the moral right is the product of legal development in western, bourgeois, capitalist nations, with whom we have deep cultural affinity."). The moral right doctrine has proven itself compatible with the capitalist systems of France, Italy and West Germany. Neither the United States nor the Soviet Union have adopted the doctrine.

VI. Precedent for Restriction of Property Rights

There is a tradition in the United States of restriction of property rights when the rights of the owner conflict with some important societal interest. "The Anglo-American legal system has long recognized that society may impose some restraint on an individual's freedom to dispose of and use his property. This notion is reflected in a variety of legal doctrines including nuisance laws, riparian rights, environmental laws, zoning laws and cultural landmark preservation."[130] In these instances, it has been held that there are situations where the interests of society are superior to the private property interests of owners. For example, in *Pennsylvania Coal Co. v. Mahon*,[131] Justice Brandeis, dissenting, stated that the restriction upon the coal company's use of its property was a deprivation of some rights previously enjoyed but went on to argue:

> The restriction here in question is merely the prohibition of a noxious use. The property, so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public.[132]

Brandeis found that, for a restriction of property rights to be lawful, it must be "an appropriate means to the public end."[133] Justice Holmes, in the majority opinion, stated that the principle fact to be considered in a termination of such restriction was the extent of the diminution of the use of the property. He conceded that the greatest weight is given to the judgment of the legislature, though interested parties might always maintain that the legislature had exceeded its constitutional powers.[134]

In *Morseburg v. Balyon*,[135] the defendant art dealer challenged the constitutionality of the California Resale Royalties Act[136] and argued that the required payment of a five per cent royalty after transfer of ownership amounted to a restraint of his property rights. The district court rejected his arguments and looked to the legal requirement that the statute be "reasonable" and "appropriate to the public purpose justifying its adoption."[137] The court found that the "public purpose of promoting

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[130] *See* Gantz, *supra* note 15, at 875.

[131] 260 U.S. 393 (1922) (statute held unconstitutional taking which forbade the Pennsylvania Coal Co. from mining its own land when there was a residence on surface, even though residents signed purchase contract specifically allowing such mining).

[132] *Id.* at 417.

[133] *Id.* at 418.

[134] *Id.* at 413.

[135] 201 U.S.P.Q. (BNA) 518 (1978), *aff'd*, 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980). *See supra* note 4.

[136] Cal. Civ. Code § 986 (West 1986).

[137] 201 U.S.P.Q. at 520.

participation in the arts and encouraging equitable financial treatment for artists outweighs any detriment suffered by plaintiff."[138] After balancing defendant's property rights against society's greater interest in "moral and cultural strength,"[139] the court concluded that the State had only "moderately compromised" defendant's rights in order to promote a higher societal interest.[140]

Perhaps the best known statement of the proper balance of societal and personal property interests, and the most topical to the issues of this Note, is articulated in *Penn Central Transp. Co. v. New York City*.[141] In this case the Supreme Court was asked to delineate when considerations of culture and aesthetics could justify restrictions on property interests. New York City had adopted the Landmarks Preservation Law in 1965.[142] Under the law, when a building was designated as an historical landmark certain restrictions were placed upon the property owner's options concerning its use.[143] The Court noted in its response to the defendant's challenge of an unconstitutional taking that destruction of historic structures and the belief that such structures "enhance the quality of life for all"[144] had resulted in all fifty states and over 500 municipalities enacting laws to encourage or require the preservation of buildings and areas with historical or aesthetic importance.[145] While it is not the purpose of this Note to discuss the various provisions of landmark preservation statutes or the particular facts of *Penn Central*, the arguments articulated by the Supreme Court in affirming restrictions on the property rights of the owner seem particularly apropos.

Finding that the restrictions imposed on the owners of Grand Central Station were substantially related to the promotion of the general welfare, the Court reasoned that the application of the landmarks law was not a "taking" of appellant's property.[146] In a case of restriction of real property interests, the Court looked to the economic impact of the regulation, the character of the governmental action, and whether the state had reasonably concluded that health, safety, morals or general welfare would be promoted by legislation limiting particular uses of property.[147]

The Court had earlier recognized in *Berman v. Parker*[148] that the

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[138] *Id.* at 521.
[139] *Id.* at 520.
[140] *Id.* at 521.
[141] 438 U.S. 104 (1978).
[142] N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0 (1976).
[143] 438 U.S. at 110.
[144] *Id.* at 108.
[145] *Id.* at 107.
[146] *Id.* at 138.
[147] *Id.* at 123-28.
[148] 348 U.S. 26 (1954).

legislature had the power "to determine that the community should be beautiful as well as healthy, spacious as well as clean, [and] well balanced as well as carefully patrolled."[149] This position was firmly reiterated in *Penn Central* when the Court stated that it would, before considering the takings argument, emphasize what was *not* in dispute. It then proceeded to cite cases in which it had recognized "in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic feature of a city."[150]

The analogy is obvious between statutes which restrict property rights in furtherance of historical, cultural, and aesthetic goals, and artist's rights legislation motivated by cultural preservation. Restriction of the property rights of art owners is consistent with other cultural preservation legislation.

VII. New Consciousness and Prioritization of Artistic Values

Traditional property concepts appear to be in conflict with recent artists' rights legislation such as the Resale Royalty Act,[151] which retains for the original artist a pecuniary interest in his artwork nothwithstanding transfer of ownership, and the Art Preservation Act,[152] Act for Preservation of Cultural and Artistic Creations,[153] and Artists' Authorship Rights Act,[154] which limit the freedom of an owner of artwork to do as he likes with his property. Yet, rather than viewing moral rights legislation as a violation of individual rights, certain restraints on ownership of artistic works might be imposed in the common interest as part of a changing consciousness and prioritization in the United States. In his book *The Greening of America*,[155] Charles Reich laments that "our culture has been reduced to the grossly commercial; all cultural values are for sale, and those that fail to make a profit are not preserved."[156] This indictment is lent credence by the fact that American copyright law addresses only pecuniary rights, and personality rights are not even acknowledged. Reich observed that in the past we have desired changes, but "we have tried wanting them without changing consciousness, that is, while continuing to accept those underlying values that stand in the

[149] *Id.* at 33.
[150] *Penn Central*, 438 U.S. at 129.
[151] Cal. Civ. Code § 986 (West 1986).
[152] *Id.* § 987.
[153] *Id.* § 989.
[154] N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney Supp. 1986).
[155] C. Reich, The Greening of America (1970).
[156] *Id.* at 8.

way of what we want."[157] He deduced that "it is useless to seek changes in society without changes of consciousness. Consciousness is prior to structure."[158]

Legislation concerning artists' rights is representative of this change of consciousness. It testifies to a growing recognition that more is involved in the creation of an artwork than mere craftsmanship. Recognition of moral right demonstrates a shift from the fundamental position in the United States that

> a work of art is like any other object of property, for legal purposes, except as modified by the copyright law, and the copyright law protects only property rights. The position in France and other civil law countries is, on the contrary, that a work of art is different for some legal purposes from other objects of property so that the law of property must be appropriately modified in order to deal properly with the special considerations that are raised by works of art.[159]

To recognize the importance of this difference, as recent legislation has done, is to acknowledge the beginning of the new consciousness which Reich finds so necessary to change.

Before a legal system will protect the moral rights of an artist in his creation the following factors must coalesce:

> (1) the recognition that an author puts himself, his personality, into a literary work, and that this personal quality has intrinsic value; (2) the attainment of a prestigious social position for the literary and artistic crafts; (3) enough bargaining power among artisans to give a certain degree of economic independence, or at least the possibility of attaining it; and (4) a climate of freedom and individual liberty which encourages personal creativity.[160]

The movement for expansion of artists' rights in the United States indicates that art is achieving the recognition and position of importance in our society which precipitates wide-spread legal protection.

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[157] *Id.* at 317.
[158] *Id.* at 334.
[159] Merryman, *supra* note 109, at 1037.
[160] Comment, *supra* note 1, at 1562 n.127.

VIII. Recognition of Moral Rights in the United States

A. California Legislation

On January 1, 1980, the Art Preservation Act[161] became operative in California. While one commentator noted that "[t]he civil-law doctrine of *droit moral* has recently been transplanted to the American statutory landscape,"[162] the California statute was not a mere carbon copy of its civil law counterparts. The California legislature had paid heed to the admonishment not to import a foreign doctrine and instead had tailored the statute to the particular concerns and objectives of American society. Emphasizing the public interest in the preservation of cultural heritage, the California statute shifted the primary significance of moral rights away from the civil law preoccupation with artistic reputation.

The legislative findings which prefaced the Act articulated a dual purpose: to protect the artist's personality interest by prohibiting alteration and destruction of fine art, and to protect the public interest in preserving the integrity of cultural and artistic creations.[163] The position of importance given to the latter is particularly significant as it is pivotal in the creation of a uniquely American concept of artists' rights. While the civil law countries protect the artist's rights of paternity and integrity as an end in itself and therefore do not prohibit the ultimate destruction of the artwork by a subsequent owner, the California doctrine views the expansion of the rights of the individual artist as an integral part of the larger purpose of art preservation in the public interest. It is this societal purpose which proves the most substantial justification for whatever modifications have occurred or will occur in the future development of artists' rights and property interests, for it has already proven a successful argument in aesthetic zoning and landmark preservation cases. As Merryman stated:

> Thus the interests of individual artists and viewers are only a part of the story. Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor or improve the work of art is to falsify a piece of the culture. We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of the public interest.[164]

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[161] California Art Preservation Act, ch. 409, § 1, 1979 Stat. 1501 (1980) (codified at Cal. Civ. Code § 987) (West 1986).

[162] *See* Gantz, *supra* note 15, at 874.

[163] Cal. Civ. Code § 987(a) (West 1986).

[164] Merryman, *supra* note 109, at 1041.

As with the Resale Royalties Act,[165] fine art was restricted in the Art Preservation Act to include an original painting, sculpture, drawing, or an original work of art in glass.[166] The enactment of Section 997 of the Civil Code in 1983 added porcelain painting and stained glass artistry to this definition, and it is likely that as the doctrine gains acceptance the list will be further expanded. Significantly, motion pictures and literary works, properties most commonly utilized by the powerful entertainment industry in California, were excluded from the definition. Their exclusion would seem to be a politically expedient choice so as not to antagonize these powerful interests and thereby endanger the fledgling moral rights legislation.

An additional qualification to the application of the Act is that the work be of "recognized quality."[167] The determination of recognized quality is left to the trier of fact, who is directed to rely on "the opinion of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art."[168] It is this requirement of recognized quality which veers sharply from the traditional French doctrine of *droit moral* and establishes a unique focus to the California legislation. In France the *droit moral* concerns itself with the artist's reputation interests and does not hinge on society's judgment as to the quality of the work.[169] The very fact of being an artist in France insures legal protection for one's work.[170] The emphasis in the California statute on recognized quality, while admittedly denying protection to those whose work has not yet met with acclaim, is consonant with the goal of art preservation in the general interest of society. In effect, the state is selectively committing its protection and resources to those works judged worthy of preservation.

By the terms of the Act, the artist retains the right at all times to claim authorship or, for just and valid reason, to disclaim authorship of the work.[171] The Act also states that no one except the original artist who owns and possesses a work of fine art "shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art."[172] Neither may a person who "frames, conserves, or restores a work of fine art . . . commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting

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[165] CAL. CIV. CODE § 986(c)(2) (West 1986).
[166] *Id.* § 987(b)(2).
[167] *Id.*
[168] *Id.* § 987(f).
[169] *See* Note, *Americanization*, *supra* note 62, at 925.
[170] *Id.* at 926.
[171] CAL. CIV. CODE § 987(d) (West 1986).
[172] *Id.* § 987(c)(1).

gross negligence."[173] The Act defines gross negligence as "so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art."[174]

Any actions brought to enforce liability under the Act must be brought within three years of the incident complained of, or one year after discovery.[175] As testimony to the legislature's commitment to the protection of artists and their works, the remedies afforded to protect the artist's personality rights include injunctive relief, actual damages, punitive damages, reasonable attorney's and expert witness fees and any other relief the court finds proper.[176]

The Act also addresses the complicated situation when fine art is an integral part of a building.[177] This situation is more delicate in terms of balancing property interests as the property owner may be only an accidental owner of the artwork and have overriding interests in the disposition of the real estate, unlike the deliberate art purchaser. The Act treads carefully in the realm of real property. If the work cannot be removed without substantial mutilation or destruction, the rights and duties established under the Act are deemed waived absent a written instruction signed by the building owner and properly recorded. Such an instrument would be binding on a subsequent owner.[178] If the work can be removed without substantial mutilation, the rights and duties of the Act apply unless the owners has diligently attempted to notify the artist or heirs and has been unsuccessful or if the artist, after notification, failed within ninety days to remove the work.[179] If the artist pays for removal, title of the work shall pass to him.[180] This provision demonstrates a careful balancing of the property rights of the individual property owner, the artist, and the society at large and allows every possibility to retrieve works of art while respecting the owner's property interests.

The personality rights may not be waived except by a written instrument so stating and signed by the artist,[181] and may be exercised by the artist, or his heirs, legatees, or personal representatives until the fiftieth anniversary of the death of the artist.[182] This time limitation, which coincides with the copyright term,[183] is in contrast to the French

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[173] *Id.* § 987(c)(2).
[174] *Id.*
[175] *Id.* § 987(i).
[176] *Id.* § 987(e)(1)-(5).
[177] *Id.* § 987(h).
[178] *Id.* § 987(h)(1).
[179] *Id.* § 987(h)(2).
[180] *Id.*
[181] *Id.* § 987(g)(3).
[182] *Id.* § 987(g)(1).
[183] 17 U.S.C. § 302(a) (The 1976 Copyright Act grants copyright protection for works created after January 1, 1978, for a period of life of the author plus fifty years.)

approach of perpetual rights but seems a reasonable compromise in the face of opposition to recognition of rights which survive transfer of ownership.

The California state legislature, in accordance with its avowed goal of maintaining the cultural heritage in the public interest, next enacted the Preservation of Cultural and Artistic Creations Act, which became operative on January 1, 1983.[184] This act provides a safeguard for preservation of the integrity of an artwork after the fifty-year period of statutory protection, or in the face of an indifferent artist or heirs.[185] In order to effectuate its long-term goals of cultural preservation, the Act establishes that "[a]n organization acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by subdivision (c) of Section 987" of the Art Preservation Act.[186] Fine art is consistently defined with the prior act, but in addition to the requirement of "recognized quality" is that of "substantial public interest."[187] This latter requirement, while admittedly limiting the reach of the Act, can be justified as a realistic attempt to focus the energy and attention of art groups on the stated goal of the statute—the societal interest in preservation of the cultural heritage. The organization being granted this right to bring action is restricted to "a public or private not-for-profit entity or association, in existence at least three years at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists."[188] The Act reflects a firm commitment to the idea that works of fine art are an integral part of the cultural property of the society at large, and therefore merit treatment which differs from that of other property. In fact, the legislature made the express finding the "there is a public interest in preserving the integrity of cultural and artistic creations."[189]

As with the Art Preservation Act, the legislature included remedies sufficient to effectuate its purpose. The court may award reasonable attorney's fees and expert witness fees to the prevailing party, in an amount determined by the court.[190] This statute reflects the approach of the Art Preservation Act in the removal of artworks from real property.[191] If such removal cannot be completed without substantial muti-

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[184] Preservation of Cultural and Artistic Creations Act, ch. 1517, § 3, 1982 Stat. 5886 1983 (codified at CAL. CIV. CODE § 989) (West 1986).
[185] *Id.* § 989(e)(2)(A).
[186] *Id.* § 989(c).
[187] *Id.* § 989(b)(1).
[188] *Id.* § 989(b)(2).
[189] *Id.* § 989(a).
[190] *Id.* § 989(f).
[191] *Id.* § 989(e).

lation or destruction of the work, an organization may not bring an action under this Act.[192] If the organization "offers evidence giving rise to a reasonable likelihood of removal, it may bring a legal action."[193] In furtherance of its preservational purpose, the Act requires that, in the event that an artist or his heirs do not take action to remove the endangered artwork after receiving notice, the building owner must place a written notice in a newspaper of general circulation in the area where the artwork is located. Any approved organization may then pay the cost of removal and acquire title to the work.[194] If no response is elicited by the notices, the owner may remove the work with no penalty, even if mutilation or destruction results.[195] This procedure, while acceptably deferential to the rights of the property owner, demonstrates the seriousness with which the legislature views artistic and cultural preservation. All possible avenues are made available either to artists, heirs, or public interest groups to salvage artworks of recognized quality and of substantial public interest.

California's legislative efforts on behalf of artists' rights have breathed new life into the movement to establish moral rights in the United States. By linking artists' rights to the larger purpose of cultural preservation, the state has established a solid basis for public support and created a domestic version of the civil law doctrine which is palatable to the American public. Another state has subsequently enacted moral rights legislation, but with a different purpose and emphasis.

B. New York Legislation

In 1984 New York followed the lead of California and passed the Artists' Authorship Rights Act, which recognized the integrity and paternity rights of artists.[196] In terms of paternity rights, the California and New York acts are virtually identical,[197] but there is sharp divergence in the sector of integrity rights. The New York statute more closely resembles the civil law moral rights statutes with their emphasis on artistic reputation. Unlike its California counterpart, the New York statute surprisingly does not state any public interest in preserving cultural and artistic creations. The legislative purpose states:

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[192] *Id.*

[193] *Id.* § 989(e)(1).

[194] *Id.* § 989(e)(2)(A)(ii).

[195] *Id.* § 989(e)(2)(B).

[196] Artists' Authorship Rights Act, L. 1983, ch. 994, § 1 (codified at N.Y. ARTS & CULT. AFF. LAW §§ 14.51-.59) (McKinney 1984). *See supra* note 12.

[197] Both CAL. CIV. CODE § 987(d) and N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a)(McKinney supra 1986) use the identical phrase "shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art."

> [T]he physical state of a work of fine art is of enduring and crucial importance to the artist and the artist's reputation . . . therefore . . . there are circumstances when an artist has the legal right to object to the alteration, defacement, mutilation or other modification of his or her work which may be prejudicial to his or her career and reputation and that further the artist should have the legal right to claim or disclaim authorship for a work of art.[198]

In harmony with its emphasis on reputation, the provisions of the Act apply only to works of fine art knowingly displayed in places accessible to the public or published or reproduced in the state.[199] Even then, display is prohibited only if the work is presented in an altered, defaced, mutilated or modified form as the work of the author, or is likely to damage his reputation.[200] Outright destruction is not actionable under the Act nor is mutilation of a work held in a private collection. A mutilated work could be publicly displayed so long as authorship was not attributed, and damage to the artist was not likely to result. In accordance with the phraseology of the statute, an alteration to an artwork might theoretically be judged an improvement and hence not harmful to the artist's reputation and not actionable. The breadth of coverage provided by this Act falls far short of the protection offered to the artist in California. While this Act, despite its limitations, admittedly fulfills the stated goal of protection of artistic reputation, the Act does not demonstrate the far-sighted California view of protection of public interest through preservation of cultural heritage.

The scope of the New York legislation, when originally enacted, was wider than that of California, as it afforded protection to any original work of visual or graphic art of any medium, excluding only sequential imagery such as motion pictures.[201] While paintings, drawings, prints, photographic prints, and sculpture were listed, the Act specifically stated that the list was not definitive.[202] At the end of the first year of operation, the scope of the Act was constricted to a newly defined class of fine art consisting of "painting, sculpture, drawing, or work of graphic art, and print, but not multiples."[203] While the restricted definition of fine art for the purposes of the Act is now more closely in line with the California legislation, an important distinction remains. Within its scope of protection, the New York legislation applies to virtually all artists as there is no requirement, such as that in California, that the work be of "recog-

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[198] N.Y. ARTS & CULT. AFF. LAW § 14.55 historical note (McKinney 1984).
[199] N.Y. ARTS & CULT. AFF. LAW § 14.03(1)(McKinney Supp. 1986).
[200] *Id.*
[201] N.Y. ARTS & CULT. AFF. LAW § 14.51(5) (McKinney 1984).
[202] *Id.*
[203] N.Y. ARTS & CULT. AFF. LAW § 11.01(9) (McKinney Supp. 1986).

nized quality." The scope of this moral rights coverage echoes the French approach that the mere fact of being an artist ensures protection.[204]

If an artist wishes to enforce liability under the Act, the action must be commenced within three years of the incident complained of or one year after its constructive discovery.[205] The remedies afforded the artist are "legal and injunctive relief."[206] This terse description of remedies would seem to establish a much weaker enforcement mechanism than the California statute, which lists injunctive relief, actual damages, punitive damages, reasonable attorney and expert witness fees, and any other relief the court deems proper.[207]

No mention is made in the Artists' Authorship Rights Act as to duration of the paternity and integrity rights. The legislative findings contain the only pertinent language and state that "[t]here are circumstances when an *artist* has the legal right to object to the alteration . . . "[208] (emphasis added). From this wording, one may extrapolate that the rights granted under the Act may be enforced only during the life of the artist. The California statute, on the other hand, has prolonged applicability for an additional fifty years[209] and through further legislation has now created perpetual protection.[210] The New York Act does not address the possibility of contractual waiver of the paternity and integrity rights, nor does it address the problem of artwork as an integral part of real property. Overall, New York's rote adoption of the civil law concept of *droit moral* does not prove satisfactory to the long term needs of either artists or the larger society. The New York Act does not secure for the artist the ultimate protection of his reputation—a guarantee that the artist's works will be preserved for posterity.

IX. Conclusion

It is obvious that the doctrine of moral rights is gaining acceptance and support in the United States. The use of analogous causes of action has proven unsatisfactory, and the growing appreciation of art has led to a new consciousness and priority for the concerns of the creative artist. Merryman has observed that we are now at "the opportune historical moment for consideration of this question: Given the cultural importance of American art, should our law be modified in such a way as to protect

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[204] *Supra* note 170.
[205] N.Y. Arts & Cult. Aff. Law § 14.03(4)(b) (McKinney Supp. 1986).
[206] *Id.* § 14.03(4)(a).
[207] *See* Cal. Civ. Code § 987(e)(1)-(5) (West 1986).
[208] N.Y. Arts & Cult. Aff. Law § 14.55 legislative findings (McKinney 1984).
[209] Cal. Civ. Code § 987(g)(1) (West 1986).
[210] *Id.* § 989.

the integrity of works of art?"[211] Two states, to varying degrees, have answered in the affirmative and have moved to protect the paternity and integrity interests of artists.

Scrutiny of the California and New York legislation reveals the California Art Preservation Act as the superior model and the one hopefully emulated by other states wishing to acknowledge artists' personality rights. It is motivated by clear objectives,[212] and each section is carefully tailored toward their accomplishment. While far from perfect, and criticized by some commentators as too narrow in its range of protection,[213] it is remarkably thorough and reflects careful preparation and anticipation of contingencies. The New York legislation, while certainly an advance for artists' rights in the state, does not reflect the effort displayed in the Art Preservation Act to anchor artists' rights to a concept such as cultural preservation which has already received public and judicial acceptance. Although adoption of paternity and integrity rights necessarily imposes certain restrictions on property rights there is precedent for such a development, and the restrictions are minor when balanced against the societal goal of preservation of our culture.

COLLEEN P. BATTLE

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[211] Merryman, *supra* note 109, at 1042.

[212] *See supra* note 163.

[213] *See* Note *Americanization*, *supra* note 62, at 918, 922 (The requirement of a showing of intent, "a very significant restriction on the effective reach of the legislation, necessitates distinguishing between deliberate and accidental damage. . . . The Act creates a diluted form of the right of integrity under droit moral."). For a general critical discussion of the Art Preservation Act, see Petrovich, *Artists Statutory Droit Moral in California: A Critical Appraisal*, 15 LOY. L. REV. 29, 41 (1981) (definition of fine arts too narrow); *cf.* Duffy, *Royalties for Visual Artists*, 7 PERF. ARTS REV. 560, 574 (1977) (Although the article deals with Resale Royalties Act, the two statutes share the same definition of fine arts and therefore the same criticism in this area applies: "[W]hy should artworks such as paintings and sculpture be distinguished from other 'artistic' endeavors?").