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Visual Artists Rights Act of 1990--What It Does and What It Preempts, The

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The Visual Artists Rights Act of 1990--What it Does, and What it Preempts

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INTRODUCTION

For many years European civil law jurisdictions, most notably France, have protected the "moral rights," or "*droit moral*," of visual artists.[1] The concept of moral rights protects the rights of a creator of a work of visual art to claim or disclaim authorship of his or her work (the "right of paternity" or "*droit à la paternité*," and the "right of disavowal");[2] to decide when to "publish," or reveal the work to the public (the "right of disclosure" or "*droit de divulgation*");[3] to withdraw the work from publication or make modifications to the work (the "right of withdrawal or modification" or "*droit de retrait ou de repentir*");[4] and to prevent the defacement or alteration of the work (the "right of integrity" or "*droit au respect de l'oeuvre*").[5] More than sixty nations currently protect artists' moral rights.[6]

American courts, while often sympathetic to artists whose moral rights have been violated, have been reluctant to create moral rights as a matter of common law.[7] Traditionally, the law in the United States has focused upon protection of the artist's economic, rather than personal rights.[8] The concept of moral rights was almost universally characterized by American courts as inconsistent with

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1. *See generally* Lewis, *The 'Droit Moral' in French Law--Part I*, 5 EUR. INTELL. PROP. L. REV. 341 (1983); Lewis, *The 'Droit Moral' in French Law--Part II*, 6 EUR. INTELL. PROP. L. REV. 11 (1984); DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 COPYRIGHT SOC'Y OF THE U.S.A. BULL. 1 (1981); Sarraute, *Current Theory on the Moral Rights of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968) (general explanations and history of the French *droit moral* statutes and cases).

2. *See* DaSilva, *supra* note 1, at 26-30 (discussing the right of paternity).

3. *See id.* at 17-23 (discussing the right of disclosure).

4. *See id.* at 23-30 (discussing the right of withdrawal or modification).

5. *See id.* at 30-37 (discussing the right of integrity).

6. Comment, *Copyright: Moral Right--A Proposal*, 43 FORDHAM L. REV. 793, 797 (1975).

7. *See, e.g.*, Gilliam v. Am. Broadcasting Co., 538 F.2d 14, 24 (2d Cir. 1976); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 575, 89 N.Y.S.2d 813, 818 (1949) (cases holding that the doctrine of moral rights is not recognized in the United States).

8. Comment, *An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus*, 9 PAC. L.J. 855, 862 (1978). *See* Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring) (American copyright law protects economic interests, but not personal interests).

American societal norms.[9] As a result of the failure of the courts to recognize any degree of protection for moral rights in the United States, several states have enacted statutes offering artists some protection for their moral rights.[10]

On December 1, 1990, Congress passed the Visual Artists Rights Act of 1990.[11] The Act became effective June 1, 1991.[12] The 1990 Act encompasses many rights found in the French *droit moral*, as well as rights specified by various state statutes. The Visual Artists Rights Act explicitly preempts similar state law provisions.[13]

Part I of this Article discusses the protections offered to artists' moral rights by state moral rights statutes,[14] with particular emphasis on the California[15] and New York[16] statutes. Part II sets forth and discusses the specific provisions of the Visual Artists Rights Act of 1990, and attempts to ascertain the congressional intent behind several of the more nebulous provisions of the Act.[17] Part III of this Article discusses the probable preemptive effect of the Visual Artists Rights Act on analogous state law provisions.[18]

I. STATE MORAL RIGHTS STATUTES

As previously stated, the American legal system has traditionally failed to protect the moral rights of artists, offering protection only for artists' economic rights.[19] In recent years,

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9. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976).

10. *See infra* note 20 (listing relevant state statutes).

11. Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (1990).

12. *Id.* § 610(a), 104 Stat. at 5132 (1990).

13. *Id.* § 605, 104 Stat. at 5131 (1990) (amending 17 U.S.C. § 301(f)(1)). *See infra* notes 320-396 and accompanying text (discussion of preemption of state law by the Visual Artists Rights Act of 1990).

14. *See infra* notes 19-166 and accompanying text.

15. *See infra* notes 25-102 and accompanying text.

16. *See infra* notes 103-148 and accompanying text.

17. *See infra* notes 167-319 and accompanying text.

18. *See infra* notes 320-396 and accompanying text.

19. *See supra* notes 7-10 and accompanying text (discussing the failure of the United States legal system to protect the moral rights of artists).

however, the legislatures of several states have enacted statutes protecting artists' moral rights.[20] The first state to enact such a statute was California, in 1979.[21] In 1984, the New York Legislature followed suit and enacted statutes protecting artists' moral rights.[22] Between 1985 and 1989, several other states enacted similar statutes.[23] These statutes are roughly analogous to either the California statute, which focuses upon the preservation of art for the public good, as well as the protection of the artist's reputation, or the New York statute, which seems to focus exclusively on the protection of the artist's professional reputation. Since these statutes are largely patterned after the California[24] and New York statutes, and because in-depth analysis of each of these other statutes is beyond the scope of this Article, this portion of the Article will largely focus upon the provisions of the California and New York moral rights statutes.

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20. *See, e.g.*, CAL. CIV. CODE §§ 987-989 (West Supp. 1991); CONN. GEN. STAT. ANN. §§ 42-116s - 42-116t (West Supp. 1991); LA. REV. STAT. ANN. §§ 2151-2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); MASS. GEN. LAWS. ANN. ch. 231, § 85S (West Supp. 1991); NEV. REV. STAT. §§ 598.970-598.978 (1989); N.J. STAT. ANN. §§ 2A:24A-2 - 2A:24A-8 (West 1987); N.M. STAT. ANN. §§ 13-4B-1 - 14-4B-3 (1988); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1991); PA. STAT. ANN. tit. 73, §§ 2101-2110 (Purdon Supp. 1991); R.I. GEN. LAWS §§ 5-62-2 - 5-62-6 (1987). *See generally* Petrovich, *Artists' Statutory Droit Moral in California: A Critical Appraisal*, 15 LOY. L.A. L. REV. 29 (1981); Comment, *California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.*, 14 U.C. DAVIS L. REV. 975 (1981); Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101 (1986); Note, *Intellectual Property--Artists' Droit Moral*, 1989 PAC. L.J. REV. NEV. LEGIS. 177 (1989); Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733 (1984); Comment, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status For Visual Artists*, 70 CORNELL L. REV. 158 (1984) (discussions of recent moral rights statutory enactments).

21. 1979 Cal. Stat. ch. 409, § 1 (enacting CAL. CIV. CODE § 987); 1982 Cal. Stat. ch. 1517, § 3 (enacting CAL. CIV. CODE § 989).

22. 1984 N.Y. Laws ch. 849, § 1 (enacting N.Y. ARTS & CULT. AFF. LAW § 14.03).

23. *See* 1988 Conn. Pub. Acts 88-284, §§ 1-8; 1986 La. Acts no. 599, § 1; 1985 Me. Laws ch. 382; 1985 Mass. Acts ch. 488, § 1; 1989 Nev. Stat. chs. 192-193; 1986 N.J. Laws ch. 97, §§ 1-8; 1987 N.M. Laws ch. 70, §§ 1-3; 1986 Pa. Laws 1502, no.1 161, §§ 1-10; 1987 R.I. Pub. Laws ch. 566, § 1. *See also supra* note 20 (list of statutes enacted by these legislative acts).

24. *See* DaSilva, *supra* note 1, at 51 (predicting that the California statute would "serve as a model for other, more comprehensive statutory schemes for protecting authors' and artists' rights").

A. The California Moral Rights Statute

California's protection for the moral rights of visual artists is found in California Civil Code sections 987 and 989.[25] The California Legislature, in enacting the statutes, declared that "the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction, and that there is also a public interest in preserving the integrity of cultural and artistic creations."[26] The substantive provisions of California's moral rights statute are set forth below.

1. Protected Subject Matter

The California statutes protect only those works which qualify as "fine art."[27] For actions brought by the artist or his or her representative to enforce the artist's rights, works created under contract for use by the purchaser in advertising or print or

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25. *See* CAL. CIV. CODE §§ 987, 989 (West Supp. 1991). California offers other protections to visual artists, including a *droit de suite*, which is an artist's right to royalties on a purchaser's resale of the work. *Id.* § 986 (West Supp. 1991). For a commentary critical of the validity of section 986, see Comment, *Droit de Suite: Only Congress Can Grant Royalty Protection For Artists*, 9 PEPPERDINE L. REV. 111 (1981).

26. CAL. CIV. CODE § 987(a) (West Supp. 1991). *Compare id.* (destruction of a work damages artist's reputation) *with* Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 576, 89 N.Y.S.2d 813, 819 (1949) (destruction of work does not damage artist's reputation). While the bill enacting Civil Code section 987 was being considered in the legislature, the author of the bill was quoted as stating:

> To destroy or alter a work of art is offensive to the artist and detrimental to the artist's reputation. The need for legislation in this area can be seen [from] the case of an Alexander Calder mobile painted "Calder red" which was donated to the Pittsburgh airport. The Airport Commission hung the mobile differently and repainted it in the colors of Pittsburgh, green and gold. When Calder discovered the changes, he was furious but had no legal remedy.

Levine, *Legislature Gets Three Art Bills*, L.A. Times, May 5, 1979, § 2, at 9, col. 1 (quoting California State Senator Alan Sieroty (D-West Los Angeles), author of Senate Bill 668, the bill enacting Civil Code section 987).

27. CAL. CIV. CODE §§ 987(c)-(d), 989(c), (e) (West Supp. 1991).

electronic media are excluded from the definition of "fine art."[28] This exclusion from the definition of "fine art" does not apply to actions brought by a nonprofit organization acting in the public interest to preserve a work of art.[29]

The types of items which may be classified as fine art are limited to paintings, sculptures, drawings, or works in glass.[30] The definition of "fine art" encompasses only originals, not copies or reproductions.[31] Additionally, the work must be one "of recognized quality."[32] The statute mandates that the trier of fact rely on the expert opinions of persons knowledgeable about fine art, such as "artists, art dealers, collectors of fine art, [and] curators of art museums," in determining whether the art is "of recognized quality."[33] For actions brought by organizations acting in the public interest to enjoin the destruction or alteration of art, the work must be not only of recognized quality but also "of substantial public interest."[34]

The "of recognized quality" standard seems troubling in its application. A particular work may lose the protection of the statutes merely because certain "experts" do not find the work aesthetically pleasing or do not recognize the value of the work.[35]

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28. *Id.* § 987(b)(2) (West Supp. 1991). The language of the statute excludes works prepared under contract "for commercial use." *Id.* "Commercial use" is defined as "fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media." *Id.* § 987(b)(7) (West Supp. 1991). Courts may narrowly construe the definition of "works of fine art" in this respect. In one case, the court held that architectural plans and drawings did not fit within the definition of "fine art," because they were prepared "in the commercial context." Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 644, 205 Cal. Rptr. 620, 624 (1984). This holding does not seem to be in accord with the plain language of the statute defining "commercial use." At best, this is a broad interpretation of the statute; at worst the court was simply wrong.

29. CAL. CIV. CODE § 989(b)(1) (West Supp. 1991).

30. CAL. CIV. CODE §§ 987(b)(2), 989(b)(1) (West Supp. 1991). The statute as originally enacted did not include works of glass in the definition of fine art. *See* 1979 Cal. Stat. ch. 409, § 1 (enacting CAL. CIV. CODE § 987). Works of glass were added to the statutory definition of fine art in 1982. *See* 1982 Cal. Stat. ch. 1517, § 2 (amending CAL. CIV. CODE § 987); *id.* § 3 (enacting CAL. CIV. CODE § 989).

31. *Id.* §§ 987(b)(2), 989(b)(1) (West Supp. 1991).

32. *Id.*

33. *Id.* § 987(f) (West Supp. 1991).

34. *Id.* § 989(b)(1) (West Supp. 1991).

35. *See* Sarraute, *supra* note 1, at 482 (allowing judges or juries to determine the "significance" of a work of art may infringe the artist's rights).

Although this standard has been adopted by a few other jurisdictions,[36] the standard possesses the potential to chill artists' freedom of expression and creativity by penalizing them for attempting new or unknown techniques or themes. As Justice Holmes observed nearly ninety years ago, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[37]

Other jurisdictions limit the definition of "fine art" in other ways, such as by requiring the work to have a minimum appraised value,[38] or merely requiring that the work be produced in a limited edition of less than three hundred copies.[39] The Senate Judiciary Committee report on the bill enacting the California moral rights statute stated the justification for the standard as follows: "Nothing changes more drastically than fashions in art. Today's trash is tomorrow's masterpiece, and vice versa. Thus, a person who honestly thought he was dealing with worthless junk could . . . find himself sued for mistreating fine art."[40] The Assembly Judiciary Committee acknowledged, however, that the proposed standard was less than ideal, stating:

> To determine whether a work of fine art is of "recognized quality," the trier of fact would rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art. Notwithstanding this provision, would the trier of fact be likely to encounter special problems when there is a conflict in the opinions of the experts? Not all the experts consulted might agree that the work has "recognized quality." What may be considered trash today could be a masterpiece tomorrow. It is conceded

36. *See, e.g.*, LA. REV. STAT. ANN. § 2152(4), (7) (West 1987); MASS. GEN. LAWS. ANN. § 85S(b), (f) (West Supp. 1991); N.M. STAT. ANN. § 13-4B-2(B) (1988); PA. STAT. ANN. tit. 73, § 2102 (Purdon Supp. 1991).

37. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

38. *See, e.g.*, CONN. GEN. STAT. ANN. § 42-116s(2) (West Supp. 1991) (only works with a value of at least $2,500 are "works of fine art").

39. *See, e.g.*, ME. REV. STAT. ANN. tit. 27, § 303(1)(D) (1988); NEV. REV. STAT. § 598.970(3) (1989); N.J. STAT. ANN. § 2A:24A-3(e) (West 1987); R.I. GEN. LAWS § 5-62-2(e) (1987).

40. SENATE COMM. ON JUDICIARY, REPORT ON SB 668, at 2 (May 17, 1979).

> that had this measure existed as law during vanGogh's lifetime, his work would not have enjoyed its protection.[41]

Given the comments and concerns noted above, it appears that the standard employed by the California statutes is not the best available alternative. Fortunately, since the new federal Visual Artists Rights Act does not incorporate this standard, at least with respect to actions for the modification, mutilation, or distortion of art, artists may be able to avoid the harsh application of the California "of recognized quality" standard by turning to the federal statute for relief.[42]

2. *Scope of the Artist's Rights*

The California moral rights statute includes a right of paternity. The statute grants the artist the right to claim authorship for his or her work.[43] The statute also grants the artist a right of disavowal, in other words, the right to disclaim authorship of his or her work.[44] However, this right is limited in that the artist may only disclaim authorship "for a just and valid reason."[45] The statute does not define this term, and there is no reported California case interpreting the term. Interpretation of what constitutes "a just and valid reason" may therefore require a court to analyze European civil law interpretations of this right.

In Europe, there are two situations in which the right of disavowal is generally enforced. First, the artist can prevent the use of his or her name in connection with an advertisement

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41. ASSEMBLY COMM. ON JUDICIARY, REPORT ON SB 668, at 4 (May 31, 1979).

42. *See* Pub. L. No. 101-650, § 602, 104 Stat. 5089, 5128 (1990) (amending 17 U.S.C. 101). *See also infra* notes 193-221 and accompanying text (discussing the federal definition of "work of visual art").

43. CAL. CIV. CODE § 987(d) (West Supp. 1991). *Compare id. with* Vargas v. Esquire, Inc., 164 F.2d 522, 524 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948) (absent a contrary contractual provision, artist could not force purchaser of the work to attribute creation of the work to artist).

44. CAL. CIV. CODE § 987(d) (West Supp. 1991).

45. *Id.*

incorporating the work.[46] Second, the artist may prevent the use of his or her name in connection with distorted or mutilated works.[47] However, European advocates of moral rights often stress that the rights are uniquely personal in that the artist instills part of his or her personality in the work at the time of the creation of the work, and for this reason the artist should be the sole arbiter of whether the work remains worthy of his or her name.[48] The "just and valid reason" requirement of the California statute does not exist in French law.[49] Thus, in this respect, the California statute falls short of the protection offered by its civil law counterparts by forcing the artist to convince the finder of fact that disavowal of the work is justified.

The California statute includes a right of integrity. This right statutorily prohibits the intentional[50] "physical defacement, mutilation, alteration, or destruction" of a protected work, except by the artist who holds both ownership and possession of the work.[51] If the person[52] or entity who causes the destruction or

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46. DaSilva, *supra* note 1, at 28. Of course, as discussed above, works that are prepared under contract for use in an advertisement do not constitute "fine art" under the California statute. CAL. CIV. CODE § 987(b)(2) (West Supp. 1991). *See supra* notes 27-42 and accompanying text (discussion of the definition of "fine art" under the statute). Therefore, only those works not originally designed to be part of an advertisement, but later incorporated into an advertisement without the artist's permission, could be subject to this right.

47. Comment, *Moral Rights for Artists Under the Lanham Act:* Gilliam v. American Broadcasting Co., 18 WM. & MARY L. REV. 595, 597 (1977).

48. *See* Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Rights Doctrine*, 20 INT'L. COMP. L.Q. 675, 678-79 (1971) (discussing the personal nature of moral rights).

49. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1743 (1984).

50. The statute does not define the term "intentional." Therefore, it is unknown whether, in order to violate the statute, an individual need only know that he or she is committing an act or defacement or destruction, or additionally whether the individual must know that the work falls into the statutory definition of "fine art." *See generally* KEETON, DOBBS, KEETON & OWEN, PROSSER & KEETON ON TORTS 33-37 (5th ed. 1984 & Supp. 1988) (general discussion on the meaning of the term "intent" in relation to tort law).

51. CAL. CIV. CODE § 987(c)(1) (West Supp. 1991).

52. *See id.* § 987(b)(3) (West Supp. 1991) (the term "person" includes natural persons, partnerships, corporations, and other groups or organizations).

mutilation of the work is one who frames,[53] conserves,[54] or restores[55] the work, grossly negligent acts are actionable by the artist.[56] Unlike the New York moral rights statute,[57] the California statute however does not address the matter of mutilation or destruction of the work occasioned by the owner of the work's negligence in maintaining and caring for the work. One commentator has stated his belief that the omission of such a provision from the California statutes renders such situations not actionable.[58] If this is an accurate interpretation, museums and private collectors could avoid liability for improperly maintaining or negligently damaging works of art.[59]

An action to protect the right of integrity may, of course, be brought by the artist.[60] Additionally, a public or private nonprofit organization which promotes the interests of art may, if acting for the benefit of the public interest, bring an action for injunctive relief to prevent the mutilation or destruction of a work of fine art.[61] The court may require the nonprofit organization to post a reasonable bond.[62]

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53. *See id.* § 987(b)(4) (West Supp. 1991) (defining "frame" as "to prepare, or cause to be prepared, a work of fine art for display in a manner customarily considered to be appropriate for a work of fine art in the particular medium"). Thus, persons who mount sculptures on bases, matte drawings, or install stained glass windows would presumably fall within the definition of "framers."

54. *See id.* § 987(b)(6) (West Supp. 1991) (stating that to "conserve" means to "preserve . . . a work of fine art by retarding or preventing deterioration or damage through appropriate treatment").

55. *See id.* § 987(b)(5) (West Supp. 1991) (defining "restore").

56. *Id.* § 987(c)(2) (West Supp. 1991). The statute defines "gross negligence" as "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art." *Id.*

57. *See* N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(a) (McKinney Supp. 1991) (making the grossly negligent failure to prevent natural deterioration of the work of art caused by the passage of time a violation of the moral rights statute).

58. Damich, *supra* note 49, at 1746-47.

59. *Id.* at 1747.

60. CAL. CIV. CODE § 987(e) (West Supp. 1991). *See infra* notes 92-97 and accompanying text (discussing the remedies available to the artist).

61. *Id.* § 989(c) (West Supp. 1991). The organization must be one which had been in existence for at least three years at the time the action is filed. *Id.* § 989(b)(2) (West Supp. 1991). Additionally, "a major purpose" of the organization must be to "stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists." *Id.*

62. *Id.* § 989(f)(2) (West Supp. 1991).

3. *Duration and Waiver of the Rights*

The rights and duties created by the California moral rights statute are enforceable by the artist during his or her lifetime.[63] If the artist is deceased, the rights may be enforced by the artist's beneficiary, devisee, or personal representative.[64] These rights are enforceable until the fiftieth anniversary of the artist's death.[65] The statute applies to works of art created before or after the effective date of the statute, whether the artist was living or dead at the time of enactment of the statute.[66]

For actions brought by public interest organizations to enjoin the destruction or alteration of works of art, the duration of the right of enforcement is unclear from the text of the statute. Civil Code section 989, which creates a right of enforcement by public interest corporations, incorporates by reference the language of Civil Code section 987, which creates rights of artists to prevent mutilation or destruction of their work.[67] It is unclear whether the incorporation of section 987 also incorporates the limitations of the statute, such as the expiration of rights on the fiftieth anniversary of the artist's death,[68] or whether the rights last in perpetuity. Interpreting the statute granting rights to public interest organizations as expiring fifty years after the artist's death seems inconsistent with the statutory scheme. The legislature has declared that the provisions granting rights to artists are intended to protect the rights of the artist,[69] and the explicit intent of the statute in

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63. *Id.* § 987(g)(1) (West Supp. 1991).

64. *Id.*

65. *Id.*

66. *Id.* § 987(j) (West Supp. 1991). However, the statute only applies to *acts* committed on or after the effective date of the statute, January 1, 1980. *Id.*

67. *Id.* § 989(c) (West Supp. 1991). The statute reads, in relevant part: "An organization acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of art from acts prohibited by subdivision (c) of Section 987." *Id.* Section 987(c) is the provision prohibiting destruction or alteration of the work by anyone except the author. *Id.* § 987(c) (West Supp. 1991).

68. *See id.* § 987(g)(1) (West Supp. 1991) (expiration of rights).

69. *See id.* § 987(a) (West Supp. 1991) (stating that, while the public has an interest in preserving works of art, the primary intent of the statute was to prevent harm to the artist's reputation).

granting rights to public interest organizations is to protect the "public interest in preserving the integrity of cultural and artistic creations."[70] Consequently, while a limitation of rights based on the lifespan of the artist is justified for the purpose of protecting the individual artist's interests, such a limitation is not justified when protecting the interests of society as a whole. This view is supported by an Assembly Judiciary Committee report on the bill enacting Civil Code section 989, the statute granting rights to public interest organizations. The report stated:

> Under existing law, an artist, and his estate for fifty years after the artist's death, may bring an action against any person who intentionally alters or destroys a work of fine art of recognized quality. However, members of the public have no such right to protect works of fine art which are of substantial public interest. Art may therefore be subject to alteration or destruction *after the fifty year period of protection afforded by current law* or if the artist does not care or has no representatives. The author of [the bill] claims that the bill is necessary because "[w]orks of fine art are more than economic commodities and they oftentimes provide our communities with a sense of cohesion and history . . . ." [O]ur communities should be able to preserve their heritage when it is in jeopardy.[71]

Given the Judiciary Committee's concerns, it is surprising that the text of section 989 does not explicitly state that the "fifty years after the artist's death" expiration date does not apply. However, given the above indications of legislative intent, it is likely that courts would construe the rights of enforcement by public interests organizations as lasting in perpetuity.

For all actions, regardless of the identity of the plaintiff, there is a limitation period of three years after the commission of the act complained of, or one year after the discovery of the act, whichever is longer.[72]

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70. *Id.* § 989(a) (West Supp. 1991).

71. ASSEMBLY COMM. ON JUDICIARY, COMMITTEE REPORT ON SB 1757, at 2 (June 18, 1982) (emphasis added) (omissions in original).

72. CAL. CIV. CODE §§ 987(i), 989(g) (West Supp. 1991).

Unlike the rights created by the French *droit moral*, waivers of which are ineffective and unenforceable,[73] the rights created under the California moral rights statutes may be waived by the artist.[74] However, such a waiver is void unless the waiver is expressly set forth in a written instrument signed by the artist.[75] The issue of whether such a waiver is effective to bar claims by organizations acting in the public interest has never been litigated, and remains an open question. Valid policy reasons exist for justifying resolution of the question either way: It seems unfair for a purchaser of art who has gone to the trouble of obtaining a valid waiver from the artist to be subject to claims by third parties; on the other hand, allowing artists to waive the rights of the public at large seems inconsistent with the legislature's intent to protect works of art for future generations. The resolution of this issue awaits a judicial determination at some future date.

4. Special Provisions for Works of Art Incorporated Into Buildings

The California statutes have special provisions concerning works of fine art that have been incorporated into real property.[76] The special provisions relate to the rights concerning destruction or mutilation of the work, and do not affect the artist's right to claim or disclaim authorship.[77]

For actions brought by the artist or his or her representative, if the work of fine art is affixed in such a manner that the work cannot be removed from the building without substantial damage to or alteration of the work, the right to prevent destruction or

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73. *See* Lewis, *Part II*, *supra* note 1, at 12 (contractual provisions waiving the artist's *droit moral* are void).

74. CAL. CIV. CODE § 987(g)(3) (West Supp. 1991).

75. *Id.* There are special rules for artwork which has been incorporated into a building. *See id.* § 987(h)(1) (West Supp. 1991). *See also infra* notes 78-79 and accompanying text (discussing the special waiver provision of section 987(h)(1)).

76. CAL. CIV. CODE §§ 987(h), 989(e) (West Supp. 1991).

77. *Id.* § 987(h)(4) (West Supp. 1991). *See supra* notes 44 - 49 and accompanying text (discussing the artist's right under the California statute to claim or disclaim authorship of a work of fine art).

alteration is deemed to be waived, unless the artist specifically reserves his or her rights in a written instrument signed by the owner of the building.[78] If properly recorded, the instrument is binding on all subsequent owners of the building.[79] If the work can be removed without substantial damage or alteration to the work, but the owner of the real property intends to remove the work in a manner likely to cause damage or alteration, the owner of the building must employ reasonable diligence to attempt to notify the artist, or, if the artist is deceased, the artist's heirs or personal representative, of the impending action.[80] If the owner of the real property fails to attempt to notify the artist or his or her representative and then removes the work of art, the owner is fully liable for any damage or alteration of the work.[81] If the owner of the real estate is successful in contacting the artist or the artist's representative, the artist or his or her representative has ninety days to remove the art or to pay for its removal.[82] If the artist does so, title to the work of art passes to the artist.[83] The owner of the building must provide similar notice, and the artist has a similar right to remove the work, if the owner of the building plans to demolish a building without removing a work of art that could be removed without substantial damage or alteration to the work of art.[84] The owner of the real estate is fully liable for his or her failure to provide such notice.[85]

For actions brought by organizations acting in the public interest, the artist has no rights if the work cannot be removed from the real estate without substantial damage or alteration to the work.[86] If the organization believes that the work can be removed without causing damage or alteration, the organization may bring

78. CAL. CIV. CODE § 987(h)(1) (West Supp. 1991). The instrument must contain a legal description of the property. *Id.* Additionally, the instrument must be recorded. *Id.*

79. *Id.*

80. *Id.* § 987(h)(2) (West Supp. 1991). The notification must be in writing. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* § 987(h)(3) (West Supp. 1991).

85. *Id.*

86. *Id.* § 989(e)(1) (West Supp. 1991).

an injunctive action, but the organization has the burden of proof.[87] If the work can be removed without substantial damage or alteration, but the owner of the real property intends to remove it in a manner likely to cause damage or alteration to the work, and if the artist fails to take action after the owner attempted to provide notice, then the owner must provide thirty days public notice of his or her intent to remove the art.[88] Within the thirty day period, a public interest organization may agree to pay for the removal of the art.[89] If the organization does pay for the removal, title to the work passes to the organization.[90] If neither the artist nor an organization agrees to take any action to protect the work, the owner may remove the work as planned.[91]

5. Remedies

If the artist's statutory rights are violated, he or she may bring an action for injunctive relief[92] and/or actual money damages.[93] Punitive damages may be assessed against the defendant to the same extent such damages would be available in other civil actions in California,[94] except that the court must select an organization engaged in educational or charitable activities in the area of fine arts in California to receive the punitive damages.[95] The artist, but

87. *Id.*

88. *Id.* § 989(e)(2)(A) (West Supp. 1991). The notice must appear in a newspaper of general circulation in the area where the art is located. *Id.* The notice must be in the form of a display ad. *Id.* The notice may run concurrently with the owner's attempt to notify the artist. *Id.*

89. *Id.* § 989(e)(2)(A)(i) (West Supp. 1991). The removal must be completed within 90 days of the start of the 30 day notice period. *Id.*

90. *Id.* § 989(e)(2)(A)(ii) (West Supp. 1991).

91. *Id.* § 989(e)(2)(B) (West Supp. 1991).

92. *Id.* § 987(e)(1) (West Supp. 1991).

93. *Id.* § 987(e)(2) (West Supp. 1991).

94. *See id.* § 3294 (West Supp. 1991) (standards for assessing punitive damages in civil actions). In California, civil defendants in noncontract actions may be liable for punitive damages when the plaintiff proves by clear and convincing evidence that the defendant has acted with oppression, fraud, or malice. *Id.* § 3294(a) (West Supp. 1991). The term "malice" is defined as despicable conduct that the defendant intentionally or recklessly commits. *Id.* § 3294(c)(1) (West Supp. 1991).

95. *Id.* § 987(e)(3) (West Supp. 1991).

not the defendant, may recover attorneys' fees and expert witness fees.[96] The court may provide any other relief it deems proper.[97]

For actions brought by organizations acting in the public interest, the organization's remedy is limited to injunctive relief.[98] However, the court may award attorneys' and expert witness fees to the prevailing party.[99]

6. Severability of Provisions

The California Moral Rights statutes include express severability provisions.[100] The severability provisions provide that if any portion of the statutes are held invalid, such a holding will not affect the validity of other provisions that can be given effect without the invalid provision.[101] Since several provisions of the California moral rights provisions may be preempted by the federal Visual Artists Rights Act of 1990, these severability provisions are highly significant.

B. The New York Moral Rights Statute

New York's moral rights statute was enacted in its present form in 1984,[102] and became effective on January 1, 1985.[103] It has been suggested that the enactment of the New York legislation was inspired by the Bank of Tokyo's act of cutting up and removing a massive sculpture by Isamo Noguchi from the bank's Wall Street office without notifying the artist.[104] Although Noguchi was quoted by the New York Times as stating that the act constituted

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96. *Id.* § 987(e)(4) (West Supp. 1991).
97. *Id.* § 987(e)(5) (West Supp. 1991).
98. *Id.* § 989(c) (West Supp. 1991).
99. *Id.* § 989(f)(1) (West Supp. 1991).
100. *See id.* §§ 987(k), 989(i) (West Supp. 1991).
101. *Id.* §§ 987(k), 989(i) (West Supp. 1991).
102. *See* 1984 N.Y. Laws ch. 849, § 1 (enacting N.Y. ARTS & CULT. AFF. LAW § 14.03). An earlier version was enacted in 1983 and repealed in 1984. *See* 1983 N.Y. Laws ch. 994, § 3 (enacting N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.59) (repealed by 1984 N.Y. Laws ch. 849, § 1).
103. N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1991).
104. Damich, *supra* note 49, at 1733.

"vandalism,"[105] New York law at the time of the act (1980) provided Noguchi with no relief.[106]

While several provisions of the New York law are similar or identical to the previously examined California statutes, there are significant differences between the New York and California statutes. The discussion below sets forth the specific provisions of the New York statute.

1. Protected Subject Matter

While the California statute protects only original works of art,[107] the New York statute protects the rights of the author of "a work of fine art or limited edition multiple of not more than three hundred copies by that artist or a reproduction thereof."[108] In the definition of "fine art," New York includes paintings, sculptures, drawings, works of graphic art, and nonmultiple prints.[109] Motion pictures are specifically excluded from the protection of the New York statute,[110] as are works prepared under contract for advertising or commercial use, absent a contractual provision to the contrary.[111] Unlike the California statute, this standard of protected subject matter does not require the trier of fact to engage in a subjective value judgment concerning the quality of the work.[112]

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105. *Id.* (quoting Glueck, *Bank Cuts Up Noguchi Sculpture and Stores It*, N.Y. Times, April 19, 1980, § 1, at 1, col. 4).

106. *Id.*

107. CAL. CIV. CODE § 987(b)(2) (West Supp. 1991).

108. N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1991). *See supra* note 39 (listing statutes from other jurisdictions with analogous provisions).

109. N.Y. ARTS & CULT. AFF. LAW § 11.01(9) (McKinney Supp. 1991).

110. *Id.* § 14.03(1) (McKinney Supp. 1991).

111. *Id.* § 14.03(3)(d) (McKinney Supp. 1991).

112. *See supra* notes 32-42 and accompanying text (explaining and criticizing the California "of recognized quality" standard).

2. Scope of the Artist's Rights

Like California, New York law protects the artist's right of paternity.[113] The statute gives the artist the unlimited right to claim authorship of a work of art, and to have his or her name appear in connection with the work.[114] Additionally, the artist has the right to disclaim authorship of the work.[115] As with the California statute,[116] this right of disavowal is limited to situations in which the artist has a "just and valid reason" to disclaim authorship.[117] While this standard is subject to the same shortcomings as the California standard,[118] the New York statute provides some guidance as to what constitutes a "just and valid reason." The statute specifies that a "[j]ust and valid reason for disclaiming authorship shall include that the work has been altered, defaced, mutilated or modified other than by the artist, without the artist's consent, and damage to the artist's reputation is reasonably likely to result or has resulted therefrom."[119] Since the statute specifies that the definition of a just and valid reason "includes," rather than "is limited to" the above situation, it seems likely that other scenarios may constitute just and valid cause.[120] It also seems, however, that the focus of the statute is the damage to the artist's reputation. Both the right of paternity provision[121] and the right of integrity provision[122] focus on the possibility of harm to

113. N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (McKinney Supp. 1991).

114. *Id.*

115. *Id.*

116. *See* CAL. CIV. CODE § 987(d) (West Supp. 1991) (right of disavowal).

117. N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (McKinney Supp. 1991).

118. *See supra* notes 45-49 and accompanying text (criticizing the "just and valid reason" standard).

119. N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (McKinney Supp. 1991).

120. For example, incorporation of the work in an advertising campaign to promote a product or idea that the artist finds objectionable might arguably constitute a "just and valid reason." *See, e.g.*, Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 131-41, (S.D.N.Y. 1990) (inclusion of artist's works in a pamphlet designed to stop public funding of the National Endowment for the Arts violated artist's rights under the New York statute).

121. *See* N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (McKinney Supp. 1991).

122. *See id.* § 14.03(1) (McKinney Supp. 1991) (right of integrity). *See also infra* notes 123-131 and accompanying text (discussion of the right of integrity under New York law).

the artist's reputation.[123] It is likely, therefore, that for an artist to prove that he or she has a "just and valid reason" to disclaim authorship, the artist will have to prove that continuing to claim authorship would be likely to damage his or her reputation.

Similar to the California statute, the New York statute includes a right of integrity.[124] As stated above, the focus of this provision seems to be on the prevention of harm to the artist's reputation. Unlike the California statute, which prohibits the *act* of destroying or defacing a work of art,[125] the New York statute only prohibits the unauthorized *public display or publication* of an altered, defaced, mutilated, or modified work of art.[126] Additionally, the display of such works of art is only prohibited if the work is displayed or published in a manner that is likely to be regarded as the work of the artist, and damage to the artist's reputation would necessarily result.[127] Such a standard, focusing exclusively on protection of the artist's reputation, ignores the very real public interest in preventing the alteration or destruction of fine art for the benefit of future generations.

The New York statute granting the right of integrity specifies as a standard of culpability that the defendant need only act "knowingly."[128] Two exceptions exist with regard to this standard of culpability. First, alteration or defacement of a work caused by the inherent nature of its materials, or resulting from the passage of time, does not constitute a violation, unless the alteration or defacement is the result of gross negligence.[129] Not only is the artist precluded from preventing or seeking compensation for such non-negligent defacement or alteration, the artist may not disclaim authorship on this basis.[130] Second,

123. N.Y. ARTS & CULT. AFF. LAW § 14.03(1)-(2) (McKinney Supp. 1991).

124. *See id.* § 14.03(1) (McKinney Supp. 1991) (right of integrity).

125. *See* CAL. CIV. CODE § 987(c) (West Supp. 1991) (right of integrity).

126. N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1991). Only display, publication, or reproduction occurring in the state of New York are prohibited. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* § 14.03(3)(a) (McKinney Supp. 1991).

130. *Id.*

conservation[131] may not constitute an alteration or acts of defacement unless the acts are undertaken in a negligent manner.[132]

It is significant that the New York statute, on its face, does not prohibit the *destruction* of works of art. Presumably, the legislature believed that the destruction of a work does not damage an artist's reputation, whereas the display of altered works, which may not be reflective of the artist's true abilities, may damage the artist's reputation. Some commentators would probably believe that this view is in accord with the French civil law doctrine of *droit moral.*[133] Nevertheless, it is unfortunate that the New York statute does not protect, and does not purport to protect, the public policy of preserving works of art for the cultural enrichment of society as a whole.[134] Although such a statutory intent may be inconsistent with the civil law *droit moral,*[135] some states, most notably California, have recognized that promotion of the public interest in the preservation of art is highly desirable. The difference in the focus of the California and New York statutes is evident even from the title of the acts; while the New York statute is captioned

131. *See id.* § 11.01(7) (McKinney Supp. 1991) (defining "conservation" as "acts undertaken to correct deterioration and alteration and acts taken to prevent, stop, or retard deterioration).

132. *Id.* § 14.03(3)(c) (McKinney Supp. 1991).

133. *See, e.g.,* Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators,* 53 HARV. L. REV. 554, 569 (1940). In discussing the civil law version of moral rights, the author stated:

> The right to prevent deformation does not include the right to prevent destruction of a created work. The doctrine of moral rights finds social basis in the need of the creator for protection of his honor and reputation. To deform his work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for work he has not done; the destruction of his work does not have this result.

Id. See also Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 573, 89 N.Y.S.2d 813, 816 (1949) (destruction of a mural painted by plaintiff did not damage plaintiff's reputation as an artist).

134. *See* 1983 N.Y. Laws ch. 994, § 1 (preamble to legislation enacting the original New York moral rights statute, stating that protecting works of fine art is crucial "to the artist and the artist's reputation"). *Compare id. with* CAL. CIV. CODE §§ 987(a), 989(a) (West Supp. 1991) (legislative declaration of the public interest in the preservation of works of art).

135. *See* Damich, *supra* note 49, at 1748-49 (the French *droit moral* does not protect the public interest, but solely protects the artist's rights).

"Artists Authorship Rights,"[136] the California statute is captioned "Preservation of Works of Art."[137]

Enactment of the New York moral rights statute was potentially inspired by the Bank of Tokyo's destruction of the Noguchi sculpture displayed in the Wall Street branch of the bank.[138] Ironically, Noguchi would be in no better position had the act of destruction occurred *after* the enactment of the New York statute, since the bank destroyed the sculpture and placed it in storage, but did not display the sculpture in a mutilated condition. Since the statute requires public display for liability to attach, Noguchi would not have been afforded relief. The New York statutory scheme, therefore, may not accomplish its drafters' intentions.

3. *Duration of the Rights*

Whereas the California statute expressly provides the duration of the rights accorded to an artist,[139] the New York statute does not do so. However, since the New York statute was intended to protect the personal reputational rights of the artist,[140] it is a logical assumption that the statutory rights do not last beyond the life of the artist. The New York statute contains a limitations period, similar to that of the California statute, mandating that an action must be brought within three years of the act complained of, or within one year of the date of discovery of the act, whichever is longer.[141] However, under the California statute, the one-year period begins after "discovery"[142] of the destructive act, whereas the New York statute provides that the one-year limitations period

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136. *See* N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1991).

137. *See* CAL. CIV. CODE § 987 (West Supp. 1991).

138. *See supra* notes 104-106 and accompanying text (discussing the destruction of the Noguchi sculpture).

139. *See* CAL. CIV. CODE § 987(g)(1) (West Supp. 1991) (duration of rights). *See also supra* notes 64-72 and accompanying text (discussion of the duration of rights under the California moral rights statute).

140. *See supra* notes 119-126 and accompanying text (discussing the personal nature of the rights created by the New York moral rights statute).

141. N.Y. ARTS & CULT. AFF. LAW § 14.03(4)(b) (McKinney Supp. 1991).

142. CAL. CIV. CODE §§ 987(i), 989(g) (West Supp. 1991).

begins on the date of "*constructive* discovery" of the destructive act.[143]

4. Remedies

The New York moral rights statute does not provide the scope of available remedies. The statute simply states the "artist aggrieved under [the statute] shall have a cause of action for legal and injunctive relief."[144] No specific mention is made in the statute of the availability of punitive damages, but punitive damages are generally available in New York when a defendant's acts exhibit a high degree of moral culpability.[145] However, early drafts of the bill explicitly included a provision for the award of punitive damages, but this provision was amended out of the bill prior to its passage.[146] Therefore, the elimination of this provision from the bill can reasonably be interpreted as an attempt to discourage awards of punitive damages for violations of the New York moral rights statute.[147]

Contrary to the California statute, there is no discussion of attorneys' fees in the New York statute. Accordingly, it appears that each party is required to bear its own attorneys' fees.

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143. N.Y. ARTS & CULT. AFF. LAW § 14.03(4)(b) (McKinney Supp. 1991) (emphasis added). No existing New York case law defines the term "constructive discovery" in the context of this statute.

144. *Id.* § 14.03(4)(a) (McKinney Supp. 1991).

145. *See* Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488, (1961) (considering when punitive damages should be available, and what procedures should be followed in awarding such damages). In *Walker*, the New York Court of Appeals held that punitive damages may be awarded "in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future." *Id.* at 404, 179 N.E.2d at 498, 223 N.Y.S.2d at 490.

146. Comment, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 178 (1984).

147. *Id.*

C. *Other States*

Although the California and New York statutes represent the first statutory schemes to be enacted in the United States protecting artists' moral rights, several other states have since enacted similar statutes.[148] These statutes are roughly evenly divided between the California type of protection and the New York type of statutory scheme.

States which have enacted statutes which, like the New York statute, protect the artist's reputation[149] include Louisiana,[150] Maine,[151] Nevada,[152] New Jersey,[153] and Rhode Island.[154] These statutes vary from the New York statute only in minor details, if at all.

States which have enacted statutes apparently patterned after the California statute include Connecticut,[155] Massachusetts,[156] New Mexico,[157] and Pennsylvania.[158] These statutes create a cause of action for the artist or the artist's representative that is essentially identical to the California statute, including the right to bring an action within fifty years of the artist's death.[159] Further, these statutes, with the exception of the Connecticut statute, require

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148. *See supra* notes 20-23 (listing various moral rights statutes and legislative enactments).

149. *See supra* notes 102-148 and accompanying text (discussing the New York moral rights statute).

150. *See* LA. REV. STAT. ANN. §§ 2152-2155 (West 1987).

151. *See* ME. REV. STAT. ANN. tit. 27, § 303 (1988).

152. *See* NEV. REV. STAT. §§ 598.970-598.978 (1989). *See also* Note, *Intellectual Property--Artists' Droit Moral*, 1989 PAC. L.J. REV. NEV. LEGIS. 177 (1989) (discussion of the provisions of the Nevada moral rights statute).

153. *See* N.J. STAT. ANN. §§ 2A:24A-1 - 2A:24A-8 (West 1987).

154. *See* R.I. GEN. LAWS §§ 5-62-2 - 5-62-6 (1987).

155. *See* CONN. GEN. STAT. ANN. §§ 42-116s - 42-116t (West Supp. 1991).

156. *See* MASS. GEN. LAWS ANN. § 85S (West Supp. 1991). *See also* Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101 (1986) (discussion of the Massachusetts moral rights statute).

157. *See* N.M. STAT. ANN. §§ 13-4B-1 - 13-4B-3 (1988).

158. *See* PA. STAT. ANN. tit. 73, §§ 2101-2110 (Purdon Supp. 1991).

159. CONN. GEN. STAT. ANN. § 42-116t(d) (West Supp. 1991); MASS. GEN. LAWS ANN. § 85S(g) (West Supp. 1991); N.M. STAT. ANN. § 13-4B-3(E) (1988); PA. STAT. ANN. tit. 73, § 2107(1) (Purdon Supp. 1991).

the work to be "of recognized quality,"[160] while the Connecticut statute requires the work to have a market value of at least $2,500 to qualify as "fine art."[161] However, with the exception of Massachusetts, the statutes do not grant a public interest organization the right to sue.

The Massachusetts statute is the only statute embodying a provision even remotely similar to that of the California statute which grants public interest organizations a right to bring an action.[162] In Massachusetts, an action may be filed by an artists' organization or union if the artist has consented in writing to the organization bringing the claim.[163] Additionally, if the artist is deceased, the state attorney general may bring an action for injunctive relief on the artist's behalf, so long as the work of art is in the public view.[164] For actions brought by the artist or the artist's heir or representative, it is not required that the work be in public view.[165]

II. THE VISUAL ARTISTS RIGHTS ACT OF 1990

A. The History of Congressional Efforts to Protect Artists' Moral Rights

Pursuant to Congress' constitutional mandate "to promote the progress of science and the useful arts,"[166] members of Congress have introduced various bills designed to protect the moral rights

160. MASS. GEN. LAWS ANN. § 85S(*b*) (West Supp. 1991); N.M. STAT. ANN. § 13-4B-2(B) (1988); PA. STAT. ANN. tit. 73, § 2102 (Purdon Supp. 1991).

161. CONN. GEN. STAT. ANN. § 42-116s(2) (West Supp. 1991).

162. *See* MASS. GEN. LAWS ANN. § 85S(*e*), (*g*) (West Supp. 1991).

163. *Id.* § 85S(*e*) (West Supp. 1991).

164. *Id.* § 85S(*g*) (West Supp. 1991).

165. *Id.* § 85S(*c*) (West Supp. 1991).

166. U.S. CONST. art. I, § 8. *See* 135 CONG. REC. S6813, S6813 (daily ed. June 16, 1989) (statement of Sen. Kasten) (congressional regulation of moral rights is authorized by the copyright clause).

of artists since as early as 1940.[167] Recently, there have been renewed congressional efforts to protect moral rights. One bill was introduced and subsequently rejected in 1977, two years before the enactment of the California moral rights statute.[168] The rejected bill proposed protections similar to those ultimately created by the Visual Artists Rights Act of 1990.[169] Over the next ten years, several other bills were introduced and rejected in Congress, all seeking to protect artists' moral rights.[170]

The genesis of the Visual Artists Rights Act of 1990 is most likely found in two identical unenacted House and Senate bills introduced by Representative Markey and Senator Kennedy, proposing the "Visual Artists Rights Act of 1987."[171] These bills, like the California statute, defined a "work of fine art" as a "pictorial, graphic or sculptural work of recognized stature," and included a provision allowing the trier of fact to consult art experts to determine whether the work is of recognized stature.[172] The bills proposed a system of protections for moral rights which, like the New York statute, was based on protecting the author's

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167. *See* S. 3043, 76th Cong., 3d Sess. § 5 (1940). This unenacted bill, an amendment to the federal copyright laws, stated that nothing in the copyright laws should impair an artist's right "to claim the paternity of his work as well as the right to object to every deformation, mutilation, or other modification of the said work which may be prejudicial to his honor or to his reputation." *Id.*

168. *See* H.R. 8261, 95th Cong., 1st Sess. (1977).

169. *Id.* The bill provided, in relevant part:

> Independently of the author's copyright in a pictorial, graphic, or sculptural work, the author or the author' legal representative shall have the right, during the life of the author and fifty years after the author's death, to claim authorship of such work and to object to any distortion, mutilation, or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor or reputation.

Id. § 2. The proposed act was entitled the "Visual Artists Moral Rights Amendment of 1977." *Id.* § 1.

170. *See, e.g.*, H.R. 288, 96th Cong., 1st Sess., 125 CONG. REC. 164 (1979); H.R. 2908, 97th Cong., 1st Sess., 127 CONG. REC. H5691 (1981); H.R. 1521, 98th Cong., 1st Sess., 129 CONG. REC. 2414 (1983); H.R. 5772, 99th Cong., 2d Sess., 132 CONG. REC. 32,704 (1986); S. 2796, 99th Cong., 2d Sess., 132 CONG. REC. S12,185 (daily ed. Sept. 9, 1986); S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987); H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987).

171. *See* S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987); H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987).

172. *See* S. 1619, 100th Cong., 1st Sess. § 2, 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987); H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987).

reputation.[173] These protections applied only to works which were publicly displayed.[174] Additionally, the 1987 bill included a *droit de suite*, or right of the artist to participate in profits realized by subsequent purchasers when the purchasers resell the work, for any sale of a work for over $1,000.[175] This provision is analogous to a current California statute.[176] The bills proposing the Visual Artists Rights Act of 1987 failed to gain passage by Congress. The sponsor of the 1987 bill believed that the inclusion of the resale royalties provisions was a major motivating factor in Congress' failure to approve the legislation.[177]

In 1988, The United States joined the Berne Convention for the Protection of Literary and Artistic Works.[178] Congress had debated whether the United States should join the Convention for nearly one hundred years.[179] It is believed that Congress was slow to support the United States' inclusion in the Berne Convention because of Article 6*bis* of the Convention, which many members of Congress believe would require enactment of a system to provide protection for artists' moral rights.[180] Article 6*bis* guarantees to artists the rights of paternity and integrity.[181]

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173. *See* S. 1619, 100th Cong., 1st Sess. § 2, 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987); H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987).

174. *See* S. 1619, 100th Cong., 1st Sess. § 2, 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987); H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987).

175. *See* S. 1619, 100th Cong., 1st Sess. § 2, 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987); H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987).

176. *Compare* S. 1619 and H.R. 3221 *with* CAL. CIV. CODE § 986 (West Supp. 1991) (providing for resale royalties). *See generally* McInerney, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1 (1984) (discussing Civil Code section 986).

177. *136* CONG. REC. H3115 (daily ed. June 5, 1990) (statement of Rep. Markey).

178. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

179. H.R. REP. NO. 514, 101st Cong., 2d Sess. 7, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6917 (1990).

180. H.R. REP. NO. 609, 100th Cong., 2d Sess. 32-40 (1988).

181. Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, *reprinted in* 4 NIMMER, NIMMER ON COPYRIGHT 27-1 app. at 27-5 (1987). The full text of article 6*bis* states:

> (1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and

However, Congress ultimately determined that the Berne Convention did not require adoption of federal moral rights legislation because the terms of the convention in this regard were already satisfied by existing federal and state statutory and common laws.[182] Congress also decided that this determination would not foreclose future efforts to enact a federal system of moral rights protection.[183] Thus, while members of Congress may have believed that moral rights legislation was not required by the Berne Convention, congressional proponents of moral rights stressed that such legislation would help ensure continued compliance with the Berne Convention.[184]

Against this backdrop, on June 20, 1989, Representative Robert Kastenmeier and Representative Edward Markey introduced H.R. 2690, entitled the "Visual Artists Rights Act of 1989."[185] This bill was ultimately enacted as the Visual Artists Rights Act of 1990.[186] On June 16, 1989, Senator Kennedy introduced a nearly identical bill in the Senate.[187] On October 27, 1990, the Senate passed H.R. 2690, after incorporating the bill into a bill containing several other provisions relating to federal courts.[188] The House passed the bill on the same day.[189] President Bush signed the

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shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Id.

182. H.R. REP. No. 609, 100th Cong., 2d Sess. 32-40 (1988).

183. *Id.*

184. *See* 136 CONG. REC. H3113, H3113 (daily ed. June 5, 1990) (statement of Rep. Kastenmeier) (the protections included in the Visual Artists Rights Act of 1990 are "based on those set forth in the Berne Convention"). *See also* 136 CONG. REC. H8271 (daily ed. Sept. 27, 1990) (statement of Rep. Markey) (implying that federal protection of moral rights is required by the Berne Convention).

185. H.R. 2690, 101st Cong., 1st Sess., 135 CONG. REC. E2199 (daily ed. June 20, 1989).

186. Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (1990).

187. *See* S. 1198, 101st Cong., 1st Sess., 135 CONG. REC. S6811 (daily ed. June 16, 1989).

188. *See* REPORT ON THE ACTIVITIES OF THE COMMITTEE ON THE JUDICIARY, H. REP. No. 1015, 101st Cong., 2d Sess. 70 (1991).

189. *Id.*

legislation enacting the "Judicial Improvement Act of 1990," Title VII of which was the Visual Artists Rights Act of 1990, on December 1, 1990.[190] The effective date of the bill was six months after passage, on June 1, 1991.[191]

B. The Provisions of the Visual Artists Rights Act of 1990

1. Substantive Provisions

The Visual Artists Rights Act[192] (hereinafter "1990 Act") establishes a system of moral rights protections which, in several respects, is distinguishable from the New York and California statutes. The following discussion sets forth the substantive protections of the 1990 Act.

a. Protected Subject Matter

The protections of the 1990 Act apply only to those items that qualify as a "work of visual art."[193] The legislative history of the 1990 Act indicates that Congress intended to draft a very narrow definition of that term.[194] The apparent congressional intent was to avoid overly constricting the business practices of industries that are heavily dependent upon copyright protection and copyrighted works.[195]

The term "work of visual art" encompasses original paintings, drawings, or sculptures.[196] To qualify as a work of visual art, the item must exist only in a single copy or in a limited edition of two

190. *Id. See* Pub. L. No. 101-650, 104 Stat. 5089 (1990) (Judicial Improvements Act of 1990); *id.* title VII, 104 Stat. 5128 (1990) (Visual Artists Rights Act of 1990).

191. Pub. L. No. 101-650 § 610, 104 Stat. 5089, 5132-33 (1990).

192. Pub. L. No. 101-650, 104 Stat. 5089, 5129 (1990) (hereinafter 1990 Act).

193. *Id.* § 603 (enacting 17 U.S.C. § 106A(a)).

194. *See, e.g.*, 136 CONG. REC. E3716, E3716-17 (daily ed. Nov. 2, 1990) (statement of Rep. Moorhead) (stressing the narrowly-drawn nature of the category or protected works); 136 CONG. REC. H8266, H8271 (daily ed. Sept. 27, 1990) (statement of Rep. Markey) (stating that the definition was intentionally narrow).

195. 136 CONG. REC. E3716, E3716-17 (daily ed. Nov. 2, 1990) (statement of Rep. Moorhead).

196. 1990 Act, *supra* note 192, § 602 (amending 17 U.S.C. § 101).

hundred or fewer copies.[197] Qualified works which exist in a single copy need not be signed by the artist, but such works which exist in multiple copies must be signed and consecutively numbered by the artist.[198] The term "work of visual art" also encompasses still photographs produced for the purpose of exhibition, so long as the photograph exists in a single signed copy, or in a signed, consecutively numbered limited edition of no more than two hundred units.[199] While the author must create the photograph for the purpose of exhibition, the House Judiciary Committee made clear its view that the original purpose for which the photograph was produced is controlling, and therefore "a qualifying photograph will not fall outside the ambit of the bill's protection simply because it is later used for nonexhibition purposes."[200] However, if such photographs are reproduced for use in a different medium such as a newspaper or magazine, only the original photograph (or its limited edition copies) and not the reproduction is protected under the 1990 Act.[201]

The 1990 Act specifies certain categories of items that do not qualify as works of visual art.[202] This group partially includes motion pictures and other audiovisual works, books and periodicals, maps and charts, and merchandising, advertising, and promotional materials.[203] Additionally, only works that are subject to

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197. *Id.* Copies of sculptures may be "in multiple cast, carved, or fabricated." *Id.*

198. *Id.* In the case of sculptures, the copies must "bear the signature or other identifying mark of the author." *Id.* According to the House Committee on the Judiciary, the physical location of the signature and number on the work is unimportant. H.R. REP. NO. 514, 101st Cong., 2d Sess. 13, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6923. The committee stated that courts should be flexible in determining whether placement of the signature and number are sufficient, and that placement on the back of the work or on the surrounding matting would be adequate. *Id.*

199. 1990 Act, *supra* note 192, § 602 (amending 17 U.S.C. § 101).

200. H.R. REP. NO. 514, 101st Cong., 2d Sess. 12, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6922.

201. *Id. See* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(c)(3)) (exception of reproductions from coverage).

202. *Id.* § 602 (amending 17 U.S.C. § 101).

203. *Id.* Specifically, the 1990 Act provides:

> A work of visual art does not include--
>
> (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

copyright protection under federal law are included in the definition of "work of visual art."[204]

Significantly, a work that qualifies as a "work made for hire" is not protected by the 1990 Act.[205] Existing federal copyright statutes define a "work made for hire" as a work prepared by an employee in the scope of employment, or a work specially commissioned in writing for inclusion in a larger collective work.[206]

Prior to a recent Supreme Court decision, the federal courts had reached conflicting results in determining whether a commissioned work prepared by an independent contractor constituted a work prepared by an "employee," therefore qualifying as a "work made for hire" for copyright purposes. Some cases were decided on the theory that the artist is an "employee" whenever the commissioning party retains a right to control the work.[207] Some circuits held that the artist is an "employee" whenever the commissioning party *actually* exercised control over the creation of the work.[208] In *Easter Seal Society for Crippled Children & Adults of Louisiana v. Playboy Enterprises*,[209] the Fifth Circuit

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(ii) any merchandising item or advertising promotional, descriptive, covering, or packaging material or container . . . .

Id.

204. *Id.*

205. *Id.*

206. 17 U.S.C. § 101 (1988). Specifically, the statute provides, in relevant part:

A "work made for hire" is-

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

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as an 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. A "collective work" is defined as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." *Id.*

207. *See, e.g.*, Peregrine v. Lauren Corp., 601 F. Supp. 828, 829 (D. Colo. 1985); Clarkstown v. Reeder, 566 F. Supp. 137, 141 (S.D. N.Y. 1983).

208. *See, e.g.*, Brunswick Beacon, Inc. v. Schock-Hopchas Pub. Co., 810 F.2d 410, 413 (4th Cir. 1987); Evans Newton, Inc. v. Chicago Systems Software, 793 F.2d 889, 894 (7th Cir. 1986), *cert. denied*, 479 U.S. 949, (1986); Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984), *cert. denied*, 469 U.S. 982 (1984).

209.815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

reasoned that the distinction between employees and nonemployees should be determined in accordance with traditional common law agency principles for distinguishing between employees and independent contractors.[210] In *Dumas v. Gommerman*,[211] the Ninth Circuit held that the term "employee" referred only to traditional salaried employees.[212] The Supreme Court of the United States resolved this controversy in 1989, in a unanimous decision in *Community for Creative Non-Violence v. Reid*.[213]

In *Community for Creative Non-Violence*, an organization committed to eradicating homelessness, the Community for Creative Non-Violence (hereinafter CCNV) orally agreed with a sculptor to commission a life-size sculpture depicting the plight of the homeless in the United States.[214] The sculpture, entitled "Third World America," was to be erected in a public place during the Christmas season, and was to depict a modern day nativity scene consisting of two adult figures and one child figure.[215] The figures were to be depicted as contemporary homeless people huddled over a steam grate with a placard bearing the legend "and still there is no room at the inn."[216] The CCNV proposed the theme of the sculpture and chose the exact configuration of the figures from several sketches made by the sculptor.[217]

Upon completion, both the sculptor and CCNV each claimed ownership of the copyright of the sculpture.[218] To determine ownership under applicable copyright law, the Court was required to determine whether the work was "made for hire,"[219] within

210. *Id.* at 335.
211. 865 F.2d 1093 (9th Cir. 1989).
212. *Id.* at 1102.
213. 490 U.S. 730 (1989).
214. *Id.* at 734.
215. *Id.* at 733.
216. *Id.*
217. *Id.* at 734.
218. *Id.* at 735.
219. *See* 17 U.S.C. § 101 (1988) (definition of work made for hire).

the definition of the copyright statute.[220] The Court reasoned that the term "employee" in the definition of "work made for hire" should be understood in light of the ordinary common law agency definitions of the terms "employee" and "independent contractor."[221] The Court stated that while a hiring party's right to control an artist's work is highly relevant in determining whether the artist was an employee or an independent contractor,[222] other factors must be considered, including the skill required, the ownership of instrumentalities or tools used in the production of the work, the location of the work, the duration of the working relationship, the right of the artist to set his or her own working hours, and the provision of employee benefits.[223] Applying these factors to the facts of the case, the Court determined that although the CCNV exercised some control over the creation of the sculpture, consideration of the other factors required the Court to hold that Reid was an independent contractor rather than an employee, and the work was therefore not made for hire.[224]

In view of the Supreme Court's decision in *Community for Creative Non-Violence*, it seems likely that many commissioned works will be protected by the 1990 Act. Only those works created by an actual employee of the commissioning party, or those works contractually commissioned for inclusion in a collective work will be excluded from protection as "works made for hire."

b. Scope of the Artist's Rights

The 1990 Act contains certain protections analogous to the French *droit moral*. However, these rights are expressly limited by

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220. *Community for Creative Non-Violence*, 490 U.S. at 750. *See* 17 U.S.C. § 201(b) (1988) (copyright ownership of works made for hire is vested in the person for whom the work was prepared). An extended discussion of copyright law is beyond the scope of this Article.

221. *Community for Creative Non-Violence*, 490 U.S. at 740-41.

222. *Id.* at 750-51.

223. *Id.* at 751-52 (citing RESTATEMENT (SECOND) OF AGENCY § 220).

224. *Id.* at 752-53. The court pointed out that Reid, as a sculptor, engaged in a skilled occupation. *Id.* at 752. The court also noted that Reid supplied his own tools, worked without supervision out of his studio, worked for a period of less than two months, and was compensated by a flat fee rather than an hourly salary. *Id.* at 752-53.

the fair use doctrine, which permits persons other than the copyright owner to use copyrighted material in a reasonable manner without the owner's consent.[225] Additionally, all rights are separate and independent from any copyright interest the artist may have in the work.[226] The rights created by the 1990 Act belong only to the artist who created the work.[227] In the case of coauthors, all authors are the co-owners of the rights.[228]

i. Rights of Paternity and Disavowal

The 1990 Act contains a right of paternity.[229] The 1990 Act provides that independent of any copyright rights, the artist has a right to claim authorship of any work of visual art he or she creates.[230] Additionally, the artist has the right to prevent the use of his or her name in connection with a work that he or she did not create.[231]

The 1990 Act grants the artist a right of disavowal. The artist has the right to disclaim authorship of a work that has been distorted, mutilated, or modified.[232] The artist may only disclaim authorship under this provision if use of the artist's name in connection with the work would be prejudicial to the artist's honor or reputation.[233]

Whereas the New York and California statutes grant the artist the right to disclaim authorship "for and just a valid reason,"[234] the federal statute contains no such provision. Consequently, it is

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225. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)). *See* 17 U.S.C. § 107 (1988) (fair use provisions).

226. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)). *See* 17 U.S.C. § 106 (1988) (availability of copyright protection).

227. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(b)).

228. *Id.*

229. *See id.* (enacting 17 U.S.C. § 106A(a)) (right of paternity).

230. *Id.* (enacting 17 U.S.C. § 106A(a)(1)(A)).

231. *Id.* (enacting 17 U.S.C. § 106A(a)(1)(B)).

232. *Id.* (enacting 17 U.S.C. § 106A(a)(2)).

233. *Id.*

234. *See supra* notes 44-49 and accompanying text (discussing the California statutory right of disavowal); *supra* notes 115-122 and accompanying text (discussing the New York statutory right of disavowal).

unclear from the text of the 1990 Act whether the artist may disclaim authorship because of the use of the art without the artist's consent in, for example, an advertising campaign which the artist finds distasteful. While under the New York and California statutes, this scenario would likely be viewed as a just and valid reason to disclaim authorship which adversely affects the artist's reputation,[235] under the federal statutes it is doubtful whether a court would view this as a "distortion" or "modification" within the meaning of the 1990 Act.

The 1990 Act contains a provision stating that a modification resulting from "the public presentation, including the lighting and placement" of a work is not a "modification" for purposes of the right of integrity.[236] While the literal language of the statute states that this provision applies only to actions seeking to protect the artist's right of integrity,[237] it is unlikely that courts would interpret the right of disavowal to require apparently inconsistent results. In other words, judicial interpretation of the term "modification" as used in the right of disavowal provisions to include undesirable presentations of the work would mean that an author could prevent the use of his or her name in connection with such a display, but could not prevent the display. The legislative history of the 1990 Act implies that the term "modification" should have the same meaning for both the right of disavowal and the right of integrity,[238] although there is little if any expression

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235. *Cf.* Serra v. U.S. Gen. Services Admin., 847 F.2d 1045, 1052 (2d Cir. 1988) (although holding that federal government's act or moving artist's "site specific" sculpture was not a violation of artist's due process rights, court acknowledged that the artist "might suffer injury to his reputation as a result of relocation of the sculpture").

236. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(c)(2)). This provision is discussed in more detail below. *See infra* notes 253-257 and accompanying text.

237. *Id. See infra* notes 239-273 and accompanying text (discussing the right of integrity under the 1990 Act).

238. *See* H.R. REP. NO. 514, 101st Cong., 2d Sess. 14, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6924 (stating that "the author shall have the right to prevent the use of his or her name in connection with a work of visual art that has been modified in a way that would violate the right of integrity set forth in" the provision of the 1990 Act creating a right of integrity).

of this view in the text of the statute.[239] It is unlikely that a court would interpret the 1990 Act in a manner inconsistent with this legislative history.

ii. Right of Integrity

The 1990 Act provides for an artist's right of integrity.[240] The 1990 Act prohibits the *intentional* distortion, mutilation, or modification of a work of visual art.[241] To be actionable, the distortion, mutilation, or modification must be prejudicial to the artist's honor or reputation.[242] The legislative history indicates that Congress intended the statute to encompass only acts which adversely affected the artist's *artistic or professional* reputation, not the artist's personal reputation.[243]

The right of integrity in the 1990 Act was subject to several amendments and revisions in the legislative process. As introduced, the bill contained no state of mind provision, and could reasonably have been interpreted as imposing strict liability.[244] An amendment to the bill made only intentional or negligent acts

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239. *See* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(c)) (exceptions to coverage). Both the exception for modifications resulting from the passage of time and the exception for modifications resulting from placement state that such a modification is not a "distortion, mutilation, or other modification described in subsection (a)(3)." *Id.* (enacting 17 U.S.C. § 106A(c)(1)-(2)). Subsection (a)(3) is the right of integrity provision. *See id.* (enacting 17 U.S.C. § 106A(a)(3)). As previously stated, the House Committee on the Judiciary Report stated that the term "modification" had the same meaning for both the right of integrity and the right of withdrawal. *See supra* note 203 (quoting the Judiciary Committee report). The apparent inconsistency between the House Report and the plain language of the statute may be attributable to faulty draftsmanship.

240. *See* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(3)) (right of integrity).

241. *Id.* (enacting 17 U.S.C. § 106A(a)(3)(A)).

242. *Id.* The legislative history indicates that Congress believed that "[t]he formulation for determining whether harm to honor or reputation exists must of necessity be flexible. The trier of fact must examine the way in which a work has been modified and professional reputation of the author of the work." H.R. REP. NO. 514, 101st Cong., 2d Sess. 15-16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6925-26 (citation omitted). Expert testimony as to whether the modification affects the artist's honor or reputation is appropriate. *Id.*

243. H.R. REP. NO. 514, 101st Cong., 2d Sess. 15, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6925.

244. *See* H.R. 2690, 101st Cong., 1st Sess. § 3, 135 CONG. REC. E2199, E2200 (daily ed. June 20, 1989) (bill as introduced).

actionable.[245] The House Committee on the Judiciary viewed this amendment as a "clarification," rather than an alteration, of the bill as introduced.[246] As enacted, the 1990 Act prohibits only intentional acts of distortion, mutilation, or modification.[247] Given this history of congressional narrowing of the state of mind requirement, it is likely that courts will strictly construe the requirement that the act of distortion or modification be intentional.

As introduced, the bill contained language stating that the distortion or alteration of a "work of recognized stature" constituted a virtual per se showing of harm to the artist's reputation, and was therefore actionable.[248] The bill contained provisions similar to the California statute, specifying procedures by which expert testimony could establish the recognized stature of the work.[249] The House Committee on the Judiciary believed that such a provision would have the undesirable potential of encouraging increased litigation by instigating battles of experts over whether works had attained the requisite recognized stature.[250] The provision does not appear in the 1990 Act as enacted, at least in regard to the distortion, mutilation, or modification of works of visual art.[251]

Changes in a work resulting from the passage of time or as a result of the inherent nature of the materials used in the work do not constitute actionable acts of distortion, mutilation, or modification.[252] Additionally, modifications resulting from conservation of the work or from public presentation, including

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245. *See* H.R. 2690, 101st Cong., 2d Sess. § 3, 136 CONG. REC. H3111, H3112 (daily ed. June 5, 1990) (bill as amended).

246. H.R. REP. NO. 514, 101st Cong., 2d Sess. 16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6926.

247. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(3)(A)).

248. *See* H.R. 2690, 101st Cong., 1st Sess. § 3, 135 CONG. REC. E2199, E2200 (daily ed. June 20, 1989) (bill as introduced).

249. *Id.*

250. H.R. REP. NO. 514, 101st Cong., 2d Sess. 15, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6925.

251. However, the Judiciary Committee recognized that modification of a work of recognized stature will ordinarily cause harm to the author's reputation. *Id.* at 16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN NEWS at 6926.

252. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(c)(1)).

lighting and placement, generally do not constitute an actionable distortion, mutilation, or modification of the work.[253] However, in an apparent exception to the requirement that such acts be intentional in order to be actionable, modifications caused by conservation or public presentation are actionable if they are the result of gross negligence.[254]

Congress recognized that the term "public presentation" could be interpreted to shield some actionable acts. In a published report, the House Judiciary Committee stated that "galleries and museums continue to have normal discretion to light, frame, and place works of art. However, conduct that goes beyond presentation of a work of art to physical modification of it is actionable."[255] The Committee cited the example of two Australian entrepreneurs who cut an original Picasso into five hundred pieces, selling them at $135 each as "original Picasso pieces,"[256] and stated that such acts would not qualify as acts of "public presentation."[257] On the other hand, the Committee cited a Canadian case[258] in which an artist objected to a shopping center's act of decorating a sculpture of geese in flight with Christmas decorations during the holiday season, and stated that such a case would fall into the exception for public presentation.[259]

In addition to prohibiting distortion, mutilation, or modification of works of visual art, the 1990 Act prohibits the *destruction* of such works.[260] Destruction of a work need not be intentional to be actionable; destruction caused by grossly negligent conduct is actionable as well.[261] As with the provision preventing distortion,

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253. *Id.* (enacting 17 U.S.C. § 106A(c)(2)).

254. *Id.*

255. H.R. REP. No. 514, 101st Cong., 2d Sess. 17, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6927.

256. *See* 136 CONG. REC. H8266, H8271 (daily ed. Sept. 27, 1990) (discussing the facts of the destruction of the Picasso painting).

257. H.R. REP. No. 514, 101st Cong., 2d Sess. 17, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6927.

258. Snow v. The Eaton Centre, Ltd., 70 Can. Pat. Rptr. 2d 105 (Ont. High Ct. 1982).

259. H.R. REP. No. 514, 101st Cong., 2d Sess. 17, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6927.

260. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(3)(B)).

261. *Id.*

mutilation, or modification, any destruction of the work as a result of conservation or public presentation of the work is not actionable unless caused by gross negligence.[262] However, the provision prohibiting destruction has different requirements than the provision prohibiting modifications or alterations: Although there is no requirement to prove that the destruction is injurious to the artist's honor or reputation, the destruction of the work is only actionable if the work is of recognized stature.[263]

The presence of the "of recognized stature" standard in the 1990 Act is curious in light of Congress' explicit rejection of a similar standard in the provision prohibiting modifications, and in light of Congress' apparent view that such a standard would invite unnecessary controversy concerning the recognized status of the work in question.[264] At the time Congress deleted the standard from the modification provision, it also deleted the standard from the destruction provision.[265] That version of the bill also provided that to be actionable, a destruction of a work must adversely affect the artist's honor or reputation.[266] The version of the bill as approved created the separate requirements for the destruction of works of art which mandate that the work be of recognized stature, and which make an inquiry into the effect of the destruction of the work on the artist's reputation irrelevant.[267] The motivation for Congress' decision to once again amend the destruction provision to include the "of recognized stature" language and remove the requirement of injury to the artist's reputation may be implied by the justification cited by the House Judiciary Committee for the removal of the standard from the provision prohibiting modification:

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262. *Id.* (enacting 17 U.S.C. § 106A(c)(2)).

263. *Id.* (enacting 17 U.S.C. § 106A(A)(3)(B)).

264. *See supra* notes 252-249 and accompanying text (discussing Congress' rejection of the "of recognized stature" standard as applied to modification of works).

265. *See* H.R. 2690, 101st Cong., 2d Sess. § 3, 136 CONG. REC. H3111, H3112 (daily ed. June 5, 1990) (as amended).

266. *Id.*

267. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(3)(B)). The provision simply states that the artist has the right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right." *Id.*

> [B]y deleting the language, the bill makes clear that to be protected, an author need not prove a pre-existing standing in the artistic community. The Committee appreciates that less well-known or appreciated artists also have honor and reputations worthy of protection. The deletion of this language is consistent with the fact that, throughout history, many works now universally acknowledged as masterpieces have been rejected and often misunderstood by the general public at the time they were created.[268]

The Committee felt that this standard was in line with the interest protected by article 6*bis* of the Berne Convention: The artist's interest in maintaining his or her honor and reputation.[269] Article 6*bis* of the Berne Convention does not contain language concerning the destruction of works of art, but is concerned only with the "distortion, mutilation, or other modification" of the work.[270] Although the Berne Convention does not impose a right of enforcement for destruction of works of art, the Committee observed that "it is clear that the Convention simply sets a floor for protection and does not prohibit member countries from providing additional rights."[271] The Committee believed that prevention of the destruction of art was beneficial to society, and was best accomplished by giving the artist enforcement rights.[272]

It appears, therefore, that Congress believed that prohibiting destruction of works of art serves national interests. It is similarly apparent that Congress was of the view that the destruction of works of art does not have the same adverse impact on the artist's reputation as alteration or modification of the work. Despite congressional recognition of the fact that "many works now universally acknowledged as masterpieces have been rejected and often misunderstood by the general public at the time they were created," Congress likely believed that protection from destruction

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268. H.R. REP. NO. 514, 101st Cong., 2d Sess. 15, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6925.

269. *Id. See supra* note 182 (quoting the text of article 6*bis* of the Berne Convention, focusing on protection of the artist's honor and reputation).

270. *See supra* note 182 (text of article 6*bis*).

271. H.R. REP. NO. 514, 101st Cong., 2d Sess. 16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6926.

272. *Id.*

of works that are not "of recognized stature" may not be worth the amount of litigation such a broad right would create.[273]

The wording of the 1990 Act creates an interesting interpretational possibility. Under the California statute, only an alteration or destruction *by someone other than the artist* is actionable.[274] The 1990 Act contains no express exclusion from liability for the artist who creates the work. In the case of coauthors, all authors are the coowners of the right of enforcement for violation of the 1990 Act.[275] It therefore appears that one coauthor could bring an action against another coauthor for modification or destruction of the work. Should such a case ever arise, it will be interesting to see if the courts will interpret the 1990 Act literally, so as to impose liability upon a creator of a work of visual art for the modification or destruction of the work by a coauthor.

iii. Exception for Reproductions

Under the 1990 Act, the rights of paternity and disavowal do not apply to "any reproduction, depiction, portrayal, or other use of a work" in connection with books, newspapers, periodicals, motion pictures and audiovisual works, and other media that are specifically excluded from the definition of a "work of visual art."[276] While the text of this provision seems ambiguous, examination of the legislative history helps to clear away some of the murkiness surrounding the provision.

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273. *But see id.* at 10, 1990 U.S. CODE CONG. & ADMIN. NEWS at 6920 (statement of Hon. John E. Frohnmayer, Chairman, National Endowment for the Arts) (acknowledging that "11 State statutes have operated successfully and that they 'have not engendered a blizzard of litigation'").

274. CAL. CIV. CODE § 987(c)(1) (West Supp. 1991). The California statute reads:

> No person, *except an artist who owns and possesses* a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.

Id. (emphasis added).

275. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(b)).

276. *Id.* (enacting 17 U.S.C. § 106A(c)(3)). *See id.* § 602 (amending 17 U.S.C. § 101) (definition of "work of visual art").

An original version of a work of art is certainly protected by the 1990 Act, but reproductions are not so protected.[277] The legislative history of this provision indicates that Congress believed that it was necessary to ensure that copyright holders would be insulated from liability for traditional, everyday uses of their copyrighted material.[278] The provision is designed, for example, to allow the producer of a motion picture to film a scene in an art gallery without specifying the authorship of all of the works depicted in the gallery, or to allow newspapers or magazines to freely publish photographs of artwork without including the artist's name in the caption of the photo.[279]

Similarly, the statute provides that such a reproduction, depiction, portrayal, or other use may not be viewed as a violation of the right of integrity.[280]

iv. Special Rules for Works Incorporated Into Buildings

Like the California statutes, the 1990 Act provides for special treatment for works of visual art incorporated into buildings. The report of the House Committee on the Judiciary states that these provisions were largely patterned after those of the California statute.[281]

The 1990 Act provides that the right of integrity does not apply when the owner of a building wishes to remove a work of art that has been affixed to the building in such a manner that removal will cause damage to or destruction of the work of art, so long as the artist had consented to the installation of the work in the

277. H.R. REP. NO. 514, 101st Cong., 2d Sess. 17, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6927.

278. *Id.*; 136 CONG. REC. E3716, E3717 (daily ed. Nov. 2, 1990) (statement of Rep. Moorhead). *But see* 136 CONG. REC. E1939 (daily ed. June 13, 1990) (statement of Rep. Williams) (expressing disappointment that reproductions were excluded from protection).

279. H.R. REP. NO. 514, 101st Cong., 2d Sess. 17, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6927.

280. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(c)(3)).

281. H.R. REP. NO. 514, 101st Cong., 2d Sess. 19, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6929.

building.[282] In the case of works of art installed in buildings prior to June 1, 1991, the artist's consent may be written or oral.[283] In the case of works installed on or after June 1, 1991, the consent must be in a written instrument signed by the author, which specifies that removal of the work could cause damage to or destruction of the work of art.[284]

If the work of art could be removed from the building without causing mutilation or destruction of the work, the owner of the building is liable for any damage or destruction caused by the removal unless the owner makes a diligent, good faith effort to notify the artist, or unless the owner actually notifies the artist and the artist fails to remove the work or pay for its removal within ninety days of receiving notice.[285]

c. *Duration, Transfer, and Waiver of the Rights*

For works created on or after June 1, 1991, the rights created by the 1990 Act expire upon the death of the artist.[286] For works created prior to June 1, 1991, to which the artist still holds title, the rights are coextensive with the copyright protection of the work, which is fifty years beyond the artist's death.[287] All terms of the rights run until the end of the calendar year in which they would otherwise expire.[288]

Noticeably absent from the provisions specifying the duration of the rights is any provision describing the duration of rights with

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282. 1990 Act, *supra* note 192, § 604 (amending 17 U.S.C. § 113(d)(1)).

283. *Id.* (amending 17 U.S.C. § 113(d)(1)(B)). Since the language of the statute does not explicitly specify what form the consent must take, it is possible the provision could be interpreted as providing that implied consent is sufficient.

284. *Id.*

285. *Id.* (amending 17 U.S.C. § 113(d)(2)(A)-(B)). An owner is presumed to have made a good faith, diligent effort to notify the artist if he or she sends the artist notification via registered mail at the artist's most recent address on file with the Register of Copyrights. *Id.* The 1990 Act requires the Register of Copyrights to establish a system of records for filing information concerning works of visual art that have been incorporated into buildings. *Id.* (amending 17 U.S.C. § 113(3)).

286. *Id.* § 603 (enacting 17 U.S.C. § 106A(d)(1)). In the case of joint works, the rights expire upon the death of the last surviving author. *Id.* (enacting 17 U.S.C. § 106A(d)(3)).

287. *Id.* (enacting 17 U.S.C. § 106A(d)(2)). *See* 17 U.S.C. § 302(a) (1988) (specifying the duration of copyright protection).

288. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(d)(4)).

respect to works of art created before June 1, 1991, to which the artist *does not* still hold title. This oversight may be the product of faulty draftsmanship.[289] Subsection (d)(3) states, in its entirety: "In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) [the rights of paternity and integrity provisions] shall endure for a term consisting of the life of the last surviving author."[290] On its face, this provision seems to apply to *all* joint works, regardless of time of creation, and regardless of ownership of title. Therefore, it would be inconsistent if Congress had intended to give protection to joint works created before the passage of the 1990 Act to which the authors no longer had title, but to deny protection to similar works created by an individual author. Additionally, the provision that all rights are to expire at the end of the calendar year in which they would otherwise expire seems nonsensical in the case of rights which expire upon the death of the artist. Since the artist is the only person who is empowered by the statute to enforce the right, it is unlikely that the artist will gain much advantage from the added time to enforce the rights between the time of his or her death and the end of the calendar year![291]

The confusion in the provisions regarding duration of the rights may be attributable to the fact that these provisions of the bill were apparently amended at the last minute. As introduced, the bill provided that with respect to works created on or after the effective date of the Act, the rights would expire fifty years after the artist's death, while for works that were created but not *published* prior to the effective date, the rights would be coextensive with the

289. As one of the cosponsors of the bill stated, "[A]rtworks are intellectual expression, not just physical property .... This bill recognizes that title to the soul of an art work does not pass with the sale of the art work itself." 136 CONG. REC. H8266, H8271 (daily ed. Sept. 27, 1990) (statement of Rep. Markey).

290. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(d)(3)).

291. It seems unlikely that this provision is designed to create a right of enforcement for the personal representative of the artist's estate to seek redress for acts occurring after the artist's death. First, it would seem that such a congressional intent would be explicitly spelled out in the statute. Second, given the personal nature of the rights and the focus on protecting the artist's professional reputation, postmortem enforcement would seem inconsistent with the statutory scheme.

copyright protection.[292] The bill was later amended to provide that for works created prior to the effective date and for which the artist still owned the *copyright*, the artist or the persons to whom the artist's copyright passed through bequest or intestate succession could enforce the rights under the Act until the expiration of the copyright.[293] In the final version, of course, the postmortem rights were deleted and the rights relating to works created before the effective date of the 1990 Act are determined by whether the artist still possesses title to the art.[294] The frequent and varying amendments to the provisions, some of which were imposed at the eleventh hour, may have caused Congress to inadvertently leave out a necessary provision. The 1990 Act, in its current state, provides that works which were created prior to June 1, 1990 to which the artist no longer holds title are not given protection. However, although this term seems inconsistent with the remainder of the statute, the courts will likely interpret the statute in this literal manner until Congress legislatively clarifies the provision.

In addition to the above provisions concerning the durations of rights, actions brought under the 1990 Act are subject to the statute of limitations generally applicable to civil actions brought under the federal copyright provisions. The statute of limitations for all such actions is three years after the accrual of the cause of action.[295]

The artist may not transfer his or her rights under the 1990 Act.[296] A transfer of the copyright in a work does not constitute a transfer or waiver of the rights created by the 1990 Act.[297] However, the artist may waive the rights created by the 1990 Act.[298] The waiver must be in a written instrument signed by the artist, and the instrument must specifically identify the work and

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292. H.R. 2690, 101st Cong., 1st Sess. § 3, 135 CONG. REC. E2199, E2200 (daily ed. June 20, 1989).

293. H.R. 2690, 101st Cong., 2d Sess. § 3, 136 CONG. REC. H3111, H3112 (daily ed. June 5, 1990).

294. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(d)).

295. 17 U.S.C. § 507(b) (1988).

296. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(e)(1)).

297. *Id.* (enacting 17 U.S.C. § 106A(e)(2)).

298. *Id.* (enacting 17 U.S.C. § 106A(e)(1)).

the uses of the work to which the waiver applies.[299] In the case of joint authors of the work, a valid waiver by one author is enforceable against all authors of the work.[300] The legislative history of the provision indicates that Congress intended the provision to be strictly construed against a finding of a waiver.[301] Congress intended the waiver to apply only to the specific person to whom it is made, and that such waivers are nontransferable.[302] Any waiver of the rights created under the 1990 Act does not constitute a waiver of the artist's copyright rights or a transfer of the artist's ownership interest in the work.[303]

d. Available Remedies

The 1990 Act specifically excludes the imposition of criminal sanctions for violation of any of its provisions.[304] Aside from criminal penalties, the artist may choose from the full range of civil remedies generally available under federal copyright law.[305] Possible remedies include injunctive relief,[306] actual money damages or profits,[307] or statutory damages.[308] In actions to enforce the rights and obligations arising under the 1990 Act, the court may award costs and attorneys' fees to the prevailing party.[309]

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299. *Id.*

300. *Id.*

301. H.R. REP. No. 514, 101st Cong., 2d Sess. 18, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6928.

302. *Id.* at 18-19, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 6928-29.

303. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(e)(2)).

304. *Id.* § 606(b) (amending 17 U.S.C. § 506(f)).

305. *Id.* § 606(a) (amending 17 U.S.C. § 501(a)).

306. *See* 17 U.S.C. § 502 (1988) (provision governing injunctive relief).

307. *See id.* § 504(b) (1988) (provision governing awards of money damages and profits).

308. *See id.* § 504(c) (1988) (providing for, in the absence of a showing of actual damages, discretionary awards of statutory damages of between $500 and $20,000).

309. *Id.* § 505 (1988).

e. Preemption of State Law

The 1990 Act contains an explicit preemption provision.[310] The 1990 Act specifically preempts state statutory or common law rights that are equivalent to provisions of the 1990 Act.[311] However, the 1990 Act does not fully occupy the field in the area of moral rights. The 1990 Act specifically does not preempt state law provisions that are not the equivalent of the 1990 Act's provisions.[312] Additionally, the preemption provision does not affect any state law cause of action filed prior to June 1, 1991.[313]

The issue of preemption of specific state laws is fully discussed below, in Part III of this Article.[314]

2. Studies by the Copyright Office

The 1990 Act requires the Register of Copyrights to conduct two studies. First, the Register must conduct a study to determine the extent that artists' rights under the 1990 Act are waived by artists.[315] The Register of Copyrights must file a preliminary report by December 1, 1992, and must file a final report and supporting recommendations by December 1, 1995.[316] The purpose of the report is "to ensure that the waiver provisions serve to facilitate current practices while not eviscerating the protections provided" by the 1990 Act.[317]

Additionally, the Register of Copyrights, in conjunction with the Chair of the National Endowment for the Arts, must conduct a study to determine the feasibility of a system of *droit de suite*, or right of resale royalties for artists.[318] The Copyright Register is

310. 1990 Act, *supra* note 192, § 605 (amending 17 U.S.C. § 301(f)).
311. *Id.* (amending 17 U.S.C. § 301(f)(1)).
312. *Id.* (amending 17 U.S.C. § 301(f)(2)(B)).
313. *Id.* (amending 17 U.S.C. § 301(f)(2)(A)).
314. *See infra* notes 320-396 and accompanying text.
315. 1990 Act, *supra* note 192, § 608(a)(1).
316. *Id.* § 608(a)(2).
317. H.R. REP. NO. 514, 101st Cong., 2d Sess. 22, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6932.
318. *Id.* § 608(b)(1).

required to consult with and seek the opinions of U.S. and foreign governments and art experts, and to submit a report to Congress by June 1, 1992.[319] As previously stated, congressional proponents of moral rights legislation blamed the inclusion of resale royalties provisions in earlier bills for Congress' failure to approve moral rights legislation prior to the 1990 Act.[320] The decision by the sponsors of the 1990 Act to propose a study of the feasibility of resale royalties instead of proposing the creation of such rights no doubt helped to ensure the passage of the 1990 Act.

III. THE PREEMPTION OF STATE STATUTES BY THE VISUAL ARTISTS RIGHTS ACT OF 1990

A. Preemption Provisions of the Visual Artists Rights Act of 1990

Under the Supremacy Clause of the United States Constitution, state law must yield to conflicting federal law.[321] Therefore, in an area in which Congress may validly legislate, if Congress explicitly provides that a state law is invalid, or if Congress implies such a result by enacting a contradictory statute, the state law is rendered unenforceable.

In enacting the Visual Artists Rights Act of 1990, Congress explicitly provided for the preemption of certain state laws. The 1990 Act provides that, after the effective date of the act, "all legal and equitable rights that are equivalent to any of the rights conferred by" the 1990 Act, with respect to works of art that are protected by the 1990 Act, "shall be governed exclusively" by the 1990 Act.[322] Thus, the 1990 Act explicitly preempts equivalent rights arising under either state statutes or state common law.[323]

Even if Congress had not enacted the preemption provision, it is possible that all similar state causes of action could have been

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319. *Id.* § 608(b)(2)-(3).

320. *See supra* notes 176-178 and accompanying text (discussing failed efforts to pass legislation in Congress granting resale royalty rights to artists).

321. U.S. CONST. art. VI.

322. 1990 Act, *supra* note 192, § 605 (amending 17 U.S.C. § 301(f)(1)).

323. *Id.*

barred. Courts may have interpreted the 1990 Act and analogous federal copyright statutes as having "occupied the field," by enacting a scheme of rights so broad as to imply Congress' intent to exclusively control this area of the law.[324] In such a case, federal statutes preempt all state statutes in an area, even if the state statutes are not equivalent to the federal statutes, do not conflict with the federal statutes, and would agree with and promote the federal policies.[325] Therefore, had Congress remained silent on the issue, it is possible that *all* state moral rights laws would be viewed as preempted even if they were not equivalent to the 1990 Act, since the 1990 Act could credibly be viewed as occupying the field.

The 1990 Act specifically provides that certain types of state claims and laws are *not* preempted by the 1990 Act. First, any state law claim filed prior to June 1, 1991 is not subject to preemption.[326] Additionally, state law claims based upon rights extending beyond the life of the artist remain viable.[327] Significantly, the 1990 Act does not preempt state laws protecting the rights of artists that are *not* the equivalent of rights created by the 1990 Act.[328]

Since the 1990 Act explicitly does not preempt state laws creating rights that are not the "equivalent" of rights under the 1990 Act, the interpretation of this language is highly significant. The language of the preemption provision,[329] as well as its

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324. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 497 (2d ed. 1988) (discussing the various ways in which Congress may occupy the field).

325. *Id. See, e.g.*, Burbank v. Lockheed Air Terminal, 411 U.S. 624, 640 (1973) (holding that the federal scheme for the prevention of aircraft noise was so broad that, even absent explicit preemption provisions, Congress had indicated that it intended to occupy the field).

326. 1990 Act, *supra* note 192, § 605 (amending 17 U.S.C. § 301(f)(2)(A)).

327. *Id.* (amending 17 U.S.C. § 301(f)(2)(C)).

328. *Id.* (amending 17 U.S.C. § 301(f)(2)(B)).

329. *See id.* (enacting 17 U.S.C. § 301(f)(1)) (stating that preemption of state law is "with respect to works of visual art to which the rights conferred by [the moral rights provisions] apply"). Presumably, this is a rather convoluted way of saying "with respect to works which are defined as 'works of visual art' within the statute."

legislative history,[330] make it clear that state statutes affecting works which fall outside the definition of a "work of visual art"[331] are not preempted by the 1990 Act. The legislative history also states that Congress did not intend to preempt state laws providing moral rights in areas *specifically exempted* from protection by the 1990 Act, such as misattribution of authorship of a reproduction of a work of visual art.[332] Similarly, the legislative history states that Congress did not intend to preempt state laws granting substantive rights unrelated to the rights granted by the 1990 Act, even if those rights affect works covered within the federal definition of "works of visual art."[333]

It is likely that certain artists who are unable to take advantage of the federal law may still avail themselves to favorable state law. For example, under the 1990 Act an artist who created a work and transferred title to the work prior to June 1, 1991 apparently may not bring an action under the 1990 Act.[334] However, it appears from the legislative history that such persons' claims under state laws would not be preempted.[335]

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330. *See* H.R. REP. 514, 101st Cong., 2d Sess. 21, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6931 (stating that the 1990 Act "will not preempt State causes of action relating to works that are not covered by the law, such as audiovisual works, photographs produced for non-exhibition purposes, and works in which the copyright has been transferred before the effective date").

331. *See* 1990 Act, *supra* note 192, § 602 (amending 17 U.S.C. § 101) (defining the term "work of visual art"). *See also supra* notes 193-222 and accompanying text (discussing the federal law definition of "work of visual art").

332. H.R. REP. 514, 101st Cong., 2d Sess. 21, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6931.

333. *Id.* For example, the legislative history shows that laws providing for artists' resale royalties are not preempted. *Id.*

334. *See* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(d)) (omitting any provision regarding the duration of rights for those artists who transfer title to the work prior to the effective date of the statute). *See also supra* notes 285-293 and accompanying text (discussing the duration of rights under the 1990 Act).

335. H.R. REP. 514, 101st Cong., 2d Sess. 21, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6931. This report states that "the new Federal law will not preempt State causes of action relating to works that are not covered by the law, such as . . . works in which the copyright has been transferred before the effective date." *Id.* At the time this report was written, the bill had not yet been amended to its final form. Rather than requiring the author of works created before the effective date of the act to possess *title* to the work in order to bring an action, the author was required to possess the *copyright*. *See* H.R. 2690, 101st Cong., 2d Sess. § 3, 136 CONG. REC. H3111, H3111-12 (daily ed. June 5, 1990) (text of the bill before amendment to final form). The language

On the other hand, when Congress provided that state laws granting rights "equivalent" to the rights created by the 1990 Act, Congress apparently intended to preempt all state statutes granting rights of attribution, disavowal, and integrity to artists are preempted with respect to works of visual art covered by the 1990 Act, even if the state law protections are not identical to the federal protections. As a report by the House Committee on the Judiciary stated:

> [I]f a State attempts to grant an author the rights of attribution or integrity for works of visual art as defined in this Act, those laws will be preempted. For example, the new law will preempt a State law granting the right of integrity in paintings or sculpture, even if a State law is broader than Federal law, such as by providing a right of attribution or integrity with respect to covered works without regard to injury to the author's honor or reputation.[336]

The apparent justification for this result is Congress' desire to enact a *uniform* system of laws protecting the moral rights of artists.[337] One witness in the congressional hearings on the proposal to enact the 1990 Act testified that state law protection of moral rights constituted "a 'patchwork' of rules which by itself vitiates somewhat the single, unified system of copyright. Artists, lawyers, courts, and even the owners of the works deserve a single set of rules on this subject."[338]

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of the report seems to indicate that, similarly, an artist who would be foreclosed from pursuing an action under federal law because he or she no longer possessed title to a work created prior to June 1, 1990 could bring an action under state law for violation of the artist's right of paternity or integrity.

336. H.R. REP. 514, 101st Cong., 2d Sess. 21, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6931.

337. *See* 136 CONG. REC. H3111, H3113 (daily ed. June 5, 1990) (statement of Rep. Kastenmeier). Representative Kastenmeier, one of the cosponsors of the bill enacting the 1990 Act, stated that one of the goals of the bill:

> . . . was to provide a nationwide standard for these protections. H.R. 2690 will preempt State laws in certain circumstances. While the States are free to continue to explore their own solutions in areas not covered by this bill, a Federal law will provide the uniformity and certainty that the individual States cannot.

Id.

338. H.R. REP. 514, 101st Cong., 2d Sess. 9-10, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6919-20 (quoting testimony of John Koegel, an art law practitioner).

The following discussion will predict the probable preemptive effects of the 1990 Act on the California[339] and New York[340] moral rights statutes. Although the 1990 Act preempts common law as well as statutory state causes of action,[341] a discussion of the preemption of common law causes of action is beyond the scope of this Article.[342]

B. Preemption of the California Statutes

Attempts to avoid total preemption of the California moral rights statutes should be facilitated by the fact that the statutes include an express severability provision. This provision reads:

> If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect any other provisions or applications of this section which can be effected without the invalid provision or application, and to this end the provisions of this section are severable.[343]

Therefore, it may be possible to save portions of the statute, even if a major portion is determined to be federally preempted. In *Raven v. Deukmejian*,[344] the California Supreme Court considered the effect of a severability provision with nearly identical language to that of the California moral rights statute. The provision was contained in Proposition 115, a sweeping criminal procedure reform

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339. *See infra* notes 343-366 and accompanying text (discussing preemption of the California statutes).

340. *See infra* notes 367-382 and accompanying text (discussing preemption of the New York statute).

341. 1990 Act, *supra* note 192, § 605 (amending 17 U.S.C. § 301(f)(1)).

342. *See generally* Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP. LAW 488 (1968) (discussing common law causes of action protecting moral rights). The House Committee on the Judiciary stated that state "causes of action such as those for misappropriation, unfair competition, breach of contract, and deceptive trade practices . . . will not be preempted" by the 1990 Act. H.R. REP. 514, 101st Cong., 2d Sess. 9-10, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6931.

343. CAL. CIV. CODE § 987(k) (West Supp. 1991). *See id.* § 989(i) (West Supp. 1991) (similar severability provision for statute concerning right of action by public interest organizations).

344. 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

provision approved by the California electorate in June, 1990.[345] The court determined that a portion of Proposition 115 violated the California Constitution, and it was therefore necessary to determine whether the provision was severable in light of the explicit severability provision contained in the measure.[346] The court stated that, even if a statute includes a severability provision, the invalid provision must be shown to be "grammatically, functionally, and volitionally separable."[347] With very limited discussion, the court determined that the invalid provision was: (1) Grammatically severable, because the provision constituted a separate provision removable without rewording other provisions; (2) functionally severable, because the invalid provision touched on an area largely unrelated to the other provisions; and (3) volitionally severable, because the voters would likely have enacted the initiative even if they had known that the invalid provision would be not be upheld.[348]

If a future defendant attempts to claim that the entire California moral rights statute is invalid because certain preempted provisions of the California statute are not severable from the statute, the court will almost certainly apply the analysis established in the *Raven* decision. It seems that the third element, "volitional severability," is perhaps the most relevant factor for courts to consider. In considering the severability of invalid provisions of federal law, the Supreme Court of the United States has stated that invalid provisions are severable "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."[349] The Supreme

345. *Id.* at 345, 801 P.2d at 1082, 276 Cal. Rptr. at 331 (quoting the text of the Proposition 115 severability provision).

346. *Id.* at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338. *See generally* Note, *Proposition 115: The Crime Victims Justice Reform Act*, 22 PAC. L.J. 1010, 1030-32 (1991) (discussing the *Raven* decision).

347. *Raven*, 52 Cal. 3d at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338 (quoting Cal-Farm Insurance Co. v. Deukmejian, 48 Cal. 3d 805, 821-22, 771 P.2d 1247, 1256, 258 Cal. Rptr. 161, 170 (1989) (considering the validity of Proposition 103, an auto insurance reform initiative)).

348. *Id.* at 356, 801 P.2d at 1090, 276 Cal. Rptr. at 339.

349. Buckley v. Valeo, 424 U.S. 1, 108 (1976) (citing Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

Court has also stated that the inclusion of a severability provision in a statutory scheme raises a "presumption of severability."[350]

The 1990 Act probably does not preempt actions brought under the California statutes with respect to works created prior to June 1, 1990, to which the artist no longer holds title.[351] Additionally, any actions brought after the artist's death by the artist's beneficiary, devisee, or personal representative are explicitly excluded from preemption by the 1990 Act.[352] Also, any action based upon protection afforded by the California statute to items which are not within the 1990 Act's definition of "work of visual art" is not preempted by the 1990 Act.[353] However, since the California statutory definition of "fine art" is even narrower than the 1990 Act's definition of "work of visual art," it appears that very few items will fall into this category. The California definition of "works prepared under contract for commercial use" is more narrow than the definition of "works for hire" in the federal statutes.[354] Consequently there may be a few instances, such as in the case of an employee who prepares a work of fine art for nonadvertising purposes, in which a work constituting a work for hire under federal statutes will not constitute a work prepared for commercial use under the California statute. In such a case, the California statute would not be preempted.

Many of the protections offered *to the artist* by the California statute will be preempted, at least when enforced by the artist and not by a third party. The right of paternity under the California statute is essentially identical to the analogous provision of the 1990 Act.[355] Therefore, the California provision granting the artist the right of paternity is in all likelihood preempted by the 1990 Act.

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350. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 932 (1983).

351. *See supra* notes 334-335 and accompanying text.

352. 1990 Act, *supra* note 192, § 605 (amending 17 U.S.C. § 301(f)(2)(C)).

353. *See supra* notes 328-331 and accompanying text.

354. *Compare* CAL. CIV. CODE § 987(b)(2), (7) (West Supp. 1991) *with* 17 U.S.C. § 101 (1988).

355. *Compare* CAL. CIV. CODE § 987(d) (West Supp. 1991) *with* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(1)(A)).

While the California statute states that the artist may exercise a right of disavowal "for just and valid reason,"[356] under the 1990 Act the artist may do so only if there has been some modification of the work which would prejudice the artist's honor or reputation.[357] This situation seems to be the type which the legislative history of the 1990 Act indicates falls within the category of "equivalent" (and therefore preempted) provisions.[358] It appears that the right of disavowal under the California statute is preempted.

Under the 1990 Act, the artist may only exercise his or her right of integrity based upon the distortion, mutilation, or modification of the work if the act is injurious to the artist's honor or reputation.[359] The California statute contains no such restriction and offers broader protections to the artist.[360] This is precisely the situation used by the House Committee on the Judiciary as an illustration of the type of statute which the 1990 Act would preempt.[361] Therefore, for actions brought by the artist to prevent the modification of a work, the California statute is preempted. Also, since the provisions of the 1990 Act and the California statute prohibiting the destruction of a work are nearly identical,[362] this provision of the California statute is preempted as well, at least with respect to actions brought by the artist.

Some commentators may feel that once the California statute is preempted during the life of the artist by the 1990 Act, the statute is preempted forever, with respect to both *inter vivos* and postmortem rights. However, this view appears to be contradicted

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356. *See supra* notes 44-49 and accompanying text (discussing the right of disavowal in California).

357. *See supra* notes 230-237 and accompanying text (discussing the right of disavowal under the 1990 Act).

358. *See supra* text accompanying note 336 (quoting a report by the House Committee on the Judiciary).

359. *See supra* notes 238-257 and accompanying text (discussing the 1990 Act's prohibition of modifications or alterations).

360. *See supra* notes 50-59 (discussing the right of integrity under the California statute).

361. *See supra* text accompanying note 336 (text of the Judiciary Committee report).

362. *Compare* CAL. CIV. CODE § 987(c)(1) (West Supp. 1991) *with* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(3)(B)). If anything, the federal law is broader, since it addresses both intentional and grossly negligent acts, while the California statute prohibits only intentional acts.

by the plain language of the preemption provisions of the 1990 Act. While the rights of paternity, disavowal, and integrity under the California statute are likely preempted with respect to actions brought *by the artist* to enforce his or her rights, it is probable that actions brought after the artist's death by the artist's heirs or personal representative will not be preempted. During the artist's life, the validity of the California moral rights statute appears to be suspended, but upon the artist's death and for the next fifty years, the California statute is valid and enforceable by the beneficiaries, devisees, or personal representative. This interaction between federal and state laws has the anomalous result of providing greater protection to the artist's heirs after the artist's death than the protection provided to the artist during his or her life.

The most nebulous area in the inquiry of the validity of the California statutes after the passage of the 1990 Act is the enforceability of the provisions of California law granting public interest organizations the right to protect the integrity of works of fine art. Enforcement rights vested in public interest organizations and enforceable after the artist's death survive the enactment of the 1990 Act. However, the gray area is the validity under the California statute of the rights of public interest organizations to protect the integrity of works of art during the artist's life.

It can be argued that since the California statute focuses upon the preservation of artwork for the public interest,[363] whereas the focus of the 1990 Act is the protection of the artist's professional reputation, the rights under the California statute are not "equivalent" for purposes of the federal preemption provision to the rights under the 1990 Act. However, the legislative history of the 1990 Act shows that the preservation of works of art for the benefit of the public at large, while not the primary goal of the statute, was a significant motivation for passage of the 1990

363. *See* CAL. CIV. CODE § 989(a) (West Supp. 1991) (legislative findings and declarations, stating: "The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.").

Act.[364] Congress passed the provision prohibiting the *destruction* of art not to protect the artist's reputation, but to protect society's interest in maintaining the integrity of works of art.[365] As a report by the House Committee on the Judiciary phrased it: "The bill furthers the preservation concept and provides in the most effective way for the protection of the work by giving the artist the right of integrity and the power to enforce it."[366]

It therefore appears that in enacting the 1990 Act one of Congress' major motivations was the protection of art for society as a whole. While the California Legislature may have believed that the creation of enforcement rights for public interest organizations was necessary to achieve this goal, Congress apparently believed that allowing the artist to enforce the rights was sufficient to achieve that goal. Therefore, it is likely that courts would find the California statute a broader "equivalent" right, one that is therefore preempted by the 1990 Act. However, the ultimate resolution of this issue awaits future judicial interpretation.

It appears that the California statutory provisions protecting the rights of integrity, paternity, and disavowal are generally preempted during the artist's life, whether the action is brought by the artist or by a public interest organization. However, works that are not protected by the 1990 Act, because the artist transferred title to them prior to the effective date of the 1990 Act, will still be

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364. *See, e.g.*, 136 CONG. REC. E1939, E1939 (daily ed. June 13, 1990) (statement of Rep. Williams) (stating that the 1990 Act "would help prevent the destruction or mutilation of important works of art--art that is an invaluable part of the American culture."); 136 CONG. REC. H3111, H3113 (daily ed. June 5, 1990) (statement of Rep. Kastenmeier) (stating that one of two goals of the 1990 Act "was to protect the works themselves. Society is the ultimate loser when these works are modified or destroyed. They should be preserved in the way the artist intended, and as the important part of our cultural heritage that they are."); 135 CONG. REC. E2227, E2227 (daily ed. June 20, 1989) (statement of Rep. Markey) (stating that "it is paramount to the integrity of our culture that we preserve the integrity of our artworks."); 136 CONG. REC. S6811, S6811 (daily ed. June 16, 1989) (statement of Sen. Kennedy) (stating that "Congress can no longer overlook its responsibility to safeguard the nation's artistic heritage."); *id.* at S6813 (statement of Sen. Kasten) (stating that "[w]orks protected by this bill are one of a kind or very limited editions. When these works are altered or destroyed, they are gone forever. We have a duty to protect them.").

365. *See supra* notes 270-271 and accompanying text (discussing Congress' motivation in prohibiting the destruction of works of art).

366. H.R. REP. NO. 514, 101st Cong., 2d Sess. 16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6926.

protected by the California moral rights statutes. Obviously, this category encompasses a huge volume of works. Additionally, postmortem rights under the California statutes survive the passage of 1990 Act, enabling public interest organizations or artists' beneficiaries, devisees, or personal representatives to bring actions within the time periods allowed by the California statutes.

To avoid subjecting these rights under the statute to the analysis announced in *Raven v. Deukmejian*, the California Legislature should amend the California moral rights statutes to reflect the partial preemption by the 1990 Act, and therefore avoid preemption of the entire California statutory scheme through judicial interpretation.

C. Preemption of the New York Statute

The New York statute does not incorporate a specific severability provision. In general, however, if the issue is in doubt, the New York courts tend to find that invalid provisions are severable from the remainder of the statute. This principle of liberal construction was established over seventy years ago by the New York Court of Appeals in *People ex. rel. Alpha Portland Cement v. Knapp*.[367] In *Knapp*, the court stated that "[t]he question in every case is whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether."[368] The court further stated, "Our duty is to save, unless in saving we pervert."[369] In recent years, the New York courts have reaffirmed the *Knapp* standard and continued to liberally interpret statutes in favor of severability.[370]

The definition of "fine art" under the New York statute is slightly broader than the analogous definition of "work of visual

367. 230 N.Y. 48, 129 N.E. 202 (1920).

368. *Id.* at 60, 129 N.E. at 207.

369. *Id.* at 63, 129 N.E. at 208.

370. *See, e.g.*, Town of Islip v. Caviglia, 141 A.D.2d 148, 532 N.Y.S.2d 783, 794-95 (1988) *aff'd*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (advocating liberal interpretation and citing *Knapp* as the appropriate standard).

art" contained in the 1990 Act.[371] Similar to the California statute, some works may fall under the federal definition of "works made for hire," while not falling into the corresponding New York definition of "works prepared under contract for advertising or trade."[372] Additionally, the New York statute includes within the definition of "fine art" work existing in a limited edition of three hundred, while the definition of "work of visual art" in the federal statute allows only editions of not more than two hundred.[373] Therefore, the New York statute is probably not preempted with respect to works of art existing in limited editions of more than two hundred but less than three hundred units.

Unlike the 1990 Act, the New York statute grants artists the right to prevent the alteration of *reproductions* of items falling within the statutory definition of "fine art."[374] The New York statute defines the term "reproduction" as "a copy, in any medium, of a work of fine art, that is displayed or published under circumstances that, reasonably construed, evinces an intent that it be taken as a representation of a work of fine art as created by the artist."[375] The 1990 Act expressly provides that the rights of paternity and disavowal do not apply with respect to reproductions.[376] Thus, upon superficial examination, it seems as if the New York statute directly conflicts with the 1990 Act, thus rendering it invalid under the supremacy clause of the Constitution. However, a report by the House Committee on the Judiciary determined that such a situation was merely an example of an nonequivalent right, stating that, "[f]or example, the [1990 Act] would not preempt a cause of action for misattribution of a

371. *Compare* N.Y. ARTS & CULT. AFF. LAW § 11.01(9) (McKinney Supp. 1991) *with* 1990 Act, *supra* note 192, § 602 (amending 17 U.S.C. § 101).

372. *Compare* 17 U.S.C. § 101 (1988) *with* N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(d) (McKinney Supp. 1991).

373. *Compare* N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1991) *with* 1990 Act, *supra* note 192, § 602 (amending 17 U.S.C. § 101).

374. *Compare* N.Y. ARTS & CULT. AFF. LAW § 14.03(3) (McKinney Supp. 1991) *with* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(c)(3)).

375. N.Y. ARTS & CULT. AFF. LAW § 11.01(16) (McKinney Supp. 1991).

376. 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(c)(3)).

reproduction of a work of visual art."[377] Therefore, so far as the New York statute applies to reproductions, the statutory provisions regarding the rights of paternity and disavowal are not preempted.

The right of paternity in the New York statute seems to be identical in all relevant ways to the right of paternity contained in the 1990 Act.[378] Therefore, the New York provision relating to the right of paternity is preempted, except so far as the provision relates to the right of attribution of reproductions.

The right of disavowal under the New York statute requires the artist to show a "just and valid reason" for the disavowal, and provides that harm to the artist's reputation constitutes such just and valid reason.[379] Whether this provision is interpreted broadly or narrowly, it appears that the rights created by the New York statute are "equivalent" to those arising under the 1990 Act. The New York provision relating to the right of disavowal therefore appears to be preempted, except that artists may still claim a right under the New York statute to disclaim authorship of reproductions.

The right of integrity under the New York statute is more narrow than the corresponding right under the 1990 Act.[380] The New York statute does not prohibit destruction of a work of art, and the statute requires, in addition to harm to the artist's reputation, that the art be displayed in a public place for the violation to be actionable.[381] Since the New York statute provides no substantive protection in this area that is not provided under the 1990 Act, it appears that the 1990 Act preempts the New York version of the right of integrity.

As with the California statute, it appears that the New York statute is still valid in situations where the artist has transferred title

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377. H.R. REP. No. 514, 101st Cong., 2d Sess. 21, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6931.

378. *Compare* N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (McKinney Supp. 1991) *with* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(1)(A)).

379. *See supra* notes 115-122 and accompanying text (discussing the artist's right of disavowal under the New York statute).

380. *Compare* N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1991) *with* 1990 Act, *supra* note 192, § 603 (enacting 17 U.S.C. § 106A(a)(3)).

381. N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1991).

to a work of art before June 1, 1991, since the 1990 Act provides no rights to the artist.[382] Additionally, the 1990 Act does not preempt the New York statutory provisions providing rights of paternity and disavowal over reproductions. Since the New York statute provides no postmortem rights of enforcement, and since most other provisions of the New York statute are analogous to the 1990 Act, the 1990 Act appears to preempt all other substantive provisions of the New York statute.

The courts in New York liberally interpret statutes in favor of severability of invalid provisions. However, absent action by the New York Legislature to clarify and narrow the provisions of the New York moral rights statute, it seems possible that since so much of the New York statute has been preempted that, even under the liberal New York severability rules, the New York courts may determine that the statute is preempted in its entirety. The New York Legislature, like the California Legislature, should therefore take action to avoid total preemption of its moral rights statute.

D. Tactical Considerations and the Possibility of Inconsistent Results Under State Law Claims

Although Congress intended in enacting the 1990 Act to create a uniform nationwide system of rights and obligations relating to the moral rights of artists,[383] this intent could be temporarily frustrated by artful pleading.

It is likely that federal courts would have fewer reservations about declaring a state statute to be preempted than state courts sitting in the jurisdiction which enacted the state statute. Consequently, particularly in nondiversity cases in which removal to federal courts for reasons of diversity of citizenship is not a problem, plaintiffs in jurisdictions offering broad rights to artists

382. *See supra* notes 334-335 and accompanying text (discussing legislative history indicating that the 1990 Act does not preempt state law in such circumstances).

383. *See supra* notes 337-338 and accompanying text (discussing Congress' motives in preempting state statutes).

under state statutes may wish to pursue claims in state courts rather than in federal courts.

Under the firmly rooted "well-pleaded complaint rule," federal courts may not allow removal of an action filed in state court to be removed on the basis of federal question jurisdiction[384] unless the basis of the federal jurisdiction appears plainly on the complaint as it is written, or as it should be written.[385] Under the well-pleaded complaint rule, the fact that a defendant could assert some federal defense is not sufficient to allow removal of an action to a federal court.[386] A case is only removable to federal court if the plaintiff's cause of action is based upon federal law.[387] In *Franchise Tax Board v. Construction Laborers Vacation Trust*,[388] the Supreme Court of the United States determined that the well-pleaded complaint rule applies to claims by defendants that the plaintiff's cause of action is preempted by federal law, even if the claim is brought as a declaratory judgment action.[389]

The analysis under *Franchise Tax Board* was somewhat complicated by the Supreme Court's recent unanimous decision in *Metropolitan Life Insurance Co. v. Taylor*.[390] In *Metropolitan Life*, the Court allowed removal of an action based on the fact that the state common law action was preempted by federal law, specifically the Employment Retirement Income Security Act (ERISA).[391] The Court reasoned that this result was justified only because Congress had *totally* occupied the field in the area of such employee rights, and because Congress had clearly manifested its

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384. *See* U.S. CONST. art. III, § 2 (granting jurisdiction to the federal courts to hear matters arising under the laws and Constitution of the United States, subject to such exceptions as Congress may make); 28 U.S.C. § 1331 (1988) (congressional grant of authority of federal courts to hear federal question cases).

385. *See generally* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (seminal case setting forth the well-pleaded complaint rule).

386. *Id.* at 152.

387. *Id. See* E. CHEMERINSKY, FEDERAL JURISDICTION 230-41 (1989) (discussion of the well pleaded complaint rule). For a critical discussion of the well-pleaded complaint rule, see Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987).

388. 463 U.S. 1 (1983).

389. *Id.* at 24-26.

390. 481 U.S. 58 (1987).

391. *Id.* at 66-67.

intent that such causes of action be removable to federal court.[392] While at least one noted authority believes that the *Metropolitan Life* case stands for the proposition that any state court action is removable to federal court "based on a claim of preemption if Congress has created [an express] cause of action,"[393] the standard established in *Metropolitan Life* seems much more restrictive. As Justice Brennan explained in his concurring opinion:

> While I join the Court's opinion, I note that our decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to preempt state law is sufficient to establish removal jurisdiction. The court holds only that removal jurisdiction exists when, as here, "Congress has *clearly* manifested an intent to make causes of action . . . removable to federal court."[394]

The majority opinion stated that absent explicit direction from Congress regarding removal to federal court, the Court "would be reluctant to find that ordinary pre-emptive power" converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.[395]

Since Congress did not totally preempt state moral rights enforcement actions, and since Congress did not choose to provide explicit removal provisions in the 1990 Act, it seems likely that the removability of a state action based upon a defendant's claim of preemption by the 1990 Act will be determined by the reasoning of *Franchise Tax Board*, rather than the reasoning of *Metropolitan Life*. Further, the Supreme Court has held that preemption claims

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392. *Id.* at 63-66.

393. *See* E. CHEMERINSKY, *supra* note 387, at 234-35. *See also* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 865 (1986) (advocating the creation of a standard similar to the one Professor Chemerinsky perceives the Court as having created in *Metropolitan Life*).

394. *Metropolitan Life*, 481 U.S. at 67-68 (Brennan, J., concurring) (citation omitted) (emphasis and omission in original).

395. *Id.* at 65.

cannot form the basis of a federal action brought under title 42 of the United States Code, section 1983.[396]

Therefore, plaintiffs may wish to file actions in state court to avail themselves of more favorable rulings by state judges. This is not meant to imply that state judges will intentionally interpret the preemption provisions of the 1990 Act in a manner inconsistent with the Constitution or the plain meaning of the law. However, in questionable cases, federal judges seem naturally more inclined than state judges to interpret federal law as preempting state law. Consequently, until a case is heard on appeal in the Supreme Court of the United States, there is a chance of inconsistent rulings among the eleven states that have enacted statutory moral rights protections.

CONCLUSION

In enacting the Visual Artists Rights Act of 1990, Congress recognized the value of providing for a uniform system of protection for both the rights of artists and the interests of the public at large in maintaining works of visual art in a condition best reflecting the artist's vision and conception. The state statutes regulating moral rights remain relevant to the extent that they regulate the misattribution of reproductions, postmortem rights, or the rights of artists who have conveyed title to their works prior to the effective date of the 1990 Act.

While in certain states, particularly those states following the California model of protection of artists' moral rights, the enactment of the Visual Artists Rights Act of 1990 and the act's corresponding preemption of state law may represent a narrowing of the rights of artists and of the public as a whole. However, the reduction of rights in these few states seems a small price to pay

396. Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 449 (1989). The Court determined that the supremacy clause of the Constitution does not create rights enforceable under section 1983. *Id. See* 42 U.S.C. § 1983 (1987) (creating a cause of action for acts, under the color of state authority, in violation of rights created by the Constitution or federal statutes).

for the establishment or vast enlargement of rights in most other states.

As one of the cosponsors of the bill stated:

> Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly.
>
> Therefore . . . it is paramount to the expression of our culture that we preserve the integrity of our artworks as expressions of creativity of the artist. John Ruskin, a famous historian and philosopher once said, "All great art is the work of the whole living creature, body and soul, and chiefly of the soul."[397]

The Visual Artists Rights Act of 1990 will go a long way towards protecting the creativity of the artist and the artist's attempt to capture the *zeitgeist* of his or her time.

397. 135 CONG. REC. E2227, E2227 (daily ed. June 20, 1989) (statement of Rep. Markey).