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Burton M. Leiser

Kathleen Spiessbach

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## Articles

### **Artists' Rights: The Free Market and State Protection of Personal Interests**

**Burton M. Leiser†**  
**Kathleen Spiessbach††**

#### I. Introduction

The rights of artists in their works have long been regarded in Europe as involving pecuniary as well as personal interests.<sup>1</sup> The former include exploitative rights in the work generally covered by the copyright laws, such as monopoly over reproduction, adaptation, and performance for a term of years.<sup>2</sup> The latter are

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† B.A., University of Chicago; M.H.L., Yeshiva University; J.D., Drake University; Ph.D., Brown University. Dr. Leiser is a Distinguished Professor of Philosophy at Pace University and is in private practice in the State of New York. Copyright © 1989 Burton M. Leiser All Rights Reserved.

†† B.A., Douglass College; J.D., New York University. The authors wish to express their appreciation to Ms. Stacy Molton, J.D., Drake University, for her research assistance.

1. Note, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); see also Kury, *Protection for Creators in the United States and Abroad*, 13 COPYRIGHT L. SYMP. (ASCAP) 1 (1963); DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980).

2. Note, *An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus*, 9 PAC. L.J. 855, 856 (1978).

concerned with the work of art, not strictly as an item of commerce, but as an expression of the artist's personality.<sup>3</sup>

When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute do not protect.<sup>4</sup>

This spiritual stake of the artist in his creations has received the highest degree of legal recognition in France,<sup>5</sup> where the bundle of rights developed to protect creative personality interests is known as *droit moral*, or moral right.<sup>6</sup> Four basic components comprise the author's moral right.<sup>7</sup> First, the right of disclosure vests solely in the artist the right to decide when a work should first be made public or sold.<sup>8</sup> Second is the right to withdraw or modify a work which is no longer representative of the creator's persona. The third component is the right to paternity, under which are subsumed the right to be credited as the author of one's own work or to remain anonymous or pseudonymous, the right to prevent false attribution of one's work to someone else, and the right to disclaim authorship of work not one's own. Finally, the right of integrity, or respect for the work, protects against mutilation, modification, or complete destruction of the work. Under French law, at least in theory, the artist cannot effectively waive these rights,<sup>9</sup> even by express contractual provision,<sup>10</sup> and their enforcement survives the life of the

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3. Note, *supra* note 1, at 556.

4. *Id.* at 557.

5. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 249 (1978).

6. UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1984) (translating Loi Sur La Propriété Littéraire Artistique L. No. 57-298, Art. 1 (1957)) [hereinafter Law of 1957].

7. See Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968).

8. For details on these rights, see *infra* notes 115-263 and accompanying text.

9. See DaSilva, *supra* note 1, at 16.

10. *Id.* at 27 (citing Judgment of Nov. 15, 1966, Cours d'appel, Paris 1967 Gazette du Palais [G.P.] 1.17); see generally Sarraute, *supra* note 7.

artist and continues in perpetuity.<sup>11</sup>

In rendering the moral right inalienable and perpetual, French law interpolates the rights of artistic personality into the interests of society in preserving art as part of the nation's cultural heritage.<sup>12</sup> Thus, rights vesting in the artist by virtue of his creative self-expression are subtly shifted, by theoretical osmosis, into the work itself, rendering it an inviolable repository of the collective interest in the preservation of art.

Although the French approach is extremely deferential to and protective of art and artists,<sup>13</sup> its subordination of property rights to the artist's moral rights has engendered numerous practical difficulties in application.<sup>14</sup> In this respect, the *droit moral* is fundamentally different from the approach found in American law, which has traditionally focused more attention on proprietary rights than upon the protection of the personal interests of artists in their creations or of the works of art themselves.<sup>15</sup>

American law does not recognize "moral" rights of artists.<sup>16</sup> Historically, the common law has treated works of art in the same manner as other forms of property, and through copyright legislation has duly protected the artist's control over first publication, reproduction, and adaptation. At common law, however, for an artist working under commission, there was a presumption of the employer's ownership of the copyright. An artist could retain his right only by reserving it pursuant to contract.<sup>17</sup> In the United States, artists seeking to vindicate their "moral" interests have had relatively little success.<sup>18</sup> Without a unified moral rights theory upon which to rely, these plaintiffs have en-

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11. Law of 1957, *supra* note 6, art. 6-7, cl. 2. The right is inheritable. *Id.*

12. *See* Diamond, *supra* note 5, at 249; *see also* Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976).

13. *See* DaSilva, *supra* note 1, at 2.

14. *Id.* at 7, 17-37; *see generally* Note, *Artworks and American Law: The California Art Preservation Act*, 61 B.U.L. REV. 1201 (1981).

15. Merryman, *supra* note 12, at 1037.

16. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 24 (2d Cir. 1976); *see also* Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act — A Judicial Shell Game?*, 48 GEO. WASH. L. REV. 377 (1980).

17. *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940).

18. *See* Diamond, *supra* note 5, at 252.

listed the aid of various common-law theories, including breach of contract, unfair competition, defamation, the right to privacy, and the right to publicity, as well as the statutory protection afforded under copyright and trademark laws.<sup>19</sup> Some commentators regard these alternatives as functionally equivalent to safeguards in a moral rights system, at least to the extent that such measures are compatible with traditional Anglo-American notions of property and contract.<sup>20</sup> There is no compelling necessity, under this view, to advocate the “transplanting” of French moral rights theory into the American legal landscape.

Moreover, there are fundamental differences in the conceptual origins and development of artists’ rights in France and in the United States, reflecting divergent attitudes toward the status of artists in society and the source and nature of their rights. Because of established legal culture and traditions, among other reasons,<sup>21</sup> wholesale adoption of moral rights doctrine is likely to be unacceptable in the United States, and might be inappropriate as well.

On the other hand, moral rights advocates contend that a reconceptualization of the role of art and artists in American society is long overdue.<sup>22</sup> Works of art, whether literary, visual, dramatic, or musical, should be recognized, not merely as “property” to be exploited, but as incarnations of creative thought. The artist’s interest in protecting the integrity of his work, as well as society’s interest in preserving its cultural legacy, must be more fully addressed in our law. The current trend of activism in the area of artists’ rights appears to be animated by an interesting coalescence of both viewpoints. In the judicial arena, the barriers to recognition of some moral rights are slowly eroding. Courts have interpreted expansively section 43(a) of the Lanham Act,<sup>23</sup> the federal trademarks statute, to proscribe the public display of a work attributed to its creator after that work

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19. *Id.* at 259-71.

20. *Giesel v. Poynter Products, Inc.*, 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968); Note, *supra* note 2, at 877.

21. See generally *infra* notes 115-130 and accompanying text.

22. See Merryman, *supra* note 12, at 1049; see also Taubman, *The New York Artists’ Authorship Rights Act of 1983: Waiver and Fair Use*, 3 CARDOZO ARTS & ENT. L.J. 113, 123 (1984).

23. 15 U.S.C. § 1125(a) (1982).

has been significantly altered without the artist's consent.<sup>24</sup>

Two state legislatures have recently exercised their apparent discretion to enact what have been called "moral rights statutes." In 1980, California enacted the Art Preservation Act,<sup>25</sup> and in 1983, New York passed its Artists' Authorship Rights Act.<sup>26</sup> As the titles indicate, California's law focuses more on preserving art for posterity, while New York's Act centers on safeguarding the artist's reputation.

Following an analysis of the historical evolution of artists' rights in France and the United States, we will discuss these recent legislative developments. We will then offer some proposals for an approach to this problem that we believe address the principal concerns of artists and of those who purchase the works that they create.

## II. The Rights of Artists in France

The modern French doctrine of artists' moral rights is philosophically rooted in the turbulent social and political milieu of the late eighteenth century. Before the French Revolution, the sovereign retained plenary power over all intellectual rights, and generally conferred such rights only upon printers.<sup>27</sup> The right granted was actually limited to a monopoly over reproduction for a fixed period.<sup>28</sup> In the years immediately preceding the Revolution, the inherent interest of an author in his unpublished manuscript was recognized as emanating from the creative act itself, rather than from any royal prerogative.<sup>29</sup>

This concept later served as a banner of revolutionary fervor. Any taint of Crown sovereignty was purged from the rights of authors. Artistic creation was considered a noble exercise of individual liberty.<sup>30</sup> Thus, the personal rights of an artist in his creations were infused at their inception with the sanctity of

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24. Sokolow, *A New Weapon for Artists' Rights: Section 43(a) of the Lanham Trademark Act*, 5 *ART & THE LAW* 32 (1980).

25. *CAL. CIV. CODE* § 987 (West Supp. 1985).

26. *N.Y. ARTS & CULT. AFF. LAW* § 14.03 (McKinney 1984 & Supp. 1988) (original version at §§ 14.51-.59 (McKinney 1983)).

27. DaSilva, *supra* note 1, at 8.

28. *Id.*

29. *Id.* at 8-9.

30. *Id.*

natural law. It is not surprising, therefore, that this reverence for the personality of the artist, as it developed in the nineteenth and twentieth centuries, was termed *droit moral*.<sup>31</sup> Nor is it difficult to comprehend why, in France, moral rights are considered wholly distinct from any proprietary interest in the *objet d'art*.<sup>32</sup> The Law of 1957<sup>33</sup> provides a lengthy list of intellectual works that are covered.<sup>34</sup> Article 2 of the law provides that all intellectual works, "regardless of their kind, form of expression, merit or purpose,"<sup>35</sup> are entitled to protection. Protection is also available for authors and editors of derivative works, including anthologies, compilations, and other variations on existing intellectual works. "[T]ranslations, adaptations, new versions, or arrangements of intellectual works shall enjoy the protection provided by this law without prejudice to the rights of the author of the original work."<sup>36</sup> Derivative works may similarly be copyrighted in the American system, as long as the material taken from the original work is used lawfully.<sup>37</sup>

The most notable feature of the French copyright law is the scope of moral rights granted to the author. Under Article 6 of the Law of 1957, "[t]he author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable and im-

31. *See id.* at 7.

32. *Id.* at 10.

33. *See* Law of 1957, *supra* note 6. This statute was amended by the Law on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises. Law No. 85-660 (1985).

34. *See* Law of 1957, *supra* note 6, at art. 3. Included in the 1957 definition of intellectual works are:

books, pamphlets, and other literary, artistic and scientific writings; lectures, addresses, sermons, pleadings in court, and other works of the same nature; dramatic or dramatico-musical works; choreographic works, and pantomimes, the acting form of which is fixed in writing or otherwise; musical compositions with or without words; cinematographic works and works made by processes analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving, lithography; photographic works of an artistic or documentary character, and other works of the same character produced by processes analogous to photography; works of applied art; illustrations, geographical maps; plans, sketches, and plastic works, relative to geography, topography, architecture, or the sciences.

*Id.*

35. *Id.* art. 2.

36. *Id.* art. 4.

37. 17 U.S.C. § 103(a) (1982).

prescriptable. It may be transmitted *mortis causa* to the heirs of the author. . . ."<sup>38</sup> Collaborative works, *i.e.*, works created by more than one person, are the joint property of the authors,<sup>39</sup> and are distinguished from "composite works," in which preexisting works are incorporated into a new work without the collaboration of the original author.<sup>40</sup> Composite works are the property of the "realizing" author without prejudice to the rights of the author of the preexisting work.<sup>41</sup> A "collective work," in which the personal contributions of the various creators are so merged as to make it impossible to attribute to each author a separate right in the work, is generally deemed the work of the person or legal entity under whose name it is disclosed.<sup>42</sup> In 1985, the law's coverage was extended to works made for hire and multiple authorship.<sup>43</sup>

In French law, as in European law generally, the protections afforded authors under the moral rights doctrine extend to each of these categories of artistic work and apply through the author's lifetime plus fifty years.<sup>44</sup>

We have already noted that the French have encountered some practical difficulties in applying the idealistic tenets of the moral rights doctrine in practice.<sup>45</sup> As we shall see, the French courts have struggled to overcome these difficulties, but have not fully succeeded in doing so.

#### A. *The Right of Disclosure*

French tribunals have consistently upheld the right of the artist alone to determine when a work is satisfactorily completed and ready for public view.<sup>46</sup> *L'Affaire Roualt*<sup>47</sup> illustrates the difficulty of discerning when disclosure has occurred and how far

38. Law of 1957, *supra* note 6, at art. 6.

39. *Id.* art. 9.

40. *Id.*

41. *Id.* art. 12.

42. *Id.* arts. 9, 13.

43. Title I, art. 1(5), 1985 amendment.

44. Law of 1957, *supra* note 6, at art. 21.

45. *See supra* note 14 and accompanying text.

46. *See* DaSilva, *supra* note 1, at 17-22.

47. *Id.* at 19 n.133 (citing Judgment of March 19, 1947, Cour d'appel, Paris, 1949 Périodique et critique [D.P.] 20).



the courts are willing to go in deference to the artist's judgment as to when a work is finished. The artist, Roualt, had placed hundreds of paintings in the custody of an art dealer, who stored them in a closet in his (the dealer's) apartment.<sup>48</sup> Roualt would occasionally come by to apply finishing touches to the works.<sup>49</sup> Following the art dealer's death, his heirs claimed ownership of Roualt's paintings; but the court held for Roualt, finding that ownership had never passed to the dealer, even though Roualt had accepted advances from him and relinquished possession of the paintings.<sup>50</sup> The only remedy the court allowed the dealer's heirs was restoration to them of the advances that Roualt had received.<sup>51</sup>

In *L'Affaire Camoin*,<sup>52</sup> the Paris Court of Appeals upheld the right of an artist to destroy his own work and to enjoin another from restoring the discarded works and selling them. This decision raises a disturbing paradox that reveals the doctrine's double edge: "After all, if *droit moral* arises from a notion that art works somehow are more sacred than fungible property, it would be ironic for the doctrine to justify court-ordered art-burnings."<sup>53</sup>

*Whistler v. Eden*<sup>54</sup> is a prime example of strict enforcement of an artist's prerogatives. Lord Eden commissioned the famous American artist to paint a portrait of Eden's wife.<sup>55</sup> With Eden's permission, Whistler arranged for the portrait to be displayed at an exhibition.<sup>56</sup> When Whistler received Lord Eden's check in payment of his fee, he was outraged at what he considered ex-

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48. *Id.* at 19.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 18 n.130 (citing Judgment of March 6, 1931, Cour d'appel, Paris, 1931 Périodique et critique [D.P.] II 88).

53. *Id.* at 19. Indeed, French law has not adequately addressed this anomaly. Somewhat paradoxically, the theoretical concept of *droit moral* presupposes that the artist's personal rights granted in perpetuity coincide with society's interest in preservation. This may not always, in fact, be the case. For discussion, see *infra* notes 64-70 and accompanying text.

54. *Id.* at 18 n.126 (citing Judgment of March 20, 1898, Trib. Civ., Seine 1898 [D.P.] II 465; Judgment of December 21, 1897, Cour d'appel, Paris; Judgment of May 14, 1900, Cass. civ. 1re 1900 [D.P.] I 5000).

55. *Id.* at 18.

56. *Id.*

cessively low compensation but cashed the check nevertheless.<sup>57</sup> When the portrait was returned to his studio from the exhibition, Whistler painted out Lady Eden's head, substituted another, and refused to deliver the painting.<sup>58</sup> Eden sued for restoration of the portrait, delivery, and damages.<sup>59</sup> The Cour de cassation awarded Eden the purchase price and damages but would not compel restoration.<sup>60</sup> The *Whistler* case stands for the proposition that the "artist is the absolute master of the decision to disclose his work, even when the right of disclosure would seem to impair contractual obligations."<sup>61</sup>

Lack of inspiration is not a ground for breach of contract to create.<sup>62</sup> The artist must act in good faith or be held liable for damages.<sup>63</sup> Thus, although French courts are generally quite solicitous of the more ethereal forms of the artist's moral rights, they nevertheless hold that the artist's discretion must, in the interest of fairness, be limited.

#### B. *The Right of Withdrawal or Modification*

In 1911, Anatole France sought to enjoin a publisher from printing a first edition of a manuscript France had written and sold to the defendant twenty-five years earlier.<sup>64</sup> France asserted that the work no longer reflected his aesthetic orientation.<sup>65</sup> The court granted the injunction but ordered France to return the full purchase price to the publisher.<sup>66</sup>

The decision in the *France* case demonstrates precisely the scope of the right of withdrawal or modification. Although in theory an artist in France may withdraw or modify a work if it is no longer representative of his vision, even after ownership has been transferred, this right is limited in practical terms so as to

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57. Merryman, *supra* note 12, at 1024.

58. *Id.*

59. *Id.*

60. *Id.*

61. DaSilva, *supra* note 1, at 18.

62. *Id.*

63. *Id.*

64. *Id.* at 23 n.159 (citing Judgment of December 4, 1911, 1912 Pataille 1.98); Kury, *supra* note 1, at 5.

65. Kury, *supra* note 1, at 5.

66. DaSilva, *supra* note 1, at 24.

obviate the potential harm to the holders of the property interests in that work.<sup>67</sup> If the artist exercises the right subsequent to sale of the work, he must indemnify the owner in advance for any loss that the retraction or change might cause.<sup>68</sup> There is an attendant obligation to give the same owner a right of first refusal on terms identical to those of the original contract once the modified work is offered for sale.<sup>69</sup> These restrictions obviously accommodate some of the property rights of the purchasers of art works, but they have the reciprocal effect of imposing very heavy costs upon the artist's invocation of his moral rights — costs that may well be prohibitive.<sup>70</sup>

### C. *The Right of Paternity*

The right to be credited as the author of one's own work has been vigorously upheld in France, in part because of its close connection with the doctrine on the natural right of individual liberty which first ignited the fuse of revolution in France. So strong is the resilience of this right of paternity that it has withstood the powerful force of contrary contractual obligations.<sup>71</sup> As we shall see later, this is not so in the United States, especially where works made for hire are concerned.<sup>72</sup>

In *Guille v. Colmant*,<sup>73</sup> the Paris Court of Appeals refused to enforce a contract requiring an artist to sign certain of his works with a pseudonym, leaving others unsigned.<sup>74</sup> The court held that such contractual provisions were void as violative of the right of paternity.<sup>75</sup> The court in *Guille* was intrigued by

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. DaSilva, *supra* note 1, at 27 (citing Judgment of March 15, 1967, Cour d'appel, Paris 1967 [G.P.] 1.17); Merryman, *supra* note 12, at 1027 (waiver of the right of paternity in France is unenforceable). Article 6 of the 1957 Law declares artists' rights to be inalienable and unassignable. See Law of 1957, *supra* note 6, at art. 6. This determination has engendered considerable controversy and provoked allegations of unnecessary paternalism. DaSilva, *supra* note 1, at 29.

72. See *infra* notes 131-143 and accompanying text.

73. DaSilva, *supra* note 1, at 27 (citing Judgment of March 15, 1967, Cour d'appel, Paris 1967 [G.P.] 1.17).

74. *Id.*

75. *Id.*

another feature of the contract as well. The business arrangement between the artist and the dealer was to last for the unusually long period of ten years, and the dealer had the exclusive unilateral right to terminate it.<sup>76</sup> The court considered such an arrangement inevitably detrimental to the artist's reputation, because it mandated a particularly rigorous rate of artistic production over an extended term.<sup>77</sup> This foray into the protection of the artist's reputation predicated on the doctrine of moral right drew criticism for its blatant inconsistency with the philosophical premises that underlie the doctrine.<sup>78</sup> "Legal protection is granted 'solely for the performance of the creative act' regardless of the artistic merit of the work produced. Thus, the work's merit, and consequently, the author's reputation, do not enter into account, and need not be protected."<sup>79</sup>

Perhaps reputation conjures all too easily specters of pecuniary interest in the minds of purist *droit moralistes*.<sup>80</sup> In *Martin-Caille v. Bergerot*,<sup>81</sup> the court refused to enjoin an art dealer from "dumping" large quantities of the artist's paintings on the market at low prices, thereby causing a serious decline in the value of all of his works.<sup>82</sup> Bergerot's real complaint, the court reasoned, was against the defendant's marketing practices, which were operating to his financial detriment.<sup>83</sup> This claim was distinguished from a veritable moral rights claim, *i.e.*, one against an attack on the artist's creative personality *per se*.<sup>84</sup>

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76. Sarraute, *supra* note 7, at 479.

77. *Id.*

78. *Id.*

79. *Id.* (quoting Law of 1957, *supra* note 6, at art. 1) (citations omitted).

80. During the early development of the *droit moral* in France, the debate raged over whether property principles or the idea of creative personality would prevail as the dominant or even exclusive characterization of moral right. Support for the personal nature of the right grew as the antiproperty influence of Marxist thinking spread in the mid-nineteenth century. Nevertheless, a separate theory of intellectual property did take root and by the twentieth century the two characterizations attained comparable vitality, while remaining conceptually distinct. DaSilva, *supra* note 1, at 10-11.

81. Merryman, *supra* note 12, at 1031 n.23 (citing *Martin-Caille v. Bergerot*, Cass. civ. 1re, 1969 Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 73).

82. *Id.* at 1031.

83. *Id.*

84. *Id.* This decision illustrates a major difference between the French and American attitudes toward reputation as a potentially protected interest. In France, reputation in this context is considered an interest too closely related to finances, too crass to merit moral rights protection. In the United States, the New York statute requires that injury

The second category of the right of paternity, the prevention of false attribution to someone else of one's own work, is less well defined in French case law.<sup>85</sup> A closely analogous example is the case of the marble cutter who signed a tombstone he had fashioned, but which the artist did not sign.<sup>86</sup> The court held that the artist's authorship took precedence over that of the marble cutter.<sup>87</sup>

The third category of the right of paternity, the artist's interest in preventing the use of her name on works not her own, is substantially similar to some aspects of the right of integrity.<sup>88</sup> Under this component of the right of paternity, if an artist's work has been altered or mutilated, the artist may disclaim authorship.<sup>89</sup> As a corollary to this right, artists have been permitted to restrain the use of their names in advertisements.<sup>90</sup>

#### D. *The Right of Integrity*

The right of integrity is regarded as the most important element of the moral rights doctrine.<sup>91</sup> If art is understood as the embodiment of the artist's personality, then any defacement or unauthorized alteration of the work is an attack on the artist's creative self.

In *Fersing v. Buffet*,<sup>92</sup> the artist, Buffet, designed a number of panels for a refrigerator.<sup>93</sup> He signed only one of the panels, evidencing his concept of the panels as an inseparable whole.<sup>94</sup> The owner of the refrigerator attempted to dismantle the work

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to reputation (or the reasonable likelihood of such injury) be proved in actions brought thereunder. See *infra* text accompanying note 291. The California statute does not require a showing of damage to reputation but mandates that the work seeking protection be "of recognized quality." See *infra* text accompanying note 270.

85. DaSilva, *supra* note 1, at 27.

86. *Id.* at 27 n.187.

87. *Id.*

88. *Id.* at 28.

89. *Id.*

90. *Id.*

91. *Id.* at 30-31.

92. *Id.* at 31 n.212 (citing Judgment of May 30, 1962, Cour d'appel, Paris 1962 Dalloz, *Jurisprudence* 570; Judgment of July 6, 1965, Cour de cass. 1965 [G.P.] II 126); see also Merryman, *supra* note 12, at 1023 n.1.

93. Merryman, *supra* note 12, at 1023.

94. *Id.*

and sell the panels separately, over Buffet's protest.<sup>95</sup> The Cour de cassation upheld Buffet's moral right to insist that his work remain intact.<sup>96</sup>

In *Buffet*, the court evidently concluded that the owner's property interests were not excessively compromised by the ruling that the refrigerator could not be disassembled, when contrasted with Buffet's personal interest in the work's integrity.<sup>97</sup> The balance of interests, however, is not always so clear. In *Lacasse v. Abbé Quenard*,<sup>98</sup> for example, an artist painted frescoes on the walls of a small chapel pursuant to a commission from the town.<sup>99</sup> The actual owner of the chapel, the bishop, had no knowledge of the commission, and ultimately disapproved of the frescoes and had them obliterated.<sup>100</sup> The artist sued and the court found for the owner, implying that if the bishop had originally consented to the commission, the outcome might have been different.<sup>101</sup>

A later case involving the complete destruction of a work of art supports this speculation. In *Sudre v. Commune de Baixas*,<sup>102</sup> the artist was commissioned to create a statue for the fountain in his native village.<sup>103</sup> The statue was not well maintained, and eventually the town council had it removed and destroyed, utilizing pieces of the sculpture to fill holes in the road.<sup>104</sup> The sculptor sued and was awarded substantial damages for violation of his right of integrity in his work.<sup>105</sup>

The results in *Lacasse* and *Sudre* suggest that the right of integrity is not absolute but will prevail against an owner's property interest if that owner gives prior consent to the work, accepts it, and later mutilates it.<sup>106</sup> In sum, whereas the modern

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95. DaSilva, *supra* note 1, at 31.

96. *Id.*

97. *Id.*

98. *Id.* at 33 n.223 (citing Judgment of April 27, 1934, Cour d'appel, Paris 1934 [D.P.] 385).

99. Merryman, *supra* note 12, at 1034.

100. *Id.*

101. *Id.*

102. *Id.* at 1034 n.34 (citing *Sudre v. Commune de Baixas*, Conseil de Prefecture, Montpellier, 1937 Gazette du Palais [G.P.] I 347).

103. *Id.* at 1034.

104. *Id.*

105. *Id.*

106. *Id.* at 1034-35.

French doctrine of *droit moral* has taken the lead in providing protection for artists' personal rights in their works and the doctrine has retained much of its idealistic resonance, it has also developed significant limitations in response to strong competing interests and modern exigencies.<sup>107</sup>

The personal nature of moral rights has been diluted in cases involving such collaborative works as motion pictures, where rights are considered to be collective and must be shared among those who collaborated in the creative effort.<sup>108</sup> Their exercise may also be subject to a rule of unanimity among joint collaborators.<sup>109</sup>

Not all rights that fall under the doctrine of *droit moral* are blessed with perpetual life. The rights of disclosure, paternity, and integrity survive the artist, but the right to withdraw or modify a work dies with him,<sup>110</sup> for these latter rights depend to a greater degree upon the artist's ongoing creative powers. Once those powers no longer exist, the rights that depend upon them vanish as well.<sup>111</sup>

Even the precept that the artist's moral rights are inalienable does not escape limitation. In practice, certain contracts transferring moral rights are enforced.<sup>112</sup> Moreover, just as each artist in a collaborative effort relinquishes a portion of his independent moral rights, so also the adaptation of a work from one medium to another (e.g., the production of a film based upon a novel or an earlier theatrical production) requires a release of part of the right of integrity.<sup>113</sup>

Finally, as a practical matter, the supremacy of moral rights over pecuniary interests, while theoretically maintained, is not absolute.<sup>114</sup> Nevertheless, despite these exceptions, the French commitment to protecting the "natural" right of artists to create and to be free of the threat of abuse of their works remains es-

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107. See generally DaSilva, *supra* note 1.

108. *Id.* at 12.

109. *Id.* at 13.

110. *Id.* at 14.

111. *Id.*

112. *Id.* at 16.

113. *Id.* at 34.

114. *Id.* at 33 (citing Judgment of April 27, 1934, Cour d'appel, Paris 1934 [D.P.] 385).

entially intact.

### III. The Public Interest vs. The Artist's Rights: American Law

#### A. *English Precedents*

As in France, artists' rights in England and later in the United States trace their legal origins to the advent of the printed word. In 1476, the first printing press opened for business in England.<sup>115</sup> The Crown quickly asserted supreme authority to regulate the emerging publishing industry. This authority encompassed the power to issue printers' licenses, "letters patent,"<sup>116</sup> to establish the Court of Star Chamber,<sup>117</sup> and to charter the Company of Stationers,<sup>118</sup> which enjoyed a monopoly "over the publication of books, and held all rights in them."<sup>119</sup> It is quite clear that the purpose of all of this was to protect the Crown, and not to confer privileges upon writers.

The Court of Star Chamber operated chiefly to suppress what was perceived to be a dangerous outbreak of heresy.<sup>120</sup> Star Chamber regarded the Company of Stationers as a convenient instrument with which to censor this religious dissension.<sup>121</sup> The Company, however, eventually developed its own policies once Star Chamber was abolished,<sup>122</sup> and it became more and more distant from the controlling influence of royal prerogative. The Company's independent policies tended to solidify its monopoly and left authors with virtually no rights at all.<sup>123</sup> Following the Glorious Revolution of 1688,<sup>124</sup> Parliament withdrew its support

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115. Note, *Copyright: Moral Right—A Proposal*, 43 *FORDHAM L. REV.* 793, 803 (1975).

116. *Id.* at 803 n.99 (letters patent grant particular rights in particular manuscripts).

117. *Id.* at 803-04.

118. *Id.*

119. DaSilva, *supra* note 1, at 37.

120. Note, *supra* note 115, at 804. The Anglican Church viewed any separatist or Calvinist ideas as heretical.

121. *Id.*

122. *Id.*

123. *Id.* at 804-05.

124. In 1688, the British Parliament resorted to extra-constitutional measures to overthrow the Catholic monarch, James II, in order to preserve the Protestant Church and to protect English rights and liberties from the vagaries of arbitrary rule. Parliament ignored the hereditary principle of succession by overlooking James' infant son as heir to



of the Company. Suddenly willing to negotiate, the Company loosened its tight-fisted control over intellectual and commercial rights in published material with Parliament's passage of the Statute of Anne,<sup>125</sup> the first copyright law.<sup>126</sup>

Far from reaching the lofty heights of the natural law theorists' exaltation of the personal liberty of the creative spirit, the Statute of Anne was a pragmatic compromise between publishers on the one hand, scrambling to retain any vestiges of their dwindling power, and the authors, independent printers, and members of Parliament on the other.<sup>127</sup> This is not to say that "natural" rights of authors were readily granted or were not vigorously disputed in subsequent interpretations of the Statute.<sup>128</sup> These disputes, however, arose from conflicting claims to exploitative power over the works.<sup>129</sup> Ultimately, the Statute of Anne became in effect "an owner's statute, and not an author's statute."<sup>130</sup>

## B. *American Copyright Laws*

This bias toward statutory protection of the proprietary rights of the copyright holder, without extending any significant statutory protection to the author, was adopted by the United States Congress in 1790, with the passage of the first American copyright act.<sup>131</sup> As time passed, Congress exhibited greater solicitude for the rights of the author, as opposed to the copyright holder — always, however, holding the public interest paramount. The legislative history of the Copyright Act of 1961, for

the throne, and invited William of Holland to lead the campaign against James and to assume the throne. There was no civil war; James fled to France and William and Mary jointly acceded to power. The following year, Parliament enacted a series of laws collectively called the Revolution Settlement, in which the balance of power between Parliament and the Crown was readjusted to deprive the Crown of much of its former prerogative. *Id.*

125. *Id.* at 805 n.112 (citing 8 Anne ch. 19 (1709)).

126. *Id.* at 805.

127. DaSilva, *supra* note 1, at 37-38.

128. Note, *supra* note 115, at 805-06.

129. *See id.* at 806.

130. DaSilva, *supra* note 1, at 38 (quoting Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 *Geo. L.J.* 1539 (1972)).

131. Copyright Act, ch. 15, Stat. 124 (1790) (current version at 17 U.S.C. §§ 101-810 (1982)).

example, indicates that Congress was concerned over whether the legislation would "stimulate the producer and so benefit the public."<sup>132</sup> "While some limitations and conditions on copyright are essential in the public interest," the report said, "they should not be so burdensome and strict as to deprive authors of their just reward."<sup>133</sup>

The Supreme Court, however, has recently diluted even this Congressional interest in artists receiving fair compensation. In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>134</sup> the Court said:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits *derived by the public* from the labors of authors.' When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.<sup>135</sup>

Thus, the monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide special benefits to authors or the creators of other forms of art. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended — *for the ultimate benefit of the public* — to motivate the creative activity of authors and inventors by the provision of a special reward and ultimately to allow the public free and unlimited access to the products of the artist's creative genius after a limited period of exclusive control has expired.

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132. REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION 5 (Comm. Print 1961) (quoting H.R. REP. NO. 2222, 60TH CONG., 2D SESS. 7 (1909)).

133. *Id.* at 6.

134. 464 U.S. 417 (1984).

135. *Id.* at 431 (quoting with approval *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1974) (footnote and citations omitted, emphasis added)).

American law's general *lack* of solicitude for authors, artists, and other creative individuals may be illustrated by its stipulations concerning works-for-hire. The copyright law confers initial ownership of a copyright upon the author or authors of a work<sup>136</sup> but declares that where the work is made for hire "the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."<sup>137</sup> Thus, works commissioned by a contracting party are considered works made for hire if they fall into one of the specific categories enumerated in the Act and the parties have executed a contract designating the work as one made for hire.<sup>138</sup> Alternatively, if the person who executes the work is an employee of the purported copyright holder and has created the work in the course of his employment, then the copyright belongs to the employer.<sup>139</sup> Some case law has suggested that the requirement of a written agreement may not be absolute if the relationship between the parties can reasonably be construed to be an employer-employee relationship,<sup>140</sup> but other cases suggest that the meaning of "em-

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136. 17 U.S.C. § 201(a) (1982).

137. *Id.* § 201(b).

138. *Id.* § 101. This section defines "work made for hire":

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

*Id.*

139. *Id.*

140. *Aldon Accessories, Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). Aldon had directed a Taiwanese manufacturer in the design of certain figurines, and had copyrighted the resulting designs. Spiegel marketed identical figurines. *Id.* at 549-50. When sued for copyright infringement, Spiegel claimed that Aldon's copyright was invalid, for statutory does not fall under the Act, and in any event, the parties had not signed an express contract. *Id.* at 551. The jury found for Aldon, and the court affirmed, holding that an employer-employee relationship had existed between Aldon and the Taiwanese firm that manufactured the figurines (noting that one of Aldon's principals had personally supervised and controlled the rendering of the designs in question).

ployee" may be construed quite literally and very narrowly.<sup>141</sup>

The unequal bargaining power of authors and artists as against publishers and those who purchase and sell their art often leaves the former powerless against the latter. Work-for-hire contracts may become the norm, as Elmer Bernstein, representing the Screen Composers of America, has testified. Although he is considered one of the top composers in his field and commands high fees, he claims that if he were to refuse to sign work-for-hire clauses he "would have to consider some other field of work."<sup>142</sup>

Because of the preemptive power of Congressional copyright legislation, the personal rights of authors in their creations, if any, were originally enforceable only through state courts and legislatures. This reliance on the states and an assortment of common-law theories has led to "inconsistent, uncertain, and somewhat inadequate" protection of the rights of authors, whose interests often tend to be subordinated, at least in the federal law, to those of others of whom the law is more solicitous.<sup>143</sup>

### C. *The Right of Disclosure*

Prior to the enactment of the Copyright Act of 1976,<sup>144</sup> each state's common-law copyright granted an author and his heirs a perpetual right of first publication.<sup>145</sup> This right closely resembles the moral right of disclosure in its personal character, its survival beyond the author's death, and its affinity with the spirit of natural law.

However, when the Copyright Act of 1976 officially abolished common-law copyright,<sup>146</sup> the right of first publication, *i.e.*,

141. *Id.* at 552. *Easter Seal Soc'y for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988), which holds that a work cannot be "made for hire" unless "the seller is an employee within the meaning of agency law." *Id.* at 334-35.

142. *Definition of Work Made for Hire in the Copyright Act of 1976: Hearings on S. 2044 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 73 (1982) (statement of Elmer Bernstein, Screen Composers of America) [hereinafter *Hearings on S. 2044*].

143. Note, *supra* note 115, at 809.

144. 17 U.S.C. §§ 101-810 (1982).

145. See Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487, 488 (1968).

146. 17 U.S.C. § 301(a):

disclosure, was subsumed into the federal scheme of protection, thus divesting the right of its perpetuity and, one may assume, any "natural right" quality it may have had under the common law. In addition to copyright protection, the tort of unfair competition offers some recourse to an artist seeking to vindicate a right ancillary to that of disclosure, namely, the right to retain control over a salient element of the work, even after copyright has been transferred. In *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System*,<sup>147</sup> for example, the court held that Dashiell Hammett could continue to exploit the character of Sam Spade and license others to do so, even though he had conveyed all rights in *The Maltese Falcon* to Warner Brothers.<sup>148</sup>

The outcome is different, of course, when rights are conveyed under a work-for-hire clause. An artist who has accepted such a contract, say, for graphics for a book, may discover too late that the publisher has used her artwork to illustrate the book's cover, while she thought that she was bargaining for the less expensive interior illustrations. Moreover, she has no legally cognizable claim against the publisher's choice of colors, though she finds them distasteful.<sup>149</sup>

Although the right of disclosure appears adequately protected in the United States, it is important to remember the qualitative difference between the concepts of natural right and property right.<sup>150</sup> In France, an artist can withhold a work from someone who has contracted for it if she in good faith decides that it is incomplete.<sup>151</sup> In the United States, courts may be more willing to award damages to a plaintiff in a like situation.<sup>152</sup>

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On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

*Id.*

147. 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

148. *Id.* at 948-51.

149. *Hearings on S. 2044, supra* note 142 (statement of Robin Brickman, Graphic Artists Guild).

150. *See supra* text accompanying notes 1-4; *see also* Note, *supra* note 115, at 795-96.

151. DaSilva, *supra* note 1, at 19 n.133 (citing Judgment of March 19, 1947, Cour d'appel, Paris 1949 [D.P.] 20).

152. Sarraute, *supra* note 7, at 485.

#### D. *The Right of Withdrawal or Modification*

The right to withdraw or modify a work that has previously been sold or published because it is no longer faithful to the artist's vision has no analogue in American law.<sup>153</sup> As we will see, however, the right to disclaim authorship of such a work has gained a limited degree of acceptance.<sup>154</sup>

#### E. *The Right of Paternity*

The right to be credited as the author of one's own work is the first component of the right to paternity. In an early case, *Clemens v. Press Publishing*,<sup>155</sup> Mark Twain sued to recover the price of a story he had sold to a publisher.<sup>156</sup> The publisher, after accepting the story, refused to print it with Twain's by-line.<sup>157</sup> Twain objected to the anonymous publication of his work, and the publisher refused to pay him the price on which they had earlier agreed.<sup>158</sup>

The court held in Twain's favor as to the issue of price, because it viewed the contract for the sale of the story to be valid.<sup>159</sup> Twain's refusal to consent to the publication without his name, however, was deemed to be ineffectual:

Title to the manuscript having passed by the completed contract . . . the defendant was not obligated to publish it at all, nor could plaintiff compel or prevent its publication, with or without his name. The objections, refusals and wishes of the plaintiff after parting with the title in the property may betray the eccentricities of the author, but they have no greater weight in law than the wishes of a stranger to the transaction after it was consummated.<sup>160</sup>

A stronger repudiation of the artist's moral right of paternity in favor of property rights could not easily be found. The sharp focus on the contract as the ultimate source of the rights

153. *Id.* See *infra* text accompanying notes 329-335.

154. See *infra* text accompanying notes 276-278 and 300-301.

155. 67 Misc. 183, 122 N.Y.S. 206 (App. Term N.Y. County 1910).

156. *Id.* at 184, 122 N.Y.S. at 206.

157. *Id.* at 184, 122 N.Y.S. at 207.

158. *Id.*

159. *Id.*

160. *Id.* at 185, 122 N.Y.S. at 207.

of the parties is a recurring theme in the cases that follow.<sup>161</sup>

Judge Seabury's majority opinion in *Clemens* enunciates "the best early statement of the basic idea of moral right"<sup>162</sup> in American common law:

Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork. . . . The man who sells a barrel of pork to another may pocket the purchase price and retain no further interest in what becomes of the pork. While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of them as he could of the pork which he purchased. . . . [T]he author is entitled . . . to have it [his work] published in the manner in which he wrote it. The purchaser cannot . . . omit altogether the name of the author, unless his contract with the latter permits him so to do.<sup>163</sup>

Judge Seabury's eloquent commentary on the moral rights of authors is often quoted in support of the proposition that art merits special treatment in property law.<sup>164</sup> His emphasis on the contract as the controlling factor presages the prominence of contractual considerations in later cases.<sup>165</sup>

Another oft-cited case, *Vargas v. Esquire*,<sup>166</sup> addresses the artist's paternity interest and specifically discusses moral rights.<sup>167</sup> In *Vargas*, the plaintiff sought to enjoin the magazine from publishing his drawings (known as *Varga Girls*) without his signature.<sup>168</sup> Although Vargas had transferred "title and ownership, . . . possession, control and use"<sup>169</sup> of all of the drawings to the defendant, he argued that there was an implied agreement between him and *Esquire* that each drawing would bear his signature, that labelling the drawings *Esquire Girls* was

161. See *supra* text accompanying notes 132-142, 155-160; see *infra* text and accompanying notes 166-170.

162. Diamond, *supra* note 5, at 250.

163. *Clemens*, 67 Misc. at 183-84, 122 N.Y.S. at 207.

164. See Diamond, *supra* note 5, at 250; see also Note, *supra* note 2, at 866.

165. See Kury, *supra* note 1, at 14-15; see also Note, *supra* note 2, at 866.

166. 164 F.2d 522 (7th Cir. 1947).

167. *Id.* at 525.

168. *Id.* at 523.

169. *Id.* at 525.

misleading and constituted unfair competition, and finally, that he had a moral right to be credited as the artist on his own works.<sup>170</sup>

The court found against Vargas on all three claims.<sup>171</sup> The contract was treated as having unambiguously transferred all rights in the drawings to *Esquire*, or, more precisely, all of the rights the court was willing to recognize.<sup>172</sup> The court discerned nothing misleading about the omission of Vargas' signature<sup>173</sup> and dismissed the "so-called 'moral rights'"<sup>174</sup> as a foreign concept, displaying a legal provincialism that is all too prevalent in some of the courts.<sup>175</sup>

Under French law, Vargas clearly would have prevailed, as did the artist in *Guille*,<sup>176</sup> in which the contract explicitly provided that Guille's real name be omitted from his work. The French court had no qualms about voiding the contract to protect Guille's moral right even against his own earlier agreement to limit it. This paternalistic solicitude for the interests of artists stands in stark contrast to the passive, laissez-faire attitude of the *Vargas* court. In these two cases, the basic differences between the orientations of the two systems stand out in bold relief: In American courts, the eyes of the judges are focused squarely on the four corners of the contract and its dispositions of economic rights. In France, the natural law moral right of the artist in his creation takes precedence over the freedom to contract, and economic considerations become subordinate.

In France and the United States, motion pictures are afforded special treatment,<sup>177</sup> for in their creation so many artists — screenwriters, actors, directors, cinematographers, set designers, and others — must collaborate to produce the ultimate work that it is impossible to attribute "authorship" to any one of them. Under current French law, it is presumed that the various

170. *Id.* at 524-26.

171. *Id.* at 527.

172. *Id.* at 525.

173. *Id.*

174. *Id.* at 526.

175. *See id.*

176. For a discussion of *Guille*, see *supra* notes 71-78 and accompanying text.

177. See Colby, *Copyright Revision Revisited: Commissioned Works as Works Made for Hire under the United States Copyright Act*, 5 WHITTIER L. REV. 491 (1983).



artists employed in the creation of a motion picture film have transferred their rights in the film to the party who has commissioned the film, *i.e.*, the producer.<sup>178</sup> However, the law delineates the amount to be paid to authors, identifies those who are responsible to pay, and requires an accounting by the producer.<sup>179</sup> It remains to be seen, however, whether this approach will succeed in striking an appropriate balance between the opposing interests of producers and artists.

The apparent dichotomy between the approaches of French and American law can be deceptive. American law has become progressively, if slowly, more responsive to the special character of art and artists' personality rights,<sup>180</sup> while French law has imposed restrictions on the exercise of the artist's moral rights where failure to do so would have resulted in manifest injustice.<sup>181</sup> Moreover, it is often exceedingly difficult to draw a clear distinction between the parties' personal rights and their financial interests in a work of art. In both systems, there appears to be a continual accommodation between theory and practice that draws them closer together than a superficial examination might lead one to suppose.

The second component of the right of paternity, the right to prevent false attribution of one's work to someone else, has been derided, even in France, as surplusage. Its critics assert that there are less restrictive legal means, such as the law of plagiarism, to protect adequately against any unauthorized appropriation.<sup>182</sup>

*Werlin v. Reader's Digest Association*,<sup>183</sup> however, reveals the lacunae in the protection offered by the doctrines of copyright and unfair competition. In *Werlin*, plaintiff wrote an original article chronicling the struggle and success of a young girl afflicted with Down's Syndrome.<sup>184</sup> The article was published locally, Werlin obtained the copyright on it, and later submitted it

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178. *Id.* at 504.

179. Françon, *The Audiovisual Production Contract*, 127 REVUE INTERNATIONALE DU DROIT D'AUTEUR 70, 84-87 (1986).

180. *See supra* text accompanying notes 25-26.

181. *See supra* text accompanying notes 91-106.

182. DaSilva, *supra* note 1, at 30.

183. 528 F. Supp. 451 (S.D.N.Y. 1981).

184. *Id.* at 454-55.

to Reader's Digest for possible publication. For nearly a decade, she had been submitting her work to Reader's Digest, but the magazine's editors had rejected every piece she had sent while encouraging her to continue her submissions.<sup>185</sup> Reader's Digest never advised her that the topic idea might be appropriated from one of her manuscripts and used in a new article composed by the magazine's staff.<sup>186</sup> This is what in fact occurred with her manuscript on the Down's Syndrome case. She sued the Reader's Digest Association, alleging copyright infringement, unfair competition, and unjust enrichment.<sup>187</sup> The court held against her on the first two claims<sup>188</sup> but awarded her five hundred dollars on the unjust enrichment claim.<sup>189</sup> The court's rationale was found in equity: "To permit RDA [Reader's Digest Association] to refuse to pay any compensation to Werlin would be, notwithstanding the fact that RDA did not act in bad faith, to permit an injustice of the most fundamental sort."<sup>190</sup>

It is not surprising that the court resorted to an equitable, quasi-contract theory.<sup>191</sup> The legal remedies available did not protect the interest that Reader's Digest had violated. Whether that interest was proprietary or personal is difficult to discern. If purely proprietary, it appears anomalous that copyright and unfair competition offered no protection. The award, however, was styled in compensation, not damages, indicating that Werlin's interest in the topic idea was a pecuniary one.<sup>192</sup>

On the other hand, the Seabury opinion in *Clemens*<sup>193</sup> reminds us that the commercial nature of an artist's work should not nullify a moral right. Ultimately, Werlin's interest can best be described as a point on a continuum of moral and economic rights. Her interest fell at the periphery of American judicial protection, while likely landing much deeper in territory to which the French would have extended their protection. If she

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185. *Id.* at 456-57.

186. *Id.*

187. *Id.* at 459.

188. *Id.* at 464-65.

189. *Id.* at 468.

190. *Id.* at 466.

191. *See id.*

192. *Id.* at 467-68.

193. 67 Misc. 183, 122 N.Y.S. 206 (App. Term N.Y. County 1910). *See supra* notes 155-165 and accompanying text.

had been residing in France, the French courts would probably have upheld her moral right of paternity in her work, with the concomitant right to be recognized as author of the article that had been published, albeit without her permission and not in the form in which she had originally written it.<sup>194</sup> Her award, if any, would have depended upon the court's assessment of the extent of her moral interest in the work.<sup>195</sup>

The right to disclaim authorship of work not one's own overlaps the right of paternity. An artist may "disown" a creation, for instance, if it has been altered to such an extent that it becomes a different work. This right, however, does not prohibit the alteration itself. The artist may merely enjoin another against falsely attributing work to him.<sup>196</sup>

Artists in the United States have attempted to assert this right under the guise of actions for libel, violations of the right to privacy or the right to publicity, and unfair competition. These theories offer some chance of relief to the aggrieved artist, but essentially fall short in comparison with the more pervasive force and scope of the rights recognized by the French courts.

Allegations of libel have on occasion proved effective in defending the right against false attribution. In *Clevenger v. Baker Voorhis & Co.*,<sup>197</sup> plaintiff was the author of *Clevenger's Annual Practice of New York*.<sup>198</sup> He transferred the work together with the copyright to defendant, and served as editor for thirteen consecutive annual revisions of the work.<sup>199</sup> Then, in 1956, Clevenger declined to edit any further editions and refused to consent to the use of his name as editor of future editions.<sup>200</sup> In 1959, defendant published the work as *Clevenger's Annual Practice of New York 1959, Annually Revised*, without plaintiff's approval or consent.<sup>201</sup> In fact, plaintiff took no part in the

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194. See *supra* notes 71-88 and accompanying text.

195. See *supra* note 81 and accompanying text.

196. See California Art Preservation Act, CAL. CIV. CODE § 987 (West Supp. 1985); New York Artists' Authorship Act, N.Y. ARTS & CULT. AFF. LAW §§ 14.51-.59 (McKinney 1983); see also *infra* text accompanying notes 246-249.

197. 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960).

198. *Id.* at 189, 168 N.E.2d at 644, 203 N.Y.S.2d at 813.

199. *Id.*

200. *Id.*

201. *Id.* at 189-90, 168 N.E.2d at 644, 203 N.Y.S.2d at 814.

revisions, which were made by defendant's staff.<sup>202</sup> The 1959 edition allegedly contained numerous errors.<sup>203</sup> The court held that the complaint stated a cause of action for libel, because a reasonable person could attribute the errors to the plaintiff.<sup>204</sup>

So far as authors are concerned, however, the interest that libel laws were designed to protect was not the artist's creative personality, but his general good standing in the community.<sup>205</sup> Even if it were possible to fine-tune the focus of a libel action so as to make it more sensitive to the author's moral rights, or, to put the matter somewhat differently, her rights of artistic and creative expression, the author in any event faces a serious dilemma: she must have a discernible reputation in the community to sustain a libel claim relating to misattribution, but such public renown often confers upon her the status of a public figure. As every student of first amendment cases knows, plaintiffs who happen also to be public figures must overcome extremely demanding burdens of proof in order to succeed in libel actions.<sup>206</sup>

These obstacles make libel an unwieldy shield for moral right at best. The right to privacy appears to be more tightly tailored to the personal character of the interests involved.<sup>207</sup> Privacy's alter ego, the right to publicity, has served to protect the artist against unauthorized use of her name or likeness.<sup>208</sup> Whereas the right to privacy dies with the artist, the right to publicity survives her.<sup>209</sup>

The right to publicity, however, drops its conceptual anchor squarely in the financial zone of the moral-economic continuum. The artist alleging a violation of her right to publicity must show that her name or likeness was misappropriated for commercial gain.<sup>210</sup> As with actions for libel or unfair competition, recovery may well hinge on the exploitative value to defendants

202. *Id.*

203. *Id.* at 189, 168 N.E.2d at 644, 203 N.Y.S.2d at 814.

204. *Id.* at 190, 168 N.E.2d at 645, 203 N.Y.S.2d at 815.

205. *See id.* *See also* Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432 (1929); and Note, *supra* note 2, at 871-72, 880.

206. Note, *supra* note 2, at 871-72; Diamond, *supra* note 5, at 265.

207. Note, *supra* note 2, at 880.

208. *Id.* at 884; DaSilva, *supra* note 1, at 44.

209. Note, *supra* note 2, at 885; *but cf.* DaSilva, *supra* note 1, at 844.

210. *See* Note, *supra* note 2, at 883.

of plaintiff's name or likeness rather than the abuse of any moral right.

Unfair competition has emerged as an unexpectedly flexible theory upon which claims against moral rights violators can be based. The doctrine's "very name suggests exploitation and value accruing therefrom. . . . The theory of unfair competition depends upon the fortuitous fact that to present a deformed work to the public may economically injure the creator by depriving him of his market . . . ." <sup>211</sup>

Despite its property right orientation, the tort of unfair competition has been stretched to cover unauthorized appropriation and misattribution of art works.<sup>212</sup> In *Follett v. New American Library*,<sup>213</sup> the best-selling novelist Ken Follett sought to enjoin a publisher from crediting him as the principal author of a work of nonfiction which he had edited and revised years before, when he was virtually unknown. Follett had worked with the principal author, whose name had appeared first in the original edition.<sup>214</sup> The issue before the court was whether the magnitude and aesthetic impact of the "revisions" Follett made in the work reasonably supported a representation that he was the principal author of the "new and improved" manuscript.<sup>215</sup> Essentially, the court for the first time<sup>216</sup> assumed the task of measuring the creative process by an "objective" standard — *i.e.*, by its own wits.<sup>217</sup> After discussing the literary merits of Follett's contribution to the work, the court concluded that he had indeed gone beyond mere editing but enjoyed "none of the special creative attributes . . . [of] authorship."<sup>218</sup> Consequently, the

211. Note, *supra* note 1, at 567-68; *cf.* *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 190, 168 N.E.2d 643, 644-45, 203 N.Y.S.2d 812, 814-15 (1960) (injury to author's reputation pleaded in terms of lost market for author's work); *but cf.* *Merryman*, *supra* note 12, at 1031 n.23 (citing *Martin-Caille v. Bergerot*, Cass. civ. 1re 1969 D.S. Jur. 73) (marketing practices detrimental to artist's reputation *not* compensable under *DROIT MORAL*).

212. See generally Comment, *Moral Rights for Artists Under the Lanham Act: Gilliam v. American Broadcasting Co.*, 18 WM. & MARY L. REV. 595 (1977); Maslow, *supra* note 16; Sokolow, *supra* note 24.

213. 497 F. Supp. 304 (S.D.N.Y. 1980).

214. *Id.* at 306-07.

215. *Id.* at 311-12.

216. *Id.* at 306.

217. *Id.* at 312.

218. *Id.* at 313.

court held that to represent Follett as the principal author would be false and misleading under the unfair competition provisions of the Lanham Act on trademarks.<sup>219</sup>

The significance of *Follett* goes far beyond the mere fact that it makes use of the unfair competition theory. Its express recognition of the "special attributes" of creativity marks it as yet another milestone in American jurisprudence in the moral rights area. In grappling for the first time in a direct manner with the elusive concept of authorship,<sup>220</sup> the court took an important step toward reorienting the treatment of artists in American law.

#### F. *The Right of Integrity*

This branch of the family of moral rights is considered the most vital to the moral security of artists. Until recently, however, American law has been unresponsive to the plight of artists whose works have been altered, mutilated, or destroyed without their consent. The sculptor David Smith was powerless to enjoin the owner of one of his sculptures from stripping it of its original color.<sup>221</sup> Similarly, Alexander Calder had no recourse when the owner of one of his mobiles repainted it in a color scheme altogether different from the one Calder had envisioned for it, and curtailed its free-floating movement by mechanization.<sup>222</sup> The Japanese artist Noguchi was without a remedy against a purchaser of one of his works who cut it up and stored it after it had been on open display for a number of years.<sup>223</sup>

One of the most telling examples of this absence of protection for the integrity of works of art in the United States is *Crimi v. Rutgers Presbyterian Church*.<sup>224</sup> Alfred D. Crimi, a

219. *Id.* In *Rich v. RCA Corp.*, 390 F. Supp. 530 (S.D.N.Y. 1975), the court held that a recent picture of the plaintiff on the cover of an album containing old recordings was a misrepresentation that the songs were new. The court reached the same conclusion in similar cases. See *Benson v. Paul Winley Record Sales Corp.*, 452 F. Supp. 516 (S.D.N.Y. 1978); *CBS, Inc. v. Springboard Int'l Records*, 429 F. Supp. 563 (S.D.N.Y. 1976).

220. 497 F. Supp. at 312.

221. Merryman, *supra* note 12, at 1039-40; Note, *supra* note 14, at 1201.

222. Bostron, *The New Artists' Authorship Rights Bill*, ART & ARTISTS, September 1983, at 28.

223. Note, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 162 (1984).

224. 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. N.Y. County 1949).

well-known artist, was commissioned to paint a fresco on the wall of the defendant church.<sup>225</sup> The fresco was duly completed and Crimi was paid.<sup>226</sup> Some years later, the defendant church ordered the Crimi fresco effaced because congregational opinion had turned against the work.<sup>227</sup> Crimi objected and brought suit, alleging breach of implied agreement in the contract and violation of his continued interest in the fresco.<sup>228</sup> He also accused the defendant of committing "an antisocial act and one against public policy."<sup>229</sup> The church prevailed on the ground that the contract commissioning the fresco reserved no "continuing rights" to Crimi. The court explicitly brushed aside the moral rights argument,<sup>230</sup> reiterating the *Clemens* court's holding that the contract is the source of the rights of the parties. "The time for the artist to have reserved any rights was when he and his attorney participated in the drawing of the contract . . ."<sup>231</sup>

It is no secret that the bargaining power of artists is not always as strong as the *Crimi* court seems to have imagined. But at least one groundbreaking case involved artists who did exercise their bargaining power at the time of contract formation. In *Gilliam v. American Broadcasting Co.*,<sup>232</sup> Monty Python, the British comedy troupe, secured a preliminary injunction against ABC Television, preventing the telecast of Monty Python programs that had been substantially edited by ABC.<sup>233</sup> The decision rested in part on the ground that Monty Python had contractually reserved the exclusive right to edit the program's script and to make any changes in the program once it was recorded.<sup>234</sup>

The emphasis on contractual rights was not, as we have seen, a novel analytic approach. The real innovation in *Gilliam* was the court's use of section 43(a) of the Lanham Act<sup>235</sup> to en-

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225. *Id.* at 572, 89 N.Y.S.2d at 814.

226. *Id.*

227. *Id.* at 571-72, 89 N.Y.S.2d at 815.

228. *Id.* at 572, 89 N.Y.S.2d at 815.

229. *Id.*

230. *Id.* at 576, 89 N.Y.S.2d at 819.

231. *Id.*

232. 538 F.2d 14 (2d Cir. 1976).

233. *Id.*

234. *Id.* at 21.

235. 15 U.S.C. § 1125(a) (1970).

force what was essentially the Monty Python group's moral right to the integrity of their work.<sup>236</sup> After giving a sympathetic nod toward the Continental concept of moral right,<sup>237</sup> the court advanced a theoretical compromise that attempted to harmonize the perceived differences between the American and French traditions regarding artists' rights:

American copyright law, 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. 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.<sup>238</sup>

In his opinion for the court, Judge Lumbard attempted to rationalize the recognition of artists' personal rights by defining those rights in economic terms, most particularly in terms of artistic reputation.<sup>239</sup> This interest in the public image of the artist has been the central point in the continuum, the gray area in which economic and moral rights coalesce. It has been the fulcrum of the American common-law defense of personal rights, whether the theory was libel,<sup>240</sup> invasion of privacy,<sup>241</sup> the right to publicity,<sup>242</sup> or unfair competition.<sup>243</sup> Injury to reputation led

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236. See Comment, *supra* note 212, at 595-96.

237. *Gilliam*, 538 F.2d at 23-24.

238. *Id.* at 24.

239. *Id.* at 14.

240. 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812. See *supra* note 197 and accompanying text.

241. See Note, *supra* note 2, at 871; *Big Seven Music Corp. v. Lennon*, 554 F.2d 504 (2d Cir. 1977) (John Lennon succeeded in enjoining distribution of poorly recorded and packaged album of his work because it amounted to mutilation and invasion of privacy).

242. See Note, *supra* note 2, at 884-86 (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (petitioner brought damage action against broadcasters for violating his state law right to publicity by airing a videotape of his human cannonball act on television; Supreme Court held in favor of broadcasters on constitutional grounds)).

243. See *Werlin*, 528 F. Supp. 451 (S.D.N.Y. 1981); see also *Benson v. Paul Winley Record Sales Corp.*, 452 F. Supp. 516 (S.D.N.Y. 1978) (record manufacturer and distributor's use of recent picture of artist on album cover and distortion of recording made years earlier constituted misleading labeling).



the way to a possible showing of financial or tangible damages, something the American system was theoretically equipped to handle. In *Gilliam*, Judge Lumbard unearthed the philosophy underlying copyright legislation to solidify the bridge he erected between the two traditions.<sup>244</sup> He simply asserted that copyright's high-sounding purpose of fostering artistic and intellectual creation would best be served if the artist's right "to have his work attributed to him in the form in which he created it"<sup>245</sup> was accorded adequate protection.

Judge Gurfein's *Gilliam* concurrence exposed the flaw in Judge Lumbard's position when Judge Gurfein asserted that the Lanham Act merely prohibits misattribution and does not extend protection to the *integrity* of the work.<sup>246</sup> The concurrence rejected the severity of injunction in favor of a simple disclaimer at the beginning of the telecast to cure the misleading attribution.<sup>247</sup> This is an argument to treat Monty Python's case in the same manner as *Follett's*, that is, as pertaining to misleading labeling, rather than as an attack on the integrity of the work.

While Judge Gurfein's view may be correct in theory (in the purist sense), Judge Lumbard's innovation gained some support in *Benson v. Paul Winley Sales Corp.*,<sup>248</sup> in which a celebrated jazz musician sought a preliminary injunction to restrain a record manufacturer and distributor from producing an album containing an altered version of a recording he had made years earlier when he was a subordinate player in an obscure group. The defendants had amplified Benson's guitar track and dubbed in a woman's suggestively moaning voice.<sup>249</sup> The album cover featured a recent picture of Benson and the words "X Rated LP."<sup>250</sup>

The court held that the defendants had falsely labelled the album as Benson's work, because the tampering had rendered it stylistically unrepresentative and misleading.<sup>251</sup> The accent in

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244. 538 F.2d at 23-24.

245. *Id.* at 24.

246. *Id.* at 27.

247. *Id.*

248. 452 F. Supp. 516 (S.D.N.Y. 1978).

249. *Id.* at 517.

250. *Id.*

251. *Id.* at 518.

the court's reasoning was on reputation: "People induced to buy the album . . . may be disappointed in its style and contents . . . and [may] mistakenly believe that Benson endorses 'X Rated' material. Thus defendants . . . have deceitfully packaged and advertised a product that is anathema to Benson, and a *threat to his professional standing and personal stature.*"<sup>252</sup>

Enforcement of this "integrity" right via unfair competition theory is not without its limits, even at this early stage. In *Gee v. CBS, Inc.*,<sup>253</sup> the court declared that technologically refining an old recording and reissuing it in a truthful format did not amount to unfair competition.<sup>254</sup> The court added, however, that if the original recording had been tampered with in an abusive or derogatory manner, the decision might have been otherwise.<sup>255</sup> This express reference to the integrity of the work itself, as filtered through the scrim of artistic reputation, suggests that a workable analogue to the right of integrity may finally be taking root in American law.

The artist Richard Serra sued the United States General Services Administration (GSA) on the ground that the GSA violated his moral rights in deciding to remove his sculpture, *Tilted Arc*, from Federal Plaza in lower Manhattan.<sup>256</sup> He claimed that his work was integral to the space in which it had been placed, that the space was integral to the work, and that the two could not be divorced without defacing the sculpture.<sup>257</sup>

Focusing on the fact that the work constituted a kind of purpresture,<sup>258</sup> Judge Milton Pollack concluded that Serra had "alleged extremely abstract violations of constitutional rights. . . . The constitutional claims present novel concepts and would constitute new restraints on the management of government property and the contractual commitments which may

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252. *Id.* (emphasis added).

253. 471 F. Supp. 600 (E.D. Pa. 1979).

254. *Id.* at 659.

255. *Id.* at 659-60.

256. *Serra v. United States General Services Admin.*, 664 F. Supp. 798, 799 (S.D.N.Y. 1987).

257. *Id.* at 800.

258. A purpresture is "[a]n inclosure by a private person of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large." BLACK'S LAW DICTIONARY 1112 (5th ed. 1979).

be made in connection therewith.”<sup>259</sup> Serra’s claim that relocation would constitute a first amendment violation by “destroying” his work, because it was solely intended for its original site, was dismissed.<sup>260</sup> His claim that relocation would “misrepresent” his authorship in violation of the copyright and trademark law was also dismissed.<sup>261</sup> Although these cases have set some important precedents, they are of course not sufficient to provide artists who sell their work in the United States the extensive protection that European artists enjoy. To accomplish this goal, legislation is indispensable.

Senator Edward Kennedy of Massachusetts introduced a bill in 1987<sup>262</sup> that would significantly expand the rights of visual artists to safeguard their work and to share in the increases in its value by providing for resale royalties of seven percent for artists.<sup>263</sup> Senator Kennedy’s bill would also have provided for an artist’s right to sue for damages if the owner negligently or deliberately damaged a work in his collection that had been created by the artist, and would have provided for the artist’s right to disavow the work if it had been changed or distorted.<sup>264</sup> At the time of this writing, the bill had not passed, and for the foreseeable future, at least, it appears unlikely that Congress will accord it a very high priority.

#### IV. State Legislation

There are other important indicia of the vitality of moral rights in the United States — most especially the California Art Preservation Act of 1980,<sup>265</sup> and the New York Artists’ Authorship Rights Act of 1983.<sup>266</sup> It is not surprising that these two states should be in the forefront in advocacy of artists’ rights, for both are major centers of creative activity. Other states, in-

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259. 664 F. Supp. at 807.

260. *Id.* at 805.

261. *Id.* at 801.

262. S. 1619, 100th Cong., 1st Sess. (1987) (proposed amendments to Copyright Act, 17 U.S.C. §§ 101, 106, 113, 401).

263. *Id.* § 3.

264. *Id.*

265. CAL. CIV. CODE § 987 (West 1982 & Supp. 1988).

266. N.Y. ARTS & CULT. AFF. LAW arts. 11-15 (McKinney 1987) (repealed 1984) (relevant sections replaced by §§ 11.01 and 14.03 (1984)).

cluding Louisiana, Maine, Massachusetts, and New Jersey, have passed legislation concerning the buying and selling of art or of artists' rights in or following such sales.<sup>267</sup> What follows is a brief examination of the goals, substance, and scope of the principal statutes—those of California and New York—and an evaluation of the potential effectiveness of each.

#### A. *The California Art Preservation Act*

The California Act asserts that "physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation . . . ."<sup>268</sup> The "public interest in preserving the integrity of cultural artistic creations"<sup>269</sup> and the artist's personality rights are given as the statute's *raison d'être*. The Act gives the artist whose works of "fine art" are of "recognized quality" a cause of action for equitable and legal relief against anyone who intentionally defaces, mutilates, alters, or destroys the work.<sup>270</sup> The artist is also free "at all times . . . to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art."<sup>271</sup> The rights conferred by the statute vest in the artist for life, and after death to his heirs for a period of fifty years.<sup>272</sup> The scheme limits protection to a rather narrow segment of the creative community, fine artists. Under the statutory definition, fine art includes "an original painting, sculpture, or drawing . . . ."<sup>273</sup> Thus, all literary, musical, dramatic, and cinematic art is excluded.<sup>274</sup> Furthermore, the Act covers only those works of fine art recognized by "[other] artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art"<sup>275</sup> to be of good quality. This contrasts with French law, which protects what it considers to

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267. LA. REV. STAT. ANN. § 2154 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (1988); MASS. GEN. L. ch. 231, § 85S (1987); N.J. STAT. ANN. § 2A:24A-1-A-8 (1987).

268. CAL. CIV. CODE § 987(a).

269. *Id.*

270. *Id.* §§ 987(a), (b)(2), (c)(1).

271. *Id.* § 987(d).

272. *Id.* § 987(g)(1).

273. *Id.* § 987(b)(2).

274. *Id.*

275. *Id.* § 987(f).

be the natural right inherent in the creative act, regardless of the caliber of the creation.<sup>276</sup> Moreover, the California Act differs from French law in that it excludes from its purview works created under contract for commercial use.<sup>277</sup> Thus, if Vargas brought suit against Esquire today, he could not count on any protection from California's Art Preservation Act. The Act does extend coverage, however, to art attached to buildings.<sup>278</sup> Crimi might have been able to invoke the Act to save his fresco, which the court in that case deemed to be part of the defendant's real estate.<sup>279</sup>

The deference shown in *Crimi* and other cases to the contract as the ultimate arbiter of the rights of the parties resurfaces in the California Act's provision allowing express written waiver of any rights granted thereunder.<sup>280</sup> Thus, the scope of the statute is further constricted to cover only fine artists whose stature confers upon them sufficient bargaining power to resist inducements to waive their rights under the law. The establishment of a Registry for Fine Art to be administered by the state Arts Council has been proposed as one way to deal with the problem of determining which works of art are worthy of protection.<sup>281</sup> Any artist wishing to declare formally that he believes his work is of high quality and merits protection under the Act may register the work for such protection.<sup>282</sup> While not conclusive, registration is evidence that the work is coverable under the law and serves to put prospective purchasers on notice that the artist claims all rights conferred by the Act.<sup>283</sup> The California Act extends its protection, within the limits described, to the interests of integrity and paternity. The integrity right is far-reaching in that it protects against intentional mutilation and destruction, whether or not the work is publicly displayed.<sup>284</sup> It is the work itself and not merely the artist's reputa-

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276. Sarraute, *supra* note 10, at 479 (noting Law of 1957, *supra* note 6, at 2).

277. CAL. CIV. CODE § 987(b)(2).

278. *Id.* § 987(h)(1).

279. *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 576, 89 N.Y.S.2d 813, 819 (Sup. Ct. N.Y. County 1949).

280. CAL. CIV. CODE § 987(g)(3).

281. Note, *supra* note 14, at 1229.

282. *Id.*

283. *Id.*

284. CAL. CIV. CODE § 987(c)(1).

tion that receives this protection.<sup>285</sup> In this way, society's interest in preservation is safeguarded. Even though the right of integrity is not perpetual, the drafters apparently assumed that any art worthy of preservation would enjoy de facto protection derived from public consensus of its worth, after the statutory period had run. The statutory "paternity right" to claim authorship or to disclaim it for a "just and valid reason"<sup>286</sup> closely approximates its French analogue.<sup>287</sup> The California Act, however, mandates closer inquiry into the reasons for the disclaimer and permits the artist to waive the right entirely.<sup>288</sup>

### B. *The New York Artists' Authorship Rights Act*

In contrast to the California Act, which embraces to a considerable extent the notion that our law must expressly alter its traditional theoretical antipathy to personal rights, the New York Act adheres more to the principle that a property-oriented legal order can be adjusted to accommodate moral rights on its own terms. The New York Act is designed to protect the artist's interest in his reputation, much along the lines of Judge Lumbard's approach in *Gilliam*.<sup>289</sup> Its scope is also limited to the work of fine artists, including "a painting, sculpture, drawing, or work of graphic art, and print, but not multiples."<sup>290</sup>

Although New York does not distinguish between art of "recognized quality" and that which is "unrecognized," it is arguable that New York affords no greater protection for obscure artists than does California. New York's sharp focus on reputation requires that the artist have a reputation before he can be damaged, and that the damage must be "reasonably likely to result" from the offending action.<sup>291</sup> This points to another fundamental difference between the two states' schemes. Under the New York law, an artist has no remedy against an owner who intentionally alters or even destroys his work, unless the owner subsequently displays the work publicly, attributes it to the art-

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285. *Id.*

286. *Id.* § 987(d).

287. See DaSilva, *supra* note 1, at 28, 30-31.

288. CAL. CIV. CODE § 987(g)(3).

289. 538 F.2d 14 (2d Cir. 1976). See *supra* notes 233-246 and accompanying text.

290. N.Y. ARTS & CULT. AFF. LAW § 11.01(9) (McKinney Supp. 1989).

291. *Id.* § 14.03(1).

ist, and such attribution causes or is reasonably likely to cause damage to the artist's reputation.<sup>292</sup> As we have seen, there is no such caveat regarding display in California.<sup>293</sup> Complete destruction of the work is actionable in California but not in New York. Both statutes, however, exclude works created under commercial contract.<sup>294</sup> New York's exclusion exempts from coverage works "prepared under contract for advertising or trade use unless the contract so provides."<sup>295</sup> Thus, the New York exclusion is arguably narrower than California's "commercial use" language.<sup>296</sup> Moreover, the New York Act expressly states that the exclusion is waivable.<sup>297</sup> Therefore, if the New York statute had been in force and Vargas had used his bargaining power shrewdly, he could have brought his drawings within the statute's protective ambit. The New York statute is silent as to waiver generally, but most commentators speculate that contractual waiver would be upheld.<sup>298</sup> In any event, the rights conferred under the Act vest only in the artist and terminate upon the artist's death.<sup>299</sup> Paternity rights granted under the Act closely parallel their California counterparts: an artist has the right to be credited for his work and to disclaim authorship for a "just and valid reason."<sup>300</sup> The determination of what constitutes a just and valid reason turns on a showing of harm to reputation, or the reasonable likelihood of such harm.<sup>301</sup> The right of integrity is similarly limited.<sup>302</sup> Finally, the New York Act provides for both legal and injunctive relief.<sup>303</sup> These remedies are cast in the reputational mold as well.<sup>304</sup> Damages can be assessed only by the economic yardstick of reputation.<sup>305</sup> An injunction may not prevent further mutilation, but merely could require that the work be labeled with a

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292. *Id.* § 14.03.

293. Compare CAL. CIV. CODE § 987(c)(2) with N.Y. ARTS & CULT. AFF. LAW § 14.03.

294. N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(d); CAL. CIV. CODE § 987(b)(2).

295. N.Y. ARTS & CULT. AFF. LAW § 14.57(4).

296. CAL. CIV. CODE § 987(b)(2).

297. N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(d).

298. See Taubman, *supra* note 22, at 117-18; see also Boston, *supra* note 223, at 28.

299. N.Y. ARTS & CULT. AFF. LAW § 14.03(4)(a).

300. *Id.* § 14.03(2)(a).

301. *Id.*

302. *Id.*

303. *Id.* § 14.03(4)(a).

304. *Id.* § 14.03.

305. *Id.*

disclaimer. As this approach aligns closely with the Gurfein concurrence in *Gilliam*, one may ask what real innovation the New York Act purports to introduce.<sup>306</sup>

## V. The Future of Moral Rights in the United States

Woody Allen and other film producers, exercised over what they consider to be unconscionable interference with their artistic integrity, have complained bitterly to Congress and in the media about Congress' failure to enact legislation designed to afford to artists residing and working in the United States the protections enjoyed by artists residing in France and other countries that have adopted the moral rights doctrine.<sup>307</sup> The immediate occasion for this outburst was the development of computerized methods of adding color to films that had originally been produced in black and white.<sup>308</sup> No doubt some producers will welcome this new technology, since some film viewers prefer color films over black and white films. The advantage, as these producers might see it, is that there will likely be a greater market for their old films than would otherwise be the case, at least for television broadcast and home video tapes, and they would then reap the financial rewards that would go with renewed distribution of films that would otherwise gather dust in their libraries. From the point of view of such producers as Woody Allen, however, the artistic integrity of their films would be seriously compromised by the artificial introduction of colors where the films were originally shot in black and white with specific artistic intent. These producers are less interested in the potential income from new rentals or sales of their films than in the preservation of their work in the form in which they created it. Although some members of Congress have expressed sympathy for the plight of those artists whose works are affected by these developments, the recently passed National Film Preserva-

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306. Actions for libel (*see supra* notes 197-206 and accompanying text) and unfair competition (*see supra* notes 170, 211-221 and accompanying text) already protect the artist's reputation without affording any preventive measures against the alteration itself. The California Act does not improve upon this situation. *See supra* text accompanying notes 277-288.

307. N.Y. Times, May 13, 1987, at C19, col. 1.

308. *Id.*, Apr. 22, at D7, col. 1.



tion Act of 1988 did not respond to the producers' concerns.<sup>309</sup> For our part, we are not certain that it should have. Moreover, we have grave doubts about the wisdom of superimposing the moral rights doctrine upon American law, at least as that doctrine has been promulgated and interpreted in France. From our point of view, although the moral rights doctrine and the legislation that has arisen from it are infused with an admirable concern for artists' rights, they are rather misguided in certain respects and fail to account for the interests of other parties to the transactions that take place between artists and their patrons or customers. At the risk of oversimplification, we have divided the interested parties into three classes: (1) the artists who create and execute the works about which we are concerned, whether they be literary, musical, or of more tangible form, such as paintings, sculptures, and architectural structures; (2) the persons who purchase those artistic creations; (3) the public, which may be variously defined as the members of a particular geographical, political, or cultural community or as mankind in general, both present and future. If we confine our attention for the moment to the most typical case, one in which an artist, having created a work of art, sells it either directly or through an agent to some individual or group of individuals, we may perhaps address some of the issues that are most likely to arise.

#### A. *Which Works of Art Should Be Protected?*

As we have seen, in those states where laws extending some protection to artists and their works have been enacted, not all art works meet the criteria set forth in the statutes.<sup>310</sup> Some entire classes of art are specifically excluded.<sup>311</sup> Others are brought under the law's protection only if they are judged by persons

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309. National Film Preservations Act of 1988, Pub. L. No. 100-446, 102 Stat. 1774, 1782 (1988). The Act, part of the Interior Department appropriations bill, established the National Film Preservation Board. As many as 25 films per year will be placed in the National Film Registry. If any of these films are colorized, a panel preceding the film will be required, stating: "Colorized version of original work; certain creative contributors did not participate." *Id.*

310. See *supra* notes 266-307 and accompanying text.

311. See *supra* notes 273-277, 290-297 and accompanying text; see also Note, *supra* note 14, at 1230.

expert in such matters to be of good quality.<sup>312</sup> In some instances, art attached to buildings is included; in others it is not.<sup>313</sup> Such works as films and theatrical productions which are of necessity collaborative efforts involving the participation of numbers of people are excluded,<sup>314</sup> although a sculptor or painter would not necessarily forfeit coverage for his works if he employed a large number of artists in the execution of a large painting. An untalented writer may invoke the copyright in an original but otherwise worthless piece of writing. So long as the writing is his, however dull, uninteresting, or nonsensical it might be, he may prevent others from reproducing it should anyone be so foolish as to want to do so.

An individual who bills himself as "the world's fastest artist" paints without brushes, using only palette knives and toilet paper. Within ten minutes of the moment when he first applies a dab of paint to a canvas, he completes a painting and frames it. At the conventions he works, he produces fifty to sixty framed paintings each day, all the while carrying on amusing conversations with the crowds that gather to watch his performance and making change for those who purchase his products. It would be very difficult indeed to make a convincing case for extending the protection of the law to such works of "art." The artist does hold a copyright in his works, so that if, for example, a purchaser wanted to publish a post card bearing a reproduction of his painting, one that we will call *Purple Sands on the Rolling Prairie*, the artist could enjoin him from doing so and sue for any damages the artist might have suffered as a result of such a misappropriation of his property rights in the design imprinted on the post cards. Suppose, however, that after several years of looking at *Purple Sands* on his living room wall, the purchaser decided to relegate his twenty dollar work of art to the trash can. Or alternatively, suppose the purchaser's daughter, now a member of the Art Students' League, asked her father whether she might use the canvas for one of her own paintings,

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312. See *supra* notes 275-281 and accompanying text; see also Note, *supra* note 13, at 1220.

313. See *supra* notes 225-232, 279 and accompanying text; see also Note, *supra* note 14, at 1222.

314. See *supra* notes 177-179 and accompanying text; see also Colby, *supra* note 177 at 496-497.

obliterating the scene that had been slapped on it in less than ten minutes some years before. On what possible ground might one reasonably claim that the artist should have the right to prevent the owner's disposing of his painting in either of these ways? Under the French doctrine of *droit moral*, even the purchaser's granddaughter, after she has inherited *Purple Sands*, would be legally bound not to convert the canvas to some purpose she might deem to be more worthwhile than the preservation of a painting she considers to be utterly worthless. The owner of *Purple Sands* has a bundle of rights in the property he purchased. Of course, he has only those rights that are recognized by the state. But under the conception of property that has prevailed thus far in the United States, the state should interfere in a possessor's exercise of rights over his property only for good and sufficient reasons and, then, only if it has compensated him for its interference with his dominion over his property.<sup>315</sup> The state offers no compensation to purchasers of art for the limitations it imposes upon the exercise of the rights of ownership that customarily attach to personal property. Hence, unless it can show that some very important public good will be served by preserving *Purple Sands*, or some grave harm will be done by not preserving it, the purchaser should be permitted to do with it as he will.

Suppose the parishioners of a church commission an artist, *à la Crimi*,<sup>316</sup> to create a fresco in their church depicting a biblical scene, and later find that the scene as rendered by the artist offends their religious sensibilities. Must they nevertheless live with the painting or abandon their church without some compensation by the state that imposes such requirements upon them? No *a priori* philosophical or legal principle permits the state to elevate the artist's sensibilities to such an eminence over those of the people for whom he was presumably working. On the contrary, there are excellent reasons for concluding that in such a case, the parishioners should prevail and be permitted to cover the offending image. Since a fresco cannot be removed without seriously damaging the structure itself, the artist or the

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315. U.S. CONST. amend. V.

316. *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. N.Y. County 1949).

state that wishes to preserve his work should compensate the church for any damages it suffers.<sup>317</sup> Failing that, the church should be permitted to paint over the unsatisfactory fresco and, if it wishes, retain the services of another artist to create a new work in the same place.<sup>318</sup>

Obviously, statutory limitations on coverage of artworks to those that are somehow judged to be of high quality or merit are irksome to artists and their defenders. Even more troubling is the fact that the works of younger artists are less likely to receive such a coveted designation than are those of artists who are already well established and enjoy both distinguished reputations and relatively high incomes. Moreover, the established artist is in a good position to bargain for such rights, if he is inclined to do so, when he enters into a commission or sales contract, and thus has less need for such a law than does the novice who has relatively little bargaining power and is happy to sell his work at almost any price. Such is the price that must be paid for the sake of both commercial and artistic freedom.

The public does have an interest in the preservation of great works of art. It has no interest at all in the preservation of 'schlock' work, and if it does, it can jolly well pay for it by purchasing it from whomever happens to own it. Advocates of *droit moral* assert without proof that government should have the right to protect artists and their works from certain alleged abuses that might be committed by the persons who buy such works. This judgment may be based upon the presumption that all works of art have such great intrinsic value that the public has or should have a vested interest in their preservation. But this presumption, which is, after all, a value judgment, is at least open to doubt and should be supported by something more than its bare assertion. In the absence of convincing evidence that it ought to be adopted as a matter of policy, the people who have invested their resources in works of art should not be prevented from disposing of them as they please — provided, of course, that no contractual agreement stipulates that they not do so. On the other hand, it may be based upon the assumption underlying the French *droit moral*, that the artist's personal rights ought to

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317. See Note, *supra* note 14, at 1206-07.

318. *Id.* at 1224 n.124.

have priority over the claims of both purchasers of their works and the public. As a matter of public policy, this assumption should, at the very least, be examined in the light of its likely consequences and its practical implications, both for artists and for those who invest in art. The French *droit moral's* extreme deference to the artist's personal rights could lead to rather anomalous consequences. The artist's right of withdrawal, for example, has been construed to mean that an artist may withdraw his work from public scrutiny long after it has been sold, so long as he indemnifies its owners.<sup>319</sup> Once the artist has retrieved his work, however much it may be valued by those who have possessed it or enjoyed it, he may alter or destroy it if he so desires.<sup>320</sup> In at least one case,<sup>321</sup> an artist attempted to "withdraw" a painting by erasing his signature from it when it was submitted to him for authentication. The court held that if it was a forgery, he had no right to alter it because it was the property of another person; and if it was not a forgery, the artist had no right to exercise his right of withdrawal after he had sold the canvas.<sup>322</sup> The California statute declares, by way of contrast to the French *droit moral*, that one of its principal goals is protection of the "public interest in preserving the integrity of cultural and artistic creations,"<sup>323</sup> and provides that organizations "acting in the public interest" may have standing to seek injunctive relief "to preserve or restore the integrity of a work of fine art."<sup>324</sup>

Some works of art have attained the status of national treasures, either because of their great aesthetic merit or because of historical, religious, or cultural associations. With regard to these items, states may act to limit or prevent their ex-

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319. Law of 1957, *supra* note 6, art. 32, para. 1 provides:

"[T]he author, even after the publication of his work, shall enjoy, in relation to the transferee, the right to correct or retract. He cannot, however, exercise this right except on the condition that he indemnify the transferee beforehand for the loss that the correction or retraction may cause him."

320. See CODE CIVIL [C. CIV.] art. 543(32) (82e ed. Petits Codes Dalloz 1983). See *supra* note 52 and accompanying text.

321. Sarraute, *supra* note 7, at 477-78 (discussing *In re Vlamincq*, Judgment of Apr. 19, 1961, Cour d'Appel, Paris 1961 [G.P.] 2.218).

322. *Id.*

323. CAL. CIV. CODE § 987(a) (West 1982 & Supp. 1988).

324. *Id.* § 989(c).

portation, defacement, or destruction. In doing so, however, they must inevitably deprive their owners of certain important rights that ordinarily inhere in items of personal property. To the extent that the owner's property rights have been abridged, the state should compensate him in some way for his loss. A sound analogy may be derived from the policies developed for the compensation of real property owners for limitations imposed upon them when their buildings are marked for preservation by landmarks preservation commissions. For example, municipalities in such cases have compensated property owners by conferring upon them the right to transfer air rights to adjacent or nearby properties.<sup>325</sup> These air rights have substantial value. By making them transferable, the state can reasonably be considered to have complied with the constitutional requirement that property not be taken without just compensation,<sup>326</sup> assuming, of course, that the value of the newly transferable right is equal to the loss in the market value of the structure that has been placed under the restrictions that accompany landmark designation.

The creation of a state or federal commission for the preservation of artistic and cultural treasures would make perfectly good sense. Provided with suitable expert consultants, such a commission could be responsible for designating those works found to possess such great aesthetic, cultural, or historical value as to be worthy of special protection by the government on behalf of the public. At the same time, however, the commission should be compelled to compensate the owners of such works for the interference in their property rights inherent in any such designation. The owner or his heirs should be entitled, for example, to demand that the commission pay the difference between the market value of the work that might be realized without its designation (*i.e.*, what it would fetch at an auction at which foreign buyers could bid on an equal footing with domestic buyers) and its value with such a designation (*i.e.*, what might be realized at a sale from which foreign buyers who might intend to export it would be excluded). Similarly, if the state commission decided that a particular outdoor sculpture or mural was worthy

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325. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

326. U.S. CONST. amend. V.

of preservation and interfered with the property owner's desire to dismantle the sculpture or paint over the mural, assuming nothing in the contract between owner and artist prevented the owner's doing so, the state should compensate the owner for any diminution in the value of his property as a result of its injunction against destruction of the artwork and for the interference itself.

In a sense, the federal and state governments already have such art preservation commissions. Public museums and private tax-supported and tax-exempt museums collectively constitute a vast network of art preservation commissions. Their resources are dedicated to the collection of those works of art which their curators and trustees deem worthy of preservation for posterity. They do this, not by imposing irksome limitations upon the owners of artworks through legislative or judicial fiat, but by purchasing items that are offered for sale on the open market. They are by far the most efficient and the least intrusive institutions dedicated to collecting, displaying, and protecting important works of art in the interest of the public and posterity. As far as possible, preservation in the public interest ought to be left to them. On the other hand, neither public institutions nor government should be permitted to become the ultimate official custodians or the principal patron of the arts or to exercise control over the private patrons of the arts.

Religious institutions and private individuals have, over the centuries, commissioned some of the greatest masterpieces. Their varying tastes and desires have given wide scope to artistic styles and modes of expression. Where artistic expression is controlled by the state, as it was most notoriously in Nazi Germany and in the Soviet Union, there is ample evidence that it becomes cramped and withers. There is no reason to believe that it would fare any better under the tutelage of art commissions appointed by democratic governments. Free expression in the arts, like free expression in politics, science, and the humanities, flourishes best where there is the least interference by government and the greatest amount of individual autonomy. Genuine individual autonomy and the diversity to which it gives rise are most likely to develop fruitfully where maximum support is supplied by private persons whose backgrounds and tastes vary. Government support of artists by way of limitations on the freedom of their

patrons and customers, however well intentioned, may have the unintended effect of reducing private support for the arts and limiting the scope of artistic expression. This is a consequence which advocates of *droit moral* seem not to have foreseen, but one that must be considered to be of the highest significance.

### B. *What Rights Should Be Protected?*

In the 1957 statute, France seems to have assumed that artists are, by and large, like children, incapable of handling their own business affairs and in need of a paternalistic government's solicitous concern and protection. Indeed, artists could not be trusted to write their own contracts. Certain safeguards had to be written into law that would override provisions to which artists, in their dealings with the public and (presumably) unscrupulous agents and dealers, might agree. Which, if any of these safeguards, ought to be incorporated or recognized in some fashion in American law? Except where children and seriously handicapped persons are concerned, American law tends, in general, to eschew paternalism and to assume that persons entering into commercial transactions or contracts for goods or services are capable of writing the terms of their own agreements. Other exceptions have been recognized in recent decades, particularly in consumer transactions, where sellers or manufacturers of products having hidden defects may be held liable in actions in contract or tort for damages suffered by purchasers or third parties.<sup>327</sup> But contracts between artists and the purchasers of their works do not bear the most remote resemblance to such transactions. Assuming, then, that artists are, by and large, mature adults capable of conducting their business affairs with the competence and responsibility that we expect other mature adults to exercise, which of the extra-contractual protections extended to artists under *droit moral* should be recognized in the United States?

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327. See RESTATEMENT (SECOND) OF TORTS §§ 394-402 (1965) (liability of sellers and manufacturers); N.Y. U.C.C. LAW §§ 2-313-15 (McKinney 1964 & Supp. 1989).



### 1. *The Right of Disclosure*

No artist in the United States can be compelled to disclose or publish his work against his will. If he has been commissioned to execute a work, he can of course be held liable in breach of contract for whatever damages are sustained by the other party to the contract, and it goes without saying that he would be bound, both legally and ethically, to return any advance that he had received. Authors are notoriously derelict in their duty to stick to deadlines that they have assumed in their contracts with publishing houses. Most publishers tend to be rather forgiving in this regard, partly because they want to maintain their good relations with productive writers on whose works they must depend. But some publishers have become far more demanding of their writers, and have adopted a policy of demanding both the rescission of contracts when authors fail to meet their deadlines and the return of advances in full. Private negotiations between artists and their patrons and between writers and their publishers appear to work well in this area. No legislation is needed or warranted.

### 2. *The Right of Paternity*

Writers and persons who create works of fine art sometimes agree, explicitly or implicitly, to create works that will not carry their own names. In collaborative works, such as films or ghost-written books, it may be practically impossible for all of the artists involved to be identified as authors of the final work. But even in those that are not collaborative, the contract between artist and purchaser may not provide for attribution. A newspaper reporter or magazine journalist need not receive a by-line for each article she writes. Those of us who are television or radio news junkies might wish that less time would be spent identifying the reporter who reads a thirty-second item, and we may be thankful that the person who wrote it is not identified as well. The artist who draws an illustration for a book cover need not be identified, unless she is successful in persuading the publisher to give her a credit line or allow her signature to appear on the cover in some more or less prominent fashion. The demand that Congress or the states legislate such terms on behalf of artists and writers, however, is patently absurd. On the other hand,

writers and artists already have a well-established right to prevent false attribution to them of works that are not their own. Invoking the torts of privacy and misrepresentation as well as libel, courts have been reasonably consistent in protecting artists against false attribution.<sup>328</sup> Similarly, authors and artists whose works have been falsely credited to others have won actions that they have brought under copyright infringement and the principles of unfair competition, and have been awarded damages for lost sales and harm to good will and business reputation. A representative case is *Fisher v. Star Co.*,<sup>329</sup> in which the court held that the use of the cartoon figures Mutt and Jeff by a competing cartoonist constituted unfair competition and "an unfair appropriation of his [Bud Fisher's] skill and the celebrity acquired by him in originating, producing and maintaining the characters and figures so as to continue the demand for further cartoons in which they appear."<sup>330</sup> When the artist's creation is transferred to another medium, however, he has relatively little reason to expect that the courts will be sympathetic to his claim that his work has been mutilated. A novel, for example, that is converted into a screenplay may undergo a metamorphosis that makes its author cringe in embarrassment. Theodore Dreiser's claim that his novel, *An American Tragedy*, was grossly distorted by Paramount Pictures fell on deaf ears when it reached the New York Supreme Court in 1938.<sup>331</sup> However, if the author takes pains to incorporate into his contract with the studio a provision that requires the studio to guard against excessive editing, distorting, or mutilation of his work, the courts are more likely to be receptive to his claim that the contract has been breached.

### 3. *The Right of Integrity*

In the United States, artists enjoy no right of integrity as such. However, courts have found that the mutilation of an art work and subsequent attachment of the artist's name to it or attribution of the mutilated work to the artist may constitute

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328. See *Garanz v. Harris*, 198 F.2d 585 (2d Cir. 1952).

329. 231 N.Y. 414, 132 N.E. 133, *cert. denied*, 257 U.S. 654 (1921).

330. *Id.* at 433, 132 N.E. at 139.

331. *Dreiser v. Paramount Publix Corp.*, 22 C.O. Bull. (N.Y. Sup. Ct. 1938).

defamation.<sup>332</sup> In *Gilliam v. American Broadcasting Co.*,<sup>333</sup> the Second Circuit found that ABC had violated the contract between BBC and the Monty Python group by editing Monty Python shows without Monty Python's permission.<sup>334</sup> Although BBC had the right to license broadcast of Monty Python shows, it did not have the right to convey rights that it did not itself have.<sup>335</sup> This, of course, is purely a question of contract law. But beyond that, the court held that ABC's actions were inconsistent with protection afforded the Monty Python group under the Lanham Act:

whether intended to allow greater economic exploitation of the work . . . or to ensure that the copyright proprietor retains a veto power over revisions desired for the derivative work, the ability of the copyright holder to control his work remains paramount in our copyright law. . . . [U]nauthorized editing of the underlying work . . . would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright.<sup>336</sup>

At the same time, the court noted:

American copyright law, 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. . . . Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law . . . or the tort of unfair competition.<sup>337</sup>

In the United States, with the possible exception of California, Buffet would not have won his case against the owner of the dismantled refrigerator.<sup>338</sup> It is easy to sympathize with the artist's sense that his artistic integrity has been compromised by

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332. *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 190-91, 168 N.E.2d 643, 645, 203 N.Y.S.2d 812, 815 (1960) (citing *Ben-Oliel v. Press Pub. Co.*, 251 N.Y. 250, 256, 167 N.E. 432, 434 (1929)).

333. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976). See also *supra* notes 233-248 and accompanying text.

334. *Gilliam*, 538 F.2d at 14.

335. *Id.*

336. *Id.* at 21.

337. *Id.* at 24.

338. See *supra* notes 92-97 and accompanying text.

the deliberate dismantling of a work that he considered to be an integral whole. But why should the refrigerator's owner have been prevented from doing what he pleased with his property, unless he had agreed, before Buffet decorated it with his painting, to keep it intact? It was, after all, his refrigerator. If a contemporary Buffet agreed to paint a scene on a student's van, would the student, in the absence of some prior agreement, be enjoined forever against dismantling his van, or selling it to another party who might want to use its parts on other vehicles? Under *Buffet*, that would presumably be the result. Such restrictions on property owners, in the absence of prior agreement by the parties, are unconscionable. We fully understand and sympathize with the artist's dismay at cavalier abuse of his work. But when he parts with it, unless he has exacted specific contractual conditions to the contrary, he should anticipate that that might be the result. Much the same may be said of some of the other cases falling under the integrity principle.

In France, Sudre was awarded damages for the destruction of his sculpture, which the townspeople evidently felt served a more valuable purpose as pothole filler.<sup>339</sup> Without passing on Sudre's skill as a sculptor, we must point out the obvious fact that the people who commissioned the work paid for it and Sudre was compensated for his efforts. Inasmuch as it was a public work, designed to be in a public place, the interests of the people who lived in the community and would have had to pass by Sudre's sculpture every day were entitled to at least as much deference as those of the artist. It is utterly perverse to empower the artist to exercise a unilateral veto over such a public monument, while the desires of the people who live in the community count for nothing once the artist has expressed himself. If a statute provided such protection to the artist's work, it would be presumed that the purchaser knew, when he purchased the work or (in the *Buffet* type of case) permitted the artist to decorate his property, that he had consented to certain limitations upon the rights and powers he would thereafter enjoy on the use of his property. Where a statute embodying *droit moral* exists, such a presumption might properly be made with regard to professional art dealers and informed collectors; but the average purchaser of

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339. See *supra* notes 102-107 and accompanying text.

a work of art could not realistically be expected to be familiar with the statutory limitations that would be attached to his purchase, much less to have given his voluntary consent to them. In any event, there is no rational justification for imposing such paternalistic measures upon the art buying public or, for that matter, on artists, who are generally quite capable of bargaining for themselves. When their work is of high quality, it is likely to fetch high prices in the open market. As demand for an artist's work rises, so does his bargaining power. If he feels that he needs benefits or rights over and above the purely financial rewards he receives for his work, he may write a contract or have a competent art lawyer write one, incorporating the provisions he wants. Such a contract would enable the purchaser to know precisely what burdens he accepts when he purchases a given work of art and would give both buyer and seller far greater flexibility than either would have under the mandatory, inalienable prescriptions of the excessively paternalistic dictates of the French *droit moral*.

#### 4. *The Right of Withdrawal or Modification*

No statute in the United States provides for a right of withdrawal or modification and, as we have seen, even in France, where such rights are recognized, the artist who exercises them is under a heavy burden to compensate the owner of the work in question.<sup>340</sup> Nor is it clear what the artist must pay if he does choose to exercise his right of withdrawal or modification.<sup>341</sup> Must he reimburse the owner for the purchase price of the work, or pay him the market value of the work at the time of the withdrawal or modification? It would be manifestly unfair to give the artist the right to withdraw or modify a work by payment of the original purchase price if that work has appreciated in value. The temptation to withdraw or modify such works in order to resell them at higher prices would simply be too great. Even if the original purchaser were given the option of first refusal, the successful artist might be tempted to withdraw and hold her older works off the market in order to let them appreciate still

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340. See *supra* notes 64-70, 320 and accompanying text.

341. See *supra* note 70 and accompanying text.

further before putting them up for sale again. In the meantime, the original purchaser would be deprived of the aesthetic pleasure he might otherwise have enjoyed from the work and any financial rewards that he might have derived from his investment. Moreover, it is not clear what the original purchaser's rights might be, even if he has the right of first refusal. Does he have the right to repurchase the work at the price he received from the artist when the right of withdrawal or modification was exercised, despite any appreciation in value in the meantime? If so, it is unlikely that the artist would be eager to let it go at such a low price relative to market value. If, on the other hand, the artist could demand of the original owner the current market value, artists would be tempted to withdraw or modify their works whenever they believed the market was bullish and, if successful, enjoy profits based purely upon such speculative maneuvers. In the meantime, the early purchasers of their works would be put at a great disadvantage — one that strikes us as being morally obtuse.<sup>342</sup>

A statute conferring such rights upon artists would render meaningless contracts for the sale of works of art. Such contracts would be converted from contracts of sale into loans callable at the will of the artist. We see no justification whatever for enacting legislation that would confer such rights upon artists. If an artist is convinced that such a provision is essential for his peace of mind and his sense of artistic integrity, let him bargain for it. Works of art are no longer viewed, if they ever were, as objects created for purely aesthetic purposes. They are obviously regarded, both by artists and by art collectors, as investments. They have financial value, sometimes so great as to reach astonishing heights. It may seem crass to suggest that they be treated, at least in some respects, like other investment vehicles, but that is precisely how we suggest they be viewed. A statute that provides for the artist's right to withdraw his artistic creations has, in a sense, created a call option on every work of art and vested

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342. We have taken note of the provisions in some European codes conferring upon artists the right to be paid a certain percentage of sums realized upon subsequent sales of their works. We are not in principle opposed to such provisions, although we would prefer to see them incorporated into contracts rather than have them imposed by statute. However, in view of the fact that markets go down as well as up, we would suggest that in equity, artists should share in any losses from subsequent sales as well.

those options in the works' creators. When a corporation issues new debt instruments, it may, for sound financial reasons, want to reserve a right to call them. The rights of both the issuer and the purchaser are clearly spelled out in the prospectus and on the face of the instrument itself. Thus, any purchaser of a callable debenture has ample notice of the precise conditions under which his investment may be called away from him, and in particular, what he will receive in exchange for the investment he is asked to make. The purchaser of a work of art is entitled to no less. An artist may argue that because some aspect of his personality is invested in the work he has created, he ought to be entitled to withdraw it or modify it if he determines at some later date that it no longer represents the best that he is capable of doing. But we see no significant difference between this argument and a parallel argument that an entrepreneur might make to the effect that he has invested not only his time and money but also some important part of himself in his business, and that he ought therefore to be entitled to call the debentures he has written whenever he concludes that to do so would be in the best interests of his business and of his self esteem. A publisher who has invested tens of thousands of dollars in editing a writer's manuscript and setting it in type in order to make it ready for publication should not be required by law to permit the author to withdraw his manuscript, unless the author is prepared to compensate the publisher for all of his expenses. Even then, perhaps, the publisher may be entitled to refuse to comply with the author's wishes. There must come a time in every business transaction when the parties are deemed to have come to a meeting of the minds, the transaction is completed, and in the absence of any further agreement by them, neither party may be permitted to renege on the terms of the agreement. Similarly, a collector or investor who has purchased a painting should not be compelled to relinquish possession of it because an artist's temperament leads him to conclude that his artistic standards require him to withdraw the work from public display.

## VI. Conclusion

The concept of moral rights developed in France and adopted, in varying degrees, by other European states, was founded upon an appreciation of the importance of art and art-

ists that transcends the purely commercial attitudes that inform the international art markets today. Artists, musicians, sculptors, and writers all make valuable contributions to each of us, enhancing our enjoyment of life and conveying to us their innermost thoughts and experiences, opening to us the delicate nuances of their perceptions of nature, of humanity, and of the world of the spirit. Their works beautify our cities and render our own lives more meaningful in countless ways. The works of some artists, ancient and contemporary, are rightly recognized as masterpieces and as national treasures. Such works deserve to be protected and preserved so that future generations too may enjoy them, learn from them, and be inspired by them. We do not pretend to be art critics, and do not presume to distinguish between those works that deserve to be called national treasures and those that do not. But if we pay heed to those who are generally recognized as experts in the field, we must conclude, as common sense would suggest, that some works are not masterpieces and are unworthy of any special protection.

We conclude that if a sculpture or a painting causes discomfort and anguish to those who have commissioned it or who have to live with it, then that work may be removed or, if it can be removed in no other way, it may be destroyed for the sake of the people who would otherwise have had to live with it, despite the hurt that such action must occasion to the artist who invested his very being in it. The state has no right, in the name of protecting the artist's personality rights, to impose upon unwilling viewers works of art that are deemed by them to be hideous or distasteful. If the artist feels that he must have the right to prevent his work from being mutilated, he may demand, if he can, that such a provision be included in the contract of sale or the commission. Thus, we favor no statutory protection of such a right, though we recognize that some valuable works of art might suffer damage or destruction by their owners as others have in the past. This risk is one of the prices we pay for not living in a paternalistic society that protects us from our own folly.

A corollary of the principle of individual liberty is the principle that the state not protect people from their own lack of good taste, their incompetence, their avarice, or their other vices. Citizens in a free society may have the most abominable taste. Respect for their autonomy requires respect for their right



to purchase bad art as well as good, to install it in places they control, and to display it tastelessly. If they choose to do so, they may allow it to deteriorate and decay, or they may deliberately mutilate it, thinking that by doing so they are improving it. Unlike museums and libraries, which serve the public and posterity in a fiduciary capacity, the private owners of art and books have no public trust to fulfill and no public constituency to which they are answerable. We may abhor their bad taste and condemn their bad practices, but the imposition of public obligations upon them in the interest of preserving artists' alleged rights is incompatible with the ideas of freedom to contract, the free marketplace, and individual autonomy which are more precious by far than the sensibilities of any artist or the most valuable work of art ever produced.