The California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.*

The California Art Preservation Act is the first American legislative enactment of the doctrine of the artist's "moral rights." The Act protects fine art works from particular violations which injure those personal interests of the artist inextricably bound to his or her creations. This comment analyzes the Art Preservation Act for its effectiveness as a "moral rights" law, and for its suitability as a model for national and other state legislation.

INTRODUCTION

Horatio came upon his friend, the artist Hapless, and found him in the throes of deep despair.

"Hail to you, Hapless! What ails thee on such a fine morning?"

"O, woe is me," said Hapless. "What a foul deed has been perpetrated upon my painting, 'The Temper.' I sold it to Unscrupulous who painted the red sky blue and in so doing doused the fire and spirit of my artistic statement. Now my name is joined with a work no longer of my creation, and each senseless stroke of blue paint pierces my heart more sharply than any mere dagger."

"What a bloody, bawdy villian this Unscrupulous is!" said Horatio.

"O, to paint, or not to paint," Hapless lamented, "that is the question. Is it nobler to suffer the slings and arrows of such outrageous fortune? I would be able to take arms against my sea of troubles were I in any of the over sixty Berne Convention Countries.[1] But nay, I had to follow the temptation of adventure to

---

* An earlier version of this article was awarded first place in the 1980 Nathan Burkan Memorial Competition at U.C. Davis sponsored by the American Society of Composers, Authors and Publishers.

[1] *See* Comment, *Copyright: Moral Right — A Proposal*, 43 FORDHAM L. REV. 793, 797 n.47 (1975).

this savage and uncivilized land called America."[2]

"Mourn no more my friend!" said Horatio with a sudden realization. "We are in California! The law here defends us from such wicked intents."

Hapless' harried face became peaceful once more. "Of course, Why, what an ass am I! So shall I have my revenge."

* * * *

Thus the artist Hapless finds comfort in the fact that California has now donned the knight's shining armor for its role as the protector of the artist's "moral rights."[3] While the state's new

---

The Berne Convention expressly recognizes the artist's "moral rights." It allows the artist to protect his or her artistic reputation and would thus give Hapless a cause of action against Unscrupulous. *See* note 4 *infra*.

[2] The United States has consistently refused to join the Berne Convention. The Convention's protection of the artist's moral rights is a major obstacle to the United States' membership in the Convention. *See* Abelman & Berkowitz, *International Copyright Law*, 22 N.Y.L.S.L. REV. 619, 634 (1977). *But see* Note, *Question of Berne Entry for the U.S.*, 11 CASE W. RES. J. INT'L L. 421, 436 (1979), contending that protection of moral rights in the United States by the common law should satisfy the Berne standard, since members of the Convention do not meet the standard in practice.

Thomas B. Hess reflected on the United States' rejection of the moral rights doctrine: "Would it not be appropriate to press for legislation that would give the American artist at least a part of the legal protection and proprietary rights that are enjoyed by his colleagues in civilized countries?" *Quoted in* Weil, *The "Moral Right" Comes to California*, ARTNEWS, Dec. 1979, at 88.

[3] CAL. CIV. CODE § 987 (West Cum. Supp. 1981) became effective on January 1, 1980.

The Act provides:

> § 987. Preservation of works of art
>
> (a) Legislative findings and declaration
>
> (a) The Legislature hereby finds and declares 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 such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.
>
> (b) Definitions
>
> (b) As used in this section:
>
> (1) "Artist" means the individual or individuals who create a work of fine art.
>
> (2) "Fine art" means an original painting, sculpture, or drawing of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.
>
> (3) "Person" means an individual, partnership, corporation, asso-

garb is a bit oversized and still squeaks from lack of wear, it is

---

ciation or other group, however organized.

(4) "Frame" means 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.

(5) "Restore" means to return, or cause to be returned, a deteriorated or damaged work of fine art as nearly as is feasible to its original state or condition, in accordance with prevailing standards.

(6) "Conserve" means to preserve, or cause to be preserved, a work of fine art by retarding or preventing deterioration or damage through appropriate treatment in accordance with prevailing standards in order to maintain the structural integrity to the fullest extent possible in an unchanging state.

(c) Mutilation, alteration or destruction of a work

(c)(1) 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.

(2) In addition to the prohibitions contained in paragraph (1), no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence. For purposes of this section, the term "gross negligence" shall mean 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.

(d) Authorship

(d) The artist shall retain at all times the right to claim authorship, or, or just and valid reason, to disclaim authorship of his or her work of fine art.

(e) Remedies

(e) To effectuate the rights created by this section, the artist may commence an action to recover or obtain any of the following:

(1) Injunctive relief.

(2) Actual damages.

(3) Punitive damages. In the event that punitive damages are awarded, the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive such damages.

(4) Reasonable attorneys' and expert witness fees.

(5) Any other relief which the court deems proper.

(f) Determination of recognized quality

(f) In determining whether a work of fine are is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation of marketing of fine art.

(g) Rights and duties

(g) The rights and duties created under this section:

an admirable imitation of the original European doctrine.[4] The

---

(1) Shall, with respect to the artist, or if any artist is deceased, his heir, legatee, or personal representative, exist until the 50th anniversary of the death of such artist.

(2) Shall exist in addition to any other rights and duties which may now or in the future be applicable.

(3) Except as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist.

(h) Removal from building; waiver

(h)(1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of such work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived. Such instrument, if properly recorded, shall be binding on subsequent owners of such building.

(2) If the owner of a building wishes to remove a work of fine art which is a part of such building but which can be removed from the building without substantial harm to such fine art, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If such work is removed at the expense of the artist, his heir, legatee, or personal representative, title to such fine art shall pass to that person.

(3) Nothing in this subdivision shall affect the rights of authorship created in subdivision (d) of this section.

(i) Limitation of actions

(i) No action may be maintained to enforce any liability under this section unless brought within three years of the act complained of or one year after discovery of such act, whichever is longer.

(j) Operative date

(j) This section shall become operative on January 1, 1980, and shall apply to claims based on proscribed acts occurring on or after that date to works of fine art whenever created.

(k) Severability

(k) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such 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.

[4] The European doctrine is adopted, in modified form, in Article 6 *bis* of the Berne Convention which provides:

doctrine of moral rights permits Hapless to redress the violation of his artistic reputation in "The Temper" even though the work is owned by Unscrupulous. The artist's rights stem from that element of the artist's personality which inheres in a creative work.[5] The doctrine of moral rights recognizes those personal rights as separate and distinct from any pecuniary interest in the work.[6] Therefore, regardless of whether or not the artist[7] retains physical possession of the work, the artist continues to have an interest in preserving the expression of his or her personality in the manner intended.[8]

Under the doctrine of moral rights, the artist can protect his or her artistic reputation in a work by asserting the right of in-

---

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work which would be prejudicial to his 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 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 author of all the rights set out in the proceeding paragraph may provide that some of these rights, 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.

Berne Copyright Union, Paris Act, 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD 3 (1971).

[5] Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 517 (1955). Pablo Picasso (1881 - 1973) said, "Those ideas and emotions will be imprisoned in [the artist's] work for good; whatever they do they will never be able to escape from the picture; they are an integral part of it, even though their presence can no longer be discerned." *Quoted in* R. FRIEDENTHAL, LETTERS OF THE GREAT ARTISTS 257 (1963).

[6] Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

[7] The California Art Preservation Act uses the term "artist" to denote the fine artist. CAL. CIV. CODE § 987(b)(1) (West Cum. Supp. 1981). As used in this comment, the term refers generally to authors and other creators when the Act is not specifically discussed.

[8] Katz, *The Doctrine of Moral Right and American Copyright — A Proposal*, 24 S. CAL. L. REV. 375, 381 (1951).

tegrity and/or the right of paternity.[9] The California Art Preservation Act adopts both of those rights.[10] The Act recognizes the right of integrity by prohibiting physical defacement, mutilation, alteration or destruction of fine art works.[11] The Act protects the artist's right of paternity by permitting the artist to claim authorship or, for good reason, to disclaim credit for the work.[12] Thus, the artist Hapless can protect his personal interests in "The Temper" from both mutilation and an inappropriate attribution of authorship.

The California law is somewhat of an anomaly on the American scene. The doctrine of moral rights has not been adopted on a national basis in the United States[13] despite its widespread ac-

---

[9] The right of integrity permits the artist to exercise control over alterations of his or her work. The right of paternity allows the artist to claim credit as creator of a work by name or pseudonym or, alternatively, to remain anonymous. False attribution — either by crediting the artist with another's work or naming another as the creator of the artist's work — is addressed under the paternity right. The paternity right also provides a legal basis for the artist to object to excessive criticism and any other attacks on the artist's reputation. *See* S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 576-77 (1938); Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators,* 68 TRADEMARK REP. 244, 245 (1978).

The traditional doctrine of moral rights also gives the artist the right of publication. This right permits the artist to determine when and in what manner the work should be presented to the public. Under the right of publication, the artist can modify the work or remove the work from circulation when it no longer represents the artist's views. *Id.*

In the United States, the artist can decide when a work is ready for publication. Under the Copyright Act, 17 U.S.C. §§ 101-810 (Supp. III 1979), the artist may control the reproduction and distribution of a copyrighted work. *Id.* § 106. American courts will not order specific performance if an artist fails to fulfill a contractual obligation to complete a painting but may instead impose damages for breach of contract. Strauss, *supra* note 5, at 511 n.25, 529 n.30; Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487, 490-91 (1968). Once a work is published, however, the artist cannot withdraw the work when it no longer represents the artist's views. *See, e.g.,* Autry v. Republic Prods. Inc., 213 F.2d 667 (9th Cir. 1954) (actor could not withdraw from circulation films made early in his career which he claimed were of inferior quality).

[10] The Art Preservation Act, however, modifies the rights of integrity and paternity. *See* notes 49-63 and accompanying text *infra.*

[11] CAL. CIV. CODE § 987(c) (West Cum. Supp. 1981).

[12] *Id.* § 987(d).

[13] Some believe that the United States has not adopted the moral rights doctrine because it has a different philosophy from that of the European nations. Sidney M. Kaye, a member of the U.S. delegation to the Intergovern-

ceptance by other nations of the world. Federal copyright law[14] recognizes only the artist's pecuniary interest in a work[15] and disavows the personal, intangible and inalienable[16] rights arising from creation of a work.[17] The courts have indirectly addressed the subject of the artist's moral rights under various common law and state statutory theories,[18] but the unsatisfactory results are due largely to the absence of a uniform national scheme. Assuming that the Art Preservation Act survives the preemption test of the federal Copyright Act,[19] it will, as the first American codification of the moral rights doctrine,[20] be a testing ground

---

mental Copyright Conference of 1952, said during the Senate hearings on the Universal Copyright Convention, "[t]he European system regards copyright as an extension of the personality of the creative artist and, therefore, as a basic human right. The U.S. has a statutory system of copyright founded upon constitutional provision and dependent upon compliance with legislative requirements." *Quoted in* Comment, *Abandon Restrictions, All Ye Who Enter Here!: The New U.S. Copyright Law and the Berne Convention,* 9 N.Y.U.J. INT'L & POL. 455, 458 (1977). *See also* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.21 (1980).

Others assert, however, that the lobbying efforts of the motion picture, television and broadcasting industries have been influential in the rejection of national moral rights legislation. 9 N.Y.U.J. INT'L L. & POL., *supra* this note, at 458-59 & n.20; 43 FORDHAM L. REV., *supra* note 1, at 801 n.78.

While the United States is not a member of the Berne Convention, American authors are entitled to the benefits of the Convention if their work is "simultaneously published" in a Berne Convention country. Art. 3(1)(b), Berne Copyright Union, Paris Act, 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD 2 (1971).

[14] 17 U.S.C. §§ 101-810 (Supp. III 1979).

[15] *See generally* 2 M. NIMMER, *supra* note 13, at § 8.21 [B].

However, § 115(a)(2) of the Copyright Act could be viewed as a moral rights provision. That section deals with musical arrangements authorized under a compulsory license. The adaptation may "not change the basic melody or fundamental character of the work . . ." 17 U.S.C. § 115(a)(2) (Supp. III 1979).

[16] Although the traditional French doctrine does grant the creator inalienable rights, *see* notes 72 - 78 and accompanying text *infra,* this is not a requirement of the Berne Convention and is not adhered to by all Convention members. 2 M. NIMMER, *supra* note 13, at § 8.21[A].

[17] Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law,* 16 AM. J. COMP. L. 465, 466 (1968).

[18] *See* notes 93-98 and accompanying text *infra.*

[19] *See* notes 100-112 and accompanying text *infra.*

[20] The Art Preservation Act is the first legislative act to specifically focus on the moral rights doctrine. However, visual art in state buildings receives moral rights protection in California. CAL. GOV'T CODE §§ 15813-15813.7 (West 1980). The Art Preservation Act nevertheless offers much more extensive and com-

for future federal, as well as state,[21] moral rights legislation.

I. A View of the Art Preservation Act — Without Rose-Colored Glasses

The California Art Preservation Act recognizes both the artist's interest in preserving his or her reputation[22] and the public's interest in protecting fine art creations.[23] This section analyzes the Act with those objectives in mind. Whether the Act lives up to its expressed goals, however, is of secondary importance, for the effectiveness of the Art Preservation Act as a "moral rights" law requires its utilization by the artist. Despite the protection available under the Act, the time and expense involved in litigation, or possibly mere ignorance of the new law, may prevent the artist from exercising his or her legal rights.[24]

A. *"Fine Art"*

The California Art Preservation Act protects the artist's right of integrity and paternity only in works of "fine art." "Fine art" includes original paintings, sculptures and drawings, except when made under a contract for commercial use.[25] To qualify for protection, a work of fine art must be of "recognized quality,"[26]

---

plete coverage of the doctrine and thus is a more suitable definition of moral rights in America.

[21] There is a large and influential art community in California subject to the Art Preservation Act. Still, state law, because of territorial limitations, can never give as complete protection as a federal law could. For example, to invoke the Act, a violation must occur within the state. A work of art may be taken out of the state and altered, then returned to California, without violating the Act. Weil, *supra* note 2, at 91. Therefore, to give fine art works complete moral rights protection, national legislation is needed.

[22] Cal. Civ. Code § 987(a) (West Cum. Supp. 1981) ("[T]he 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 such alteration or destruction . . .").

[23] *Id.* § 987(a) ("[T]here is also a public interest in preserving the integrity of cultural and artistic creations.").

[24] Since artists frequently do not take advantage of statutory copyright protection, *see* Sheehan, *Why Don't Fine Artists Use Statutory Copyright? — An Empirical and Legal Survey*, 22 Copyright Soc'y Bull. 242 (1975), they may also not take full advantage of the Art Preservation Act.

[25] Cal. Civ. Code § 987(b)(2) (West Cum. Supp. 1981).

[26] *Id.*

as determined by the trier of fact.[27] And although a work of fine art is of requisite quality, it is not protected by the Act if it is permanently affixed to a building.[28]

The exclusion of works prepared under a contract for commercial use parallels the federal Copyright Act's treatment of works of art created in an employer-employee relationship. The Copyright Act considers "works made for hire" created by the employer and not the artist.[29] Such nonrecognition of the artist's creative efforts in those situations appears to have been adopted in the Art Preservation Act.

This exclusion contradicts California's express support of the artist's moral rights. The legislature recognizes the artist's interest in preserving his or her reputation,[30] yet the Act, in denying protection to works created under a contract for commercial use, leaves the artist's reputation in those works vulnerable to abuse. Moreover, the public's interest in art preservation is disserved when a moral rights violation of a commercial work is permitted to continue.[31]

In addition, the provision excluding works created under a contract for commercial use is vague.[32] The provision appears to exclude only works directly commissioned for and not those completed works that are sold to a purchaser who uses the work for commercial purposes. This distinction is arbitrary under either of two separate rationales. First, if the purpose of the provision is to accomodate the inevitable adjustments required by commercial adaptations (e.g., reproducing the original design on greeting cards),[33] then all works for commercial use should be

---

[27] *Id.* § 987(f).

[28] *Id.* § 987(h)(1). When a work of fine art is permanently affixed to a building and cannot be removed without substantial harm to the work, the Art Preservation Act does not apply unless the rights under the Act are specifically reserved in a written agreement.

[29] 17 U.S.C. § 210(b) (Supp. III 1979). *See generally* 1 M. NIMMER, *supra* note 13, at § 5.03.

[30] CAL. CIV. CODE § 987(a) (West Cum. Supp. 1981).

[31] The public is concerned with "seeing . . . the work as the artist intended it, undistorted and 'unimproved' by the unilateral actions of others . . . ." Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976).

[32] CAL. CIV. CODE § 987(b)(2) (West Cum. Supp. 1981) (" 'Fine art' . . . shall not include work prepared under contract for commercial use by its purchaser.").

[33] Even if the Act included works created under a contract for commercial

excluded.[34] Second, if the exclusion is based on the employer-employee relationship,[35] the Act should exclude all works-for-hire[36] — including those works made under a contract for private use.

The requirement that a work be of "recognized quality" was included as a control on frivolous claims and claims advanced primarily for publicity.[37] A finding of recognized quality is based on expert testimony, the final decision lying with the trier of fact.[38] However, the courts have been reluctant to assume the position of art critic[39] despite the availability of expert opinion. A court usually finds the work before it to possess the requisite artistic merit, since "[w]hat seems to one to be trash may have

---

use, it would not address violations of the artist's moral rights by a distorted adaptation. The Act protects only the original art work. *See* note 49 *infra*.

[34] However, the courts acknowledge the technical difficulties involved in transforming a work to a different medium and permit necessary changes. *See, e.g.*, Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363, 267 N.Y.S.2d 594 (Sup. Ct.) (absent a contractual provision to the contrary, a licensee can make customary adjustments when adapting a work to its licensed use), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913, *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966); *cf.* Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976) (although necessary changes must be made when a work is adapted from one medium to another, the Lanham Act, 15 U.S.C. § 1125(a) (1976), prevents that which constitutes mutilation of the work when the artist's name is attached).

[35] Finding the employer to be the creator of a work created in a "work for hire" situation under the Copyright Act was justified as the codification of an accepted American principle. H.R. REP. No. 1476, 94th Congress, 2d Sess. 121 (1976).

[36] *See* note 29 and accompanying text *supra*.

[37] Weil, *supra* note 2, at 90.

[38] CAL. CIV. CODE § 987(f) (West Cum. Supp. 1981).

[39] The frequently quoted passage of Justice Holmes describes the courts' attitude toward judging artistic merit:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public has learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).

for others fleeting or even enduring values."[40]

The requirement of recognized quality is not only superfluous, but it imposes an undue burden on the artist. Even though satisfaction of the requirement can be predicted from the past penchant of the judiciary,[41] the artist must nonetheless account for the fees of the expert witnesses.[42] The unnecessary inclusion of expert testimony also lengthens the time in litigation, thereby increasing court costs and diverting the artist from his or her creative efforts.[43]

The Art Preservation Act does not apply when a work of fine art is permanently affixed to a building.[44] If a work can be removed without serious damage, the building owner must notify the artist of his or her intent not to preserve the artist's work.[45] The artist may then remove the work and reclaim title.[46] Unfortunately, the time and expense of removal may, in some cases, pose an insurmountable obstacle, thus leaving the artist's work without protection.[47]

The Art Preservation Act does not cover all types of visual art embodying the personality of the artist. For example, photographs, crafts and collages are not protected by the Act.[48] While

---

[40] University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 458, 256 N.Y.S.2d 301, 307 (citations omitted), *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 517, 259 N.Y.S.2d 832 (1965).

[41] *See* notes 39-40 and accompanying text *supra*.

[42] In an action under the Art Preservation Act, the artist can seek to recover expert witnesses' fees, but such compensation is not assured. CAL. CIV. CODE § 987(e)(4) (West Cum. Supp. 1981).

[43] However, under CAL. CIV. CODE § 987(e)(5) (West Cum. Supp. 1981), the court may award any relief it deems proper and could conceivably compensate the artist for any expenses incurred. But again, since that decision is within the court's discretion, recovery is not certain.

[44] *Id.* § 987(h)(1).

[45] *Id.* § 987(h)(2). If the artist cannot be found, the Act does not apply.

[46] *Id.* The artist must remove the work within 90 days of notification.

[47] For a discussion of landmark preservation as a possible solution for works not effectively protected by the Art Preservation Act, see notes 73-76 and accompanying text *infra*.

[48] *See* CAL. CIV. CODE § 987(b)(2) (West Cum. Supp. 1981); Weil, *supra* note 2, at 89.

The defacement of Richard Avedon's photographic masterpiece, entitled "Andy Warhol and the Members of the Factory," was an unfortunate incident that emphasizes the fact that such works are certainly deserving of protection. The large 31-foot-wide and 10-foot-high photo was defaced while on display. Since the photograph is incapable of reproduction, a visual record of part of

these types of art arguably deserve moral rights protection, limiting the subject matter to original paintings, sculptures and drawings not developed under a contract for commercial use brings the new law within manageable proportions. Once the legislation secures a foothold, it can be expanded to provide more comprehensive coverage of artistic creations.

B. *The Integrity and Paternity Rights*

The California Art Preservation Act prohibits the intentional physical defacement, mutilation, alteration or destruction of a work[49] by any person other than the artist.[50] The Act qualifies

---

our present culture has been removed from the archives of future generations. Keuhl, *Big Avedon Photo Defaced at Exhibit*, S. F. Chronicle, May 2, 1980, at 5, col. 1.

[49] The Art Preservation Act protects only the artist's original work. CAL. CIV. CODE § 987(b)(2) (West Cum. Supp. 1981). If the artist's work is copyrighted, the artist may claim copyright infringement by an unauthorized reproduction. Under the Copyright Act, the copyright owner is granted the exclusive rights to make reproductions of work and to prepare derivative works based on it. 17 U.S.C. § 106 (Supp. III 1979); *see* Comment, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490 (1979).

Regardless of whether the artist has copyrighted the work, if an adaptation was purposely intended to satirize the work, the artist may have no legal recourse. The concept of a "parody" as an independent form of expression deserving of protection, has been gaining acceptance. The Second Circuit Court of Appeals has held that a parody qualifies as a "fair use" exception to a suit for copyright infringement under 17 U.S.C. § 107 (Supp. III 1979). *E.g.*, Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252 (2d Cir. 1980); Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301, *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 517, 259 N.Y.S.2d 832 (1965); *accord* Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam sub. nom.* Columbia Broadcasting System, Inc. v. Loew's Inc., 356 U.S. 43 (1958); MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976); Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975). *See generally* 3 M. NIMMER, *supra* note 13, at § 13.05; Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979); Comment, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320 (1979); Comment, *Piracy or Parody: Never the Twain*, 38 U. COLO. L. REV. 550 (1966); Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F.L. REV. 564 (1976).

Even so, protection under the Copyright Act may be the artist's only shield against distorted adaptations of the original work absent a contractual provision and/or first amendment considerations. Since Congress has legislated in

the traditional moral rights doctrine by prohibiting only "intentional" and "physical" changes of a fine art work.[51] While the Act is narrower in scope than its European counterpart in these respects, it removes the threat of liability for accidental violations[52] and precludes resort to abstract analysis to determine proscribed nonphysical violations.[53]

At the same time, the Art Preservation Act extends the traditional concept of the right of integrity by providing the artist with a cause of action for destruction of a work.[54] Under French law,[55] the destruction of a work of art is not considered a violation of the artist's moral rights.[56] Destruction of the work is

---

the area of reproductions, an extension of the Art Preservation Act to cover reproductions and adaptations would most likely be preempted. 17 U.S.C. § 301 (Supp. III 1979) provides that state laws granting rights "equivalent" to the exclusive rights granted under the Copyright Act will not stand. *See* Section II, "PREEMPTION," *infra*. Thus, the Art Preservation Act may not be a suitable vehicle for protection of the artist's work from such moral rights violations.

[50] CAL. CIV. CODE § 987(c) (West Cum. Supp. 1981).

[51] *See* Weil, *supra* note 2, at 90.

[52] "Intent" was required to ply the fears of collectors, dealers and museum owners. *See id.*

Note, however, that a person who frames, conserves or restores a work of fine art is held to a higher standard of care. If the actions by such persons constitute "gross negligence," a cause of action under the Art Preservation Act will lie. CAL. CIV. CODE § 987(c)(2) (West Cum. Supp. 1981).

[53] Applying the Act only to "physical" distortions of the work avoids the problem of whether the display of the work is such as to injure the artist's reputation. For example, the artist would have cause to object to an art gallery's display of his or her work where, as one critic noted, "[the artist's paintings] are so badly hung among many commercial paintings that what quality they might have is completely destroyed." Fisher v. Washington Post Co., 212 A.2d 335, 336 (D.C.App. 1965). But the artist's objections would not be redressed under the Art Preservation Act. CAL. CIV. CODE § 987(c) (West Cum. Supp. 1981).

[54] CAL. CIV. CODE § 987(c) (West Cum. Supp. 1981).

[55] Since France has been the forerunner in the development of the moral rights doctrine, French law is frequently noted when comparing the American and European doctrines. *See generally* Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 INT'L & COMP. L.Q. 675 (1971); Merryman, *supra* note 31; Sarraute, *supra* note 17.

[56] Diamond, *supra* note 9, at 257-58.

The Art Preservation Act is, however, more restrictive than the French doctrine in other respects. The rights under the Act are not perpetual, *see* notes 72-78 and accompanying text *infra*, or inalienable. *See* notes 86-87 and accom-

thought to remove any possibility that the artist's reputation may be damaged by misrepresentation through an altered version of the original.[57] But despite the contended absence of injury to the artist, society suffers a loss when a work of art is destroyed.[58] California's provision against destruction of fine art works thus comports with the Act's express declaration of a public interest in art preservation.

The Art Preservation Act permits the artist to "retain at all times the right to claim authorship."[59] Heretofore in America, the artist has been denied this paternity right absent a contracutal provision.[60] The artist may also exercise his or her paternity right to disclaim authorship for "just and valid reason."[61] The courts have permitted the artist to disclaim credit for creation of a work under the guise of false attribution when the artist's name is attached to a gross distortion of the original.[62] However, in dealing expressly with the paternity right, as well as with the integrity right, the courts need not resort to manipulation of judicially-fashioned remedies.[63] The Art Preservation Act gives the artist "insurance" for his or her personal investment in the creative work.

C. *Application of the Act*

The artist can exercise the rights granted under the California

---

panying text *infra*.

[57] Diamond, *supra* note 9, at 257; Merryman, *supra* note 31, at 1035-36; Roeder, *supra* note 6, at 569. *See also* Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949) (artist could not compel church to remove paint covering his mural on church wall, nor could he recover damages, having sold all his rights in mural to church).

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

Merryman, *supra* note 31, at 1041. *See also* Katz, *supra* note 8, at 405; Roeder, *supra* note 6, at 561; Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 689 (1974).

[59] CAL. CIV. CODE § 987(d) (West Cum. Supp. 1981).

[60] *See* note 95 and accompanying text *infra*.

[61] CAL. CIV. CODE § 987(d) (West Cum. Supp. 1981).

[62] *See* notes 86-98 and accompanying text *infra*.

[63] *See* note 93 and accompanying text *infra*.

Art Preservation Act during his or her lifetime. For a fifty-year period following the artist's death, the artist's heir, legatee or personal representative assumes those rights.[64] The length of protection under the Art Preservation Act coincides with the term of federal copyright protection.[65] Federal copyright protection must be restricted because of the copyright clause's requirement that rights granted to the creator be only for "limited Times."[66] The Art Preservation Act, as a state law, is not bound by the "limited Times" provision[67] and could conceivably be extended in perpetuity. But since a federal moral rights amendment to the Copyright Act[68] would probably require a definite term, the Art Preservation Act in its present form may be a more suitable model for prospective federal legislation.

The present fifty-year limitation on the rights granted by the

---

[64] CAL. CIV. CODE § 987(g)(1) (West Cum. Supp. 1981).

A cause of action under the Art Preservation Act must be brought within three years of the alleged violation or one year after discovery of it. *Id.* § 987(i).

[65] 17 U.S.C. § 302(a) (Supp. III 1979)

[66] "To promote the Progress of Science and the useful Arts, by securing for *limited Times* to Authors . . . the exclusive Right to their . . . Writings . . . ." U.S. CONST., art. 1, § 8, cl. 8 (emphasis added).

[67] In Goldstein v. California, 412 U.S. 546, 560-61 (1973), the court held that the "limited Times" provision of the copyright clause limits only congressional and not state action. *See* Note, *Goldstein v. California: Validity of State Copyright Under the Copyright and Supremacy Clauses*, 25 HASTINGS L.J. 1196, 1213-14 (1974), criticizing that aspect of *Goldstein*.

[68] In January 1979, Rep. Robert Drinan (Mass.) introduced the "Visual Artists Moral Rights Amendment of 1979," H.R. 288, 96th Cong., 1st Sess. (1979), which would add the following to the federal Copyright Act:

> Independently of the author's copyright in a pictorial, graphic, or sculptural work, the author or the author's 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 honour or reputation.

A moral rights amendment to the federal Copyright Act may be construed as an aspect of copyright law. Moral rights deal with the artist's personal rights, whereas copyright is concerned with the artist's pecuniary interests. *See* notes 5-7 and accompanying text *supra*. But some countries nevertheless treat moral rights as part of copyright, and the terms end simultaneously (*e.g.*, Germany and the Netherlands). One commentator suggests that that characterization may be in recognition of the purely theortical distinction between economic and moral rights, since many of the artist's moral rights have a pecuniary effect. Diamond, *supra* note 9, at 249.

Act nevertheless leaves works of prior centuries unprotected. Arguably, the artist's interest in a work is of a personal nature and thus should be limited.[69] But besides the artist's personal interests in a work, the California Art Preservation Act recognizes the public's interest in art preservation.[70] The public interest in a work does not cease automatically on the fiftieth anniversary of the artist's death. Works of art are part of our cultural heritage, and preservation of such works is of concern not only to our present society but to all subsequent generations.[71] In recognition of California's express declaration of a public interest in art preservation, the term of the Act could be extended beyond the fifty-year period by vesting the public with rights in fine art works. An independent federal moral rights law, similarly fashioned in furtherance of the public interest, would avoid the copyright clause's limitation on the grant of rights made to creators and provide protection for older works.

France treats the artist's moral rights as a perpetual interest.[72] The French approach to protecting works of art after the artist's death, although conceptually at odds with the limited term of protection granted to creators in the United States,[73] seeks the same result as would extending the term of the Art Preservation Act in recognition of the public's interest. In France, upon the death of the artist, a work may be protected by the following persons (listed in hierarchical order): (1) the artist's descendants; (2) the artist's spouse; (3) other heirs; (4) general legatees.[74] Works that have fallen into the public domain after the artist's death[75] are protected by the National Literary Fund — a

---

[69] *See* U.S. CONST., art. 1, § 8, cl. 8; note 72 and accompanying text *infra*.

[70] CAL. CIV. CODE § 987(a) (West Cum. Supp. 1981); *see* note 23 *supra*.

[71] *See* note 58 and accompanying text *supra*.

[72] *See generally* Sarraute, *supra* note 17, at 483-84.

The "positive" components of the artist's moral rights — i.e., the right to publish, the right to create, the right to withdraw a work from circulation — do not pass, but the "negative" components — i.e., the right to prevent changes which might injure the artist's reputation — continue in perpetuity. Strauss, *supra* note 5, at 517-18.

[73] Katz, *supra* note 8, at 376-90; Merryman, *supra* note 31, at 1037.

[74] Sarraute, *supra* note 17, at 483-84.

[75] Since moral rights are part of the artist's personal interests in a work, the state may protect a work only after the heirs have died and thus are not able to protect the artist's interests. *Id.* 484; *see* note 77 and accompanying text *infra*.

public institution in France.[76] Also, French courts may exercise supervisory powers over the moral rights in a work when there are no heirs and in cases of disinheritance.[77] A structure similar to the French prototype offers one possible solution to the problem of protecting older works.[78]

Adapting the existing historical landmark laws[79] to protect fine art works of prior centuries would be more feasible than the major legislative overhaul required to extend the Art Preservation Act's protection in perpetuity. At least for those works in the public view, protection of art through landmark preservation utilizes a working governmental program[80] with established se-

---

[76] Sarraute, *supra* note 17, at 484.

[77] *Id.* at 483. *See, e.g.*, Brugnier Rouve c. de Corton, [1907] D.A. 137 (France), *cited in* L. DUBOFF, THE DESKBOOK OF ART LAW 806 (1977), where the court extended its protection over the integrity of the creation even as to actions by the artist's heirs. The heirs must exercise the moral rights in a work to serve the concerns of the artist, rather than their own interests. Sarraute, *supra* note 17, at 484 n.59.

[78] Older works of art are certainly no less deserving of protection than those works covered by the Art Preservation Act. For example, Winslow Homer was an eminent American painter who died in 1910. His depictions of American life at home and at war are invaluable visual accounts of our social history. Consider the loss to society if one of his works was destroyed or defaced by a private owner. Neither the Art Preservation Act nor the Copyright Act provides any protection against such an atrocity.

The story of the sculptures in David Smith's estate is often repeated to point up this deficiency in our legal system. The executor of Smith's estate stripped the paint from some of the sculptures and left others to rust in the elements. While the unpainted sculptures brought higher prices on the market, Smith would have objected to their defacement if he had been alive. Merryman, *supra* note 31, at 1039-40.

The "chain-saw massacre" of Bernard Langlais' 25-foot-high sculpture also illustrates the problem. The sculpture decorated the entrance to a resort until it was no longer considered appropriate, and a chain-saw was used to disassemble it. The action outraged the sculptor's widow, with similar sentiments voiced by many local residents and other members of the public. Mrs. Langlais was somewhat comforted by the Portland Museum of Art's plan to restore the work. *The "Vasari" Diary: Shivered Timbers*, ART NEWS, Dec. 1979, at 12.

[79] *See, e.g.*, CAL. PUB. RES. CODE §§ 5020-5025.3 (West Cum. Supp. 1981).

[80] Local municipalities, under the authority of the state, bear the primary duty of designating and protecting historical landmarks. *See, e.g.*, CAL. GOV'T CODE § 25373 (West 1968). *See also* Note, *Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources*, 39 ALB. L. REV. 521, 522 (1975).

However, a problem arises as to the practical effect of local control. Local municipalities often lack the time and money to carry out comprehensive planning programs. Boasberg, *The Washington Beat: Historic Preservation —*

lection procedures.[81] Furthermore, the objectives of historic preservation legislation mirror the aims expounded for art preservation. Under both schemes, the purpose of the legislation is to preserve valuable representatives of our cultural heritage.[82]

The goal of art preservation may be defeated during the term of protection under the California Art Preservation Act if the artist signs a written agreement waiving his or her rights under the Act.[83] Taking into account the typically poor bargaining position of the artist,[84] most experienced purchasers could success-

---

Some Practical Problems With the Federal Funding Apporach, 5 URB. LAW. 749 (1973).

[81] State Historic Preservation Offices operate under the framework of the National Historic Preservation Act, 16 U.S.C. § 470 (1976 & Supp. III 1979). Works that qualify for protection must meet certain requirements. One requirement is that a work have achieved significance within the past 50 years. Historic preservation could therefore take over where the Art Preservation Act leaves off. *See generally* Boasberg, *supra* note 80; Nieć, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L.J. 1089, 1112 (1976); 39 ALB. L. REV, *supra* note 80, at 521.

A work achieves significance if it has attained importance in American history and culture and has either become associated with important events or individuals, possesses high artistic values, or is likely to yield information of historical importance. *See generally* HERITAGE CONSERVATION AND RECREATION SERVICE, U.S. DEP'T OF THE INTERIOR, *The National Register of Historic Places* (1979) (copy on file U.C. Davis Law Review office).

The selection of a landmark necessitates a value determination, but the finding is made by a commission of experts rather than by the court. *See, e.g.*, CAL. PUB. RES. CODE § 5020.4 (West Cum. Supp. 1981). *See also id.* § 5020.2(b) ("The members [of the State Historical Resources Commission] shall include persons possessing expertise in the fields of history, architecture, and archaeology, and in such other fields of expertise as the Governor shall deem to be necessary or desirable . . . ."). The court avoids the position of art critic, and the state can limit the number of works to be protected according to its budgetary constraints. *See* notes 39-40 and accompanying text *supra*.

One drawback to using historic preservation for the protection of older works of art is that federal funding of such projects is often insubstantial and sporadic. Boasberg, *supra* note 80, at 754. Limited resources thus restrict the number of works which can be protected. For example, the California State Historical Resources Commission designates only about 30 landmarks per year. Phone conversation with William Padgett, Historical Preservation Officer, California State Historical Resources Commission (Feb. 12, 1980).

[82] 16 U.S.C. § 468 (1976); CAL. CIV. CODE § 987(a) (West Cum. Supp. 1981). *See generally* Boasberg, *supra* note 80; Nieć, *supra* note 81; 7 VAND. J. TRANSNAT'L L., *supra* note 58.

[83] CAL. CIV. CODE § 987(g)(3) (West Cum. Supp. 1981).

[84] *See* Merryman, *supra* note 31, at 1043.

fully avoid the constraints of the new law by merely incorporating a waiver in the sales contract. While the effectiveness of the statute appears severely diminished by this provision,[85] similar contractual waivers are upheld even in those countries acknowledging the moral rights doctrine.[86] Only the paternity right under French law is perpetual and cannot be waived.[87] A purchaser could permit the artist to claim authorship of the creation without seriously infringing the purchaser's ownership rights. If the Act adopted the French approach toward the paternity right, the artist would be assured recognition for his or her creative efforts, and the public could count on truthful identification of the creator of the artistic work.

If a work of art evades contractual subversion and meets the statutory requirements of the Art Preservation Act, a number of remedies are open to the artist. The Art Preservation Act allows the artist to seek injunctive relief and actual damages, and authorizes recovery for attorney's fees and expert witnesses' fees.[88] "Actual damages" are left undefined, and since the Act expressly seeks to protect the artist's reputation, the courts should recognize the injury to the artist's personal rights and compensate the artist accordingly.[89] If the trier of fact decides that punitive damages are warranted, the award is deposited with an arts-related California charitable or educational organization.[90] Denying the artist punitive damages is intended to remove the incentive for law suits instigated primarily for financial gain.[91] Nonetheless, an action under the Art Preservation Act should not be distinguished from other tort actions that award punitive damages to the victim.[92]

Prior to enactment of the Act Preservation Act, artists had to

---

[85] A court will, however, consider the extent of the modifications even when a contract is involved. The changes must not exceed those necessary to adapt the work to its licensed use. *See* note 34 *supra*.

[86] Sarraute, *supra* note 17, at 481.

[87] *Id.* at 478; Marvin, *supra* note 55, at 694; Strauss, *supra* note 5, at 517.

[88] CAL. CIV. CODE § 987(e) (West Cum. Supp. 1981).

[89] *But see* Weil, *supra* note 2, at 90, where the author contends that the measure of actual damages might be related to some future *economic* loss the artist suffers because of the present or continuing injury.

[90] CAL. CIV. CODE § 987(e)(3) (West Cum. Supp. 1981).

[91] Weil, *supra* note 2, at 90.

[92] For example, if the artist could establish a claim for libel for a moral rights violation, he or she could in that case also seek punitive damages. *See* note 95 *infra*.

rely on various state remedies to redress violations of their moral rights.[93] For violations occurring outside California, the artist is still confined[94] to actions for breach of contract,[95] libel,[96]

---

[93] *See generally* Diamond, *supra* note 9; Strauss, *supra* note 5; Treece, *supra* note 9.

The courts' reluctance to expressly adopt the moral rights doctrine has been a subject of criticism. One commentator states:

> [The courts] have not seen the doctrine in the light of a stimulating challenge, but as a threat, though ill-defined, to the *status quo* of copyright principles . . . . [H]e who is ignorant of the doctrine of moral right will tend to reject such doctrine in fear of its unknown consequences, if adopted. But the ignorance of an intellectually curious court is easily turned into wisdom when the way is shown to the court. The ground of ignorance becomes dangerous only when the court "knows that it knows not," and knowing not, still refuses to seek a solution. Here we have judicial abdication in all its shallow splendor!

Katz, *supra* note 8, at 410.

[94] The cases cited in notes 95-98 *infra* were decided under the Copyright Act of 1909. The new Copyright Act preempts state laws which grant rights equivalent to the rights granted under the Copyright Act. But actions for breach of contract, libel, invasion of privacy and unfair competition should not be preempted by the Copyright Act. 1 M. NIMMER, *supra* note 13, § 1.01[B][1]; Diamond, *Preemption of State Law,* 25 COPYRIGHT SOC'Y BULL. 204 (1978). *See also* Section II, "PREEMPTION," *infra.*

[95] The artist's right of paternity is protected only if the right is retained by contract. *See, e.g.,* Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947); Clemens v. Press Pub. Co., 67 Misc. 183, 122 N.Y.S. 206 (Sup. Ct. 1910).

When a contract provides that the author is to be named as creator of the work, the work must not be altered so as to misrepresent the artist's efforts. Granz v. Harris, 198 F.2d 585 (2d Cir. 1952).

When the artist retains no rights in the work, if the artist is truthfully named as its creator, or if the work indicates that it is based on the artist's work, the artist may not ordinarily object. *See, e.g.,* Clemens v. Belford Clark & Co., 14 F. 728 (C.C.N.D.Ill. 1883); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331 (S.D.N.Y. 1968); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948); Ellis v. Hurst, 70 Misc. 122, 128 N.Y.S. 144 (Sup. Ct. 1910), *aff'd mem.,* 145 A.D. 918, 130 N.Y.S. 1110 (1911). *But see* note 97 *infra* as to the use of the artist's name for commercial purposes when a state privacy statute is applicable.

The artist may have no recourse against a violation of his or her integrity when the artist is party to an agreement which, by broad language, purports to permit all necessary changes. Seroff v. Simon & Schuster, Inc., 6 Misc. 2d 383, 162 N.Y.S.2d 770 (1957), *motion for leave to app. denied,* 12 A.D.2d 755, 210 N.Y.S.2d 1000 (1961); *see* Comment, *The Moral Rights of the Author: A Comparative Study,* 71 DICK. L. REV. 93, 96 (1966).

To prevent mutilation of a work, the artist must reserve that right in a contractual agreement with the purchaser. For example, in Preminger v. Columbia

invasion of privacy[97] and unfair competition.[98] The results are

---

Pictures Corp., 49 Misc. 2d 363, 267 N.Y.S.2d 594 (Sup. Ct.), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913, *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966), failure to specify restrictions regarding the adaptation of the movie "Anatomy of a Murder" to television implied a right to make customary cuts. Such provisions have also been incorporated into model artist-gallery contracts, most notably the Artist's Reserved Rights Transfer and Sale Agreement and the Jurrist contract. *Reprinted in* H. SANDISON, THE VISUAL ARTIST AND THE LAW 3-301 to -315 (1975).

Generally, however, only well recognized artists can assert such demands. Moreover, many artists do not formally execute contracutal agreements when selling their works. *See* Diamond, *supra* note 9, at 261; Merryman, *supra* note 31, at 1043; Treece, *supra* note 9, at 499.

[96] Protection for the artist's integrity and paternity rights has been claimed under the law of libel. Strauss, *supra* note 5, at 521, 525; *see, e.g.*, Ben-Oliel v. Press Pub. Co., 251 N.Y. 250, 167 N.E. 432 (1929); Donaldson v. Wright, 7 App. D.C. 45 (1894)(dicta). A cause of action arises when the artist's name is joined with a mutilation of his or her work or when authorship is falsely attributed to the artist, thus injuring the artist's repuation. S. HODES, WHAT EVERY ARTIST AND COLLECTOR SHOULD KNOW ABOUT THE LAW 78-79 (1974).

The remedies in a libel action, however, address only the injury to the artist's general reputation in the community and not the violation of the artist's personal interests. *See, e.g.*, Zorich v. Petroff, 152 Cal. App. 2d 806, 313 P.2d 118 (2d Dist. 1957) (screenwriter could not recover under libel theory for failure of film to note his contribution since the film suffered financial losses, and the lack of credit would not harm the author's reputation); Lillie v. Warner Bros. Pictures, Inc., 139 Cal. App. 724, 34 P.2d 835 (2d Dist. 1934) (no actionable claim under libel theory when feature film was distributed as short subjects which plaintiff actress claimed damaged her reputation as feature film star). To receive any type of damage award, the artist must be relatively well established. A libel action is therefore not appropriate for the young and unknown artist. In addition, an injunction is usually not available in a libel action, so that the damage to the artist's personal rights is often permitted to continue. Diamond, *supra* note 9, at 264; Katz, *supra* note 8, at 398.

Since a libel action is better suited to the well known artist, that artist may have attained the status of a "public figure" and therefore must show that a moral right violation was made with actual malice. New York Times v. Sullivan, 376 U.S. 254 (1964). The "public figure" creator will thus have a more difficult time redressing a moral rights violation under a libel theory. Diamond, *supra* note 9, at 265; Comment, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1497 (1979). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[97] An action for invasion of privacy may arise in the case of false attribution. The artist may recover damages, including recovery for mental distress, and may seek an injunction. *See, e.g.*, Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (2d Dist. 1942). *See generally* S. HODES, supra note 96, at 76-78.

inconsistent and often unsatisfactory. The remedies granted

But if the work is in the public domain, and the artist's name is truthfully attributed to the work or a disclaimer clearly denotes the extent of reliance on the artist's work, no common law privacy action will lie. *See, e.g.*, Geisel v. Poynter Prods, Inc., 295 F. Supp. 331 (S.D.N.Y. 1968); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948); Ellis v. Hurst, 70 Misc. 122, 128 N.Y.S. 144 (Sup. Ct. 1910), *aff'd mem.*, 145 A.D. 918, 130 N.Y.S. 1110 (1911).

State privacy statutes prevent the use of the artist's name or likeness for commercial purposes without the artist's consent. *See, e.g.*, CAL. CIV. CODE § 3344 (West Cum. Supp. 1981); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). Privacy statutes have also been applied to redress violations of the artist's rights of paternity and integrity that result in false attribution. *See, e.g.*, Big Seven Music v. Lennon, 554 F.2d 504 (2d Cir. 1977) (artist's name was affixed to a hastily arranged record album made without his permission but crediting him as creator of the design); Neyland v. Home Pattern Co., 65 F.2d 363 (2d Cir.), *cert. denied*, 290 U.S. 661 (1933) (artist's painting was adapted to embroidery design without his permission but crediting him as creator of the design). *But cf.* Geisel v. Poynter Prods, Inc., 295 F. Supp. 331 (S.D.N.Y. 1968) (artist had no cause of action under New York's privacy statute because his trade name, and not his generic name, was used).

[98] A violation of the artist's rights of paternity or integrity may constitute unfair competition where the defendant reaps the value of the artist's work without consent. S. HODES, *supra* note 96, at 83; *see, e.g.*, Granz v. Harris, 198 F.2d 585 (2d Cir. 1952) (abbreviated versions of artist's performance were described as presentations of artist); Fisher v. Star Co., 231 N.Y. 414, 132 N.E. 133 (1921) (use of artist's cartoon characters, Mutt and Jeff, by another without permission constituted unfair competition), *cert. denied*, 257 U.S. 654 (1922); Prouty v. National Broadcasting Co., Inc., 26 F. Supp. 265 (D. Mass. 1939) (broadcasts of author's work without consent was unfair competition); De Bekker v. Frederick A. Stokes Co., 168 A.D. 452, 153 N.Y. Supp. 1066 (publisher printed author's book in series and increased sales of the work; author still entitled to insist that book be printed as originally agreed), *aff'd*, 172 A.D. 960, 157 N.Y.S. 576, *aff'd*, 219 N.Y. 573, 114 N.E. 1064 (1916).

Changes in the artist's work may give rise to an unfair competition claim even absent any contractual prohibition reserving the artist's moral rights. Alterations which exceed those required to adapt a work to a different medium are proscribed. *See, e.g.*, Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363, 267 N.Y.S.2d 594 (Sup. Ct.), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913, *aff'd*, 18 N.Y.2d 659, 219 N.E. 431, 273 N.Y.S.2d 80 (1966). Also, when the artist's work is so distorted that the affixation of his or her name to the work constitutes false attribution, the artist has a claim of unfair competition. *See generally* 2 M. NIMMER, *supra* note 13, at § 8.02.

As with a libel action, the remedies under an unfair competition claim focus on the economic injury to the artist's business reputation and ignores the artist's interests in preserving his or her artistic reputation. *See generally* Comment, *An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus*, 9 PAC. L.J. 855, 857 (1978); 43 FORDHAM L.

under these traditional state actions tend to focus on the artist's business reputation and base recovery on the corresponding economic injury, rather than on the violation of the artist's personal interests.[99] The Art Preservation Act thus provides a more appropriate remedy for moral rights violations, since it expressly addresses the artist's personal interests.

II. PREEMPTION

The California Art Preservation Act is subject to preemption analysis under section 301 of the federal Copyright Act of 1976.[100] Section 301 preempts state laws which deal with the same subject matter as the Copyright Act and grant rights "equivalent" to any of the exclusive rights under the Copyright Act.[101] Since works of art receive protection under both acts,[102]

REV., *supra* note 1, at 814.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1976), prevents false designation or misrepresentation of the origin of goods and services. Section 43(a) was the basis for the court's decision in Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976), upholding a claim for mutilation of the artist's work. But the Lanham Act applies only where the artist's name has acquired substantial public recognition. *See generally* Solomon, *Monty Python and the Lanham Act: In Search of the Moral Right,* 30 RUTGERS L. REV. 452, 476 (1977); 2 M. NIMMER, *supra* note 13, at § 8.21[C].

[99] Katz, *supra* note 8, at 398; 43 FORDHAM L. REV., *supra* note 1, at 855.

[100] 17 U.S.C. § 301 (Supp. III 1979).

[101] *Id.* § 106. The exclusive rights granted under the Copyright Act are as follows:

> (1) to reproduce the copyrighted work . . .
> (2) to prepare derivative works . . .
> (3) to distribute copies . . . to the public by sale or other transfer of ownership . . .
> (5) in the case of . . . pictorial, graphic, or sculptural works . . . to display the copyrighted work publicly.

One commentator suggests that non-equivalent rights are those which provide more than a merely economic incentive — which moral rights do. Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite,* 47 GEO. WASH. L. REV. 201, 212 (1978).

Federal laws are not preempted by section 301. 17 U.S.C. § 301(d) (Supp. III 1979). For example, section 43(a) of the Lanham Act is not affected. 15 U.S.C. § 1125(a) (1976); *see* note 91 *supra.*

[102] The Art Preservation Act protects works of fine art which are defined as original paintings, sculptures or drawings. CAL. CIV. CODE § 987(b)(2) (West Cum. Supp. 1981). The Copyright Act covers "original works of authorship," which includes "pictorial, graphic and sculptural works." 17 U.S.C. § 102(a)(5) (Supp. III 1979).

the critical issue is whether or not the rights granted under the Art Preservation Act are equivalent to any of the exclusive rights under the Copyright Act.

The Art Preservation Act protects the artist's work against alteration or destruction and permits the artist to claim or disclaim authorship.[103] Those rights emanate from that part of the artist's personality permanently embodied in the work.[104] Federal copyright law does not address such violations of the artist's personal rights.[105] The application of the Art Preservation Act imposes conditions on,[106] but does not attempt to replace, any of the exclusive rights granted by the federal Copyright Act.[107]

Even if the rights under state law pass the "equivalency" test of section 301, state law may be preempted when its objectives conflict with the objectives of federal legislation.[108] Both the California law and the Copyright Act are directed at promoting artistic creation. Federal copyright law, by constitutional directive, seeks to promote the arts for the public benefit by granting the artist an economic monopoly.[109] But the promise of financial reward is not the sole motivating factor behind artistic creation.[110] For many artists, the economic incentive is secondary to

---

[103] CAL. CIV. CODE §§ 987(c), 987(d) (West Cum. Supp. 1981).

[104] *See* note 5 and accompanying text *supra*.

[105] *Id.; see* note 13 *supra*.

[106] The copyright owner may exercise his or her exclusive rights, *see* note 102 *supra*, so long as (1) the work is not physically defaced or destroyed, and (2) the artist is given the right to claim or disclaim authorship. *See* CAL. CIV. CODE §§ 987(c), 987(d) (West Cum. Supp. 1981).

[107] The California Legislative Counsel is of the opinion that the Copyright Act does not preempt the California Art Preservation Act. Letter to California State Senator Alan Sieroty (West Los Angeles) (Apr. 9, 1980) (copy on file U.C. Davis Law Review office).

[108] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (state trade secret laws retaining concurrent jurisdiction with federal patent law); Goldstein v. California, 412 U.S. 546 (1973) (state piracy law prohibiting unauthorized duplication of all recordings was permitted even though no protection was given under the then existing copyright law). *See also* Compco Corp. v. Daybright Lighting, Inc., 376 U.S. 234 (1964); Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). *See generally* Diamond, *supra* note 94; Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107 (1977); Katz, *supra* note 101.

[109] U.S. CONST., art. 1, § 8, cl. 1; *see* note 66 *supra*.

[110] One artist described the driving force behind his artistic creativity in the following way:

> I have such a passion for painting! I am continually working at

some higher calling.[111] The Art Preservation Act protects the artist's visual interpretation of this calling. The Act thus gives the artist a personal incentive for creation, supplementing the economic incentive provided by the Copyright Act. Since there is no conflict of legislative objectives, and since the Act does not grant rights "equivalent" to those under the Copyright Act, the California law should stand as a valid exercise of state power.[112]

CONCLUSION

" 'Ephraim,' said the prophet Hosea, 'is the wild ass that trampleth down the corn alone.' "[113] American copyright law is like Ephraim. It purports to advance the arts and seeks to do so by giving the artist an economic monopoly.[114] But in denying recognition of the artist's moral rights, it defeats that legislative purpose. The artist has more than a monetary interest in his or her work.[115] To acknowledge that personal element that moti-

---

> form. In actual drawing, and in my head, and during my sleep. Sometimes I think I shall go mad, this painful, sensual pleasure tires and torments me so much. Everything else vanishes . . . .

Max Beckman (1886 - 1950), *quoted in* R. FRIEDENTHAL, *supra* note 5, at 213.

[111] Michelangelo (1475 - 1564) wrote:

> With glorious art — that gift received from heaven —
> That conquers nature in every way
> Clings to all human longing and desire;
> If such a gift I truly have been given . . .

Quoted in THE SONNETS OF MICHELANGELO 49 (E. Jennings trans. 1979).

[112] California has another law which recognizes an incentive to artistic creation not covered by the Copyright Act. The California Resale Royalties Act grants the artist a percentage of the profit from subsequent sales of the artist's work. CAL. CIV. CODE § 986 (West Cum. Supp. 1981). The court in Moresburg v. Balyon, 621 F.2d 972 (9th Cir. 1980), found that the Resale Royalties Act was not preempted since Congress had not expressly legislated the sale of art works. *See generally* Katz, *supra* note 101; Comment, *The Resale Royalties Act: Paintings, Preemption and Profit,* 8 GOLDEN GATE U.L. REV. 239 (1978). Since Congress has not regulated the artist's moral rights, then by analogy to the court's treatment of the Resale Royalties Act, the Art Preservation Act should also escape preemption.

[113] A. BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 35 (1899).

[114] *See* note 15 and accompanying text *supra.*

[115] One artist reminded his fellow creators that the financial aspect of art should be kept in proper persepctive:

> What's all this you tell me about the modern movement, commercialism, etc., etc.? It bears no relation to our conception of art . . . . After all, money is a fragile thing; let us earn some of it,

vates and inspires great works can only lead to a more plentiful harvest of artistic creations.

The California Art Preservation Act can serve as a model for future moral rights legislation at the state and, ideally, at the national level. However, several changes in the Act should be considered in formulating similar legislative protection:

1) The definition of "fine art" should exclude the provisions for "recognized quality" and "contracts for commercial use";

2) If a value judgment of art works is to be made, a board of experts rather than the courts should make that determination;[116]

3) Under either moral rights legislation or landmark preservation laws, the length of protection for fine art works should be extended to cover works of prior centuries; and

4) The paternity right should be inalienable so that the right could not be waived in a written agreement signed by the artist.

Despite its shortcomings, the Art Preservation Act is an important step toward increasing the public's awareness of the artist's plight. The unique contribution of the artist is that which elevates works of art to a special place of significance in our society. To deny protection of the artist's personal stake in a creation reduces the work of art to a mere technical endeavor no more deserving of protection than a "barrel of pork."[117] Thus the Art Preservation Act's recognition of the necessity of moral rights legislation is a noteworthy achievement. Similar legislaton on a national basis can raise our standing in the international community to the level of all other "civilized"[118] nations.

Debora Ann Chan

---

since we must, but let us keep to our role . . . .

Camille Pissarro (1831 - 1903), *quoted in* R. FRIEDENTHAL, *supra* note 5, at 148-49.

[116] *See* note 81 *supra*.

[117] Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork . . . . While an author may write to earn his living, and sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of it as he could of the pork which he purchased.

Clemens v. Press Pub. Co., 67 Misc. 183, 122 N.Y.S. 206, 207-08 (App. Term 1910) (Seabury, J., concurring).

[118] *See* note 2 and accompanying text *supra*.