

Moral Rights for Muralists: Expanding Artists' Rights Under California Civil Code Section 987

INTRODUCTION

An artist creates a mural¹ for the outside wall of a savings and loan. The muralist² spends several months planning and installing the artwork. The artist's intangible personality and creative energy fuse into the tangible mural affixed to the building. Two years later, however, the savings and loan becomes insolvent. A new occupant, a real estate broker, moves in and decides that the mural does not suit her tastes. She intends to whitewash the artwork and install a neon sign advertising brokerage services. In the alternative, the broker considers installing the neon sign directly over the top one-third of the mural.³ Does the muralist have a right to prevent the broker from altering or destroying the artwork?

The muralist may be able to protect her work depending upon where the building and mural are located. Several European

¹ A mural is "a painting or other work applied to and made integral with a wall surface." WEBSTER'S THIRD NEW INT'L DICTIONARY 1488 (unabr. ed. 1986).

² A muralist is a visual artist who creates murals. See E. COCKCROFT, TOWARD A PEOPLE'S ART 26 (1977) (describing the growth of murals as a "visual-art" movement).

³ Although the introductory scenario is fictional, actual incidents of mutilation or destruction of murals exist. See Gibson, *The Other Rothko Scandal*, NEW CRITERION, Oct. 1988, at 85. The Arthur M. Sackler Museum at Harvard University presented an exhibition entitled "Mark Rothko's Harvard Murals." *Id.* The University allowed the six murals to "molder in a room inadequately shielded from sunlight." *Id.* The author criticized the incident as a "wretched, sickening spectacle." *Id.*; see also *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (church whitewashes mural); Judgment of May 30, 1962, Cour d'appel, Paris, D. Jur. 570 (buyer at auction separates painted panels on refrigerator); *L.A. Murals: Destruction and Protection*, ARTWEEK, Feb. 7, 1987, at 3 (reporting on muralist Tom Van Sant's suit against several corporations for destroying his mural in the Crocker Citizens Plaza Building in Los Angeles).

countries⁴ protect the artist's personal interest — the “*droit moral*,”⁵ or “moral right”⁶ — in her creative work. Under this concept, France recognizes the bond between an artist and her work, even after the artist's traditional property interest passes to the purchaser of art.⁷ *Droit moral* thus protects the artist's creative personality, which is part of the artwork, and prevents purchasers or third parties from mutilating or destroying the work.⁸ Part I of

⁴ France, Italy, and Germany incorporate the moral right into laws protecting artists. See generally Diamond, *Legal Protection for the “Moral Rights” of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978). A discussion of Italian or German law, however, is beyond the scope of this Comment.

⁵ *Droit moral*, a personal right, recognizes the infusion of an artist's personality with her work. See Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733 (1984). The concept of *droit moral* is “founded on a legal recognition of the bond between an author and his work based on the fact that the artwork is an expression of the author's personality.” *Id.* at 1734. Another commentator notes that the moral right “includes non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality.” Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968).

After an artist transfers property rights in a work, the moral right protects the artist's continuing personal interest in the work. See, e.g., Kohs, *Paint Your Wagon—Please!: Colorization, Copyright, and the Search for Moral Rights*, 40 FED. COMM. L.J. 1, 27 (1988) (finding that the doctrine of moral right “preserv[es] the integrity of an artist's work even after the artist has sold the work and has no further economic interest in it”); see also *infra* notes 20-26 and accompanying text.

⁶ The phrase “moral right” is an English translation of the French term *droit moral*. The translation does not convey the notions of “inner meaning” or “intellectual concept” which is inherent in the French term “moral.” Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1, 3 n.6 (1985). *Droit moral* refers not only to rights “inherent in our notion of morality,” but also to a right that “exists in an entity's ultimate being.” *Id.* Notwithstanding these limitations of the English translation, “moral right” is a term of art that most scholars accept. See Diamond, *supra* note 4, at 244 (defining “moral right” as a personal right and stating that the term “has become firmly entrenched in the legal literature of English-speaking countries”); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 554-55 (1940) (defining “moral right” as doctrine which protects the “personal right of creators” and arguing that “usage has given the term [moral right] legal significance . . . and most legal writers in English have used it”).

⁷ See *infra* notes 20-26 and accompanying text.

⁸ See *infra* notes 20-30 and accompanying text.

this Comment will address French law and the concept of *droit moral*.

Next, Part II discusses the narrower United States copyright system.⁹ In the United States, moral rights take on a less significant role relative to traditional property and economic interests.¹⁰ Federal law does not specifically recognize or protect moral rights.¹¹

Part III of this Comment addresses artists' moral rights in California.¹² Unlike federal law, California expands the rights of artists. The California Art Preservation Act¹³ protects two important moral rights: the right of integrity¹⁴ and the right of attribution.¹⁵ The protection of the California Art Preservation Act is limited, however, by "commercial use" and "removal from building" provisions that are prejudicial to muralists' moral rights.¹⁶ Yet murals play an important role in protecting and pre-

⁹ See *infra* notes 31-41 and accompanying text.

¹⁰ See *infra* notes 31-41 and accompanying text.

¹¹ See Diamond, *supra* note 4, at 252 (noting that "[m]ost of the United States cases in which attempts were made to enforce moral rights have flatly denied that any such doctrine exists in American law"); Comment, *Artist's Right to Prevent Destruction of His Work After Sale*, 38 WASH. U.L.Q. 124, 124 (1951) (declaring that "[i]n the United States an artist's rights in his work are legally protected from economic exploitation by statutory and common law copyright, but his further interest in the work after it has been sold has frequently been denied by the courts").

Federal case law neither recognizes nor protects moral rights. See, e.g., *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952). In *Granz*, the court refused to recognize plaintiff's moral rights to twelve-inch 78 rpm master records. The court found that the moral right doctrine "includes very extensive rights which courts in . . . American jurisdictions are not yet prepared to acknowledge." *Id.* at 590. Further, the court stated that "the phrase 'moral right' seems to have frightened some . . . courts to such an extent that they have unduly narrowed artists' rights." *Id.*; see also *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947) (recognizing that foreign "civil law countries" protect moral rights, but concluding that the court is "not disposed to make any new law in this respect"); *Geisel v. Poynter Prods.*, 295 F. Supp. 331 (S.D.N.Y. 1968) (refusing to recognize plaintiff's moral rights in drawings of dolls because "the doctrine of moral right is not part of the law in the United States").

¹² See *infra* notes 43-57 and accompanying text. For a brief discussion of other states' moral rights legislation, see *infra* note 42.

¹³ CAL. CIV. CODE § 987 (West Supp. 1990).

¹⁴ See *infra* notes 48-68 and accompanying text.

¹⁵ See *infra* notes 53-57 and accompanying text.

¹⁶ See *infra* notes 65-68 and accompanying text.

serving California's unique cultural heritage.¹⁷ They are thus especially deserving of the Act's protection.¹⁸ Therefore, Part IV

¹⁷ Murals are a "celebration of the community and its heritage." A. BARNETT, *COMMUNITY MURALS: THE PEOPLE'S ART* 14 (1984). "The murals are in fact mirrors that show us what we are, what we could be, and how." *Id.* at 17. Murals "have indicted the racism, sexism, and economic exploitation of our society and helped bring people together to overcome them." *Id.* Murals "reconnect art, ordinary work, and the community." *Id.*; see also Joselit, *Living on the Border*, *ART AM.*, Dec. 1989, at 120, 125 (noting "mural movement of the '60s and '70s . . . established a model" for contemporary artists in San Diego, California to exercise "political activism and cultural self-determination"); Olson, *Painting a Portable Mural*, 53 *AM. ARTIST*, Apr. 1989, at 70, 70 (discussing artist Steve Ominski's eight-panel mural created for a library in West Salem, Oregon); Atkinson, *ArtAlert on the Hollywood Freeway*, *L.A. Times*, Aug. 6, 1989, Calendar, at 91, col. 1 (discussing artist Karen Kitchel's *Urban Eden* mural on wall of northbound Hollywood Freeway at Barham Blvd. exit); Krier, *Inside Looking Out*, *L.A. Times*, Nov. 30, 1988, § V, at 1, col. 2 (mentioning, *inter alia*, artist Nancy A. Kintisch's commission from Bette Midler to create garden mural).

Murals constitute "one of the oldest forms of artistic expression." Anderson, *Radical Response to a 'High-Tech' World: Contemporary American Street Murals*, 21 *LEONARDO* 267 (1988). Examining the forces which motivated artist Osha Neuman and the Berkeley, California group "Commonarts" to construct the mural *Peoples' History of Telegraph Avenue*, the author notes that "professional artists went to the wall as an alternative to the gallery system, which conflicted with their political and personal ideologies." *Id.* Declaring the contemporary mural movement as "[p]luralistic in thematic content," Anderson details the movement's subjects as including "ethnic pride, hippy culture, antiwar activism, health food consciousness, local identity, women's rights, environmentalism, and economic and social equality." *Id.* Indeed, some critics contend that muralists have yet to achieve their full creative potential. See Brüderlin, *Painting as Architecture*, *FLASH ART*, Mar./Apr. 1989, at 72. The author quotes Fernand Léger: "I believe and also emphasize that abstract art runs into difficulties when it manifests itself in easel paintings. Whereas with wall painting its possibilities are unlimited. In the years to come, we can expect to see masterpieces of it." *Id.*

Murals also bring fine art out of museums and into everyday life. "People identify with murals because murals tell the story of the people themselves." *Id.* at 83. People "see their lives reflected in the murals on a heroic scale." *Id.* The process of creating a mural also "demystifies" art as the community observes the "day-to-day process of painting." *Id.* at 88. "This strange thing 'art' becomes not only accessible, but a *necessary, desirable thing*." *Id.* (emphasis added).

¹⁸ Society suffers a cultural loss when a mural is damaged or destroyed. See Merryman, *The Refrigerator of Bernard Buffet*, 27 *HASTINGS L.J.* 1023, 1041 (1976). "Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from." *Id.* "To revise, censor, or improve the work of art is to falsify a piece of the culture." *Id.* "We are

of this Comment proposes amendments to the California Act to completely protect muralists' moral rights of integrity and attribution.¹⁹

I. FRENCH RECOGNITION OF MORAL RIGHTS

Because art is an expression of the artist's personality, the French believe that there is a bond between an artist and her work.²⁰ This belief led French courts to recognize that an artist retains "moral rights" to her work, even after transfer of title.²¹

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." *Id.* (emphasis added).

¹⁹ See *infra* notes 79-86 and accompanying text.

²⁰ See Damich, *supra* note 5, at 1734 (observing that "[t]he personal rights of authors were first legally recognized in France under the name of *droit moral*, and that country remains their foremost exponent"). The concept "emerged not from statute, but from judicially created doctrines which developed slowly in the nineteenth century, and more rapidly in the twentieth." *Id.* at 9; see also Merryman, *supra* note 18, at 1026 (noting that the "moral right of the artist in French law is entirely judicial in origin"). Further, the concept of *droit moral* arose from "the philosophy of individualism which accompanied the French Revolution." DaSilva, *Droit Moral and the Amoral Copyright*, 28 BULL. COPYRIGHT SOC'Y 1, 9 (1980). One commentator provides an overview of the stages through which the moral right developed:

Historians divide the modern history of moral rights into three periods: 1793 to 1878; 1878 to 1902; and 1902 to 1957. The initial period was marked by disagreement as to whether artists' rights were to be found in concepts of property or, under the influence of Kant, from the right of personality. Later, the incorporation of Marxist philosophy largely minimized the property theory of artists' rights in France. In Germany during the second period, Joseph Kohler developed the *Doppelrecht* theory, reasoning that creative works give rise to personality rights which are either patrimonial or moral Kohler's view prevailed in France during the third period and remains the dominant theory The French Law on Literary and Artistic Property of March [11], 1957, codified that country's artists' rights doctrine, recognizing both patrimonial or copyright-type rights and non-economic moral rights.

Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 157-58 (1983) (footnotes omitted); see also DaSilva, *supra*, at 9-11.

²¹ See Damich, *supra* note 5, at 1734. Moral rights must be contrasted with more traditional property rights, or *droit patrimoniaux*, which are economic rights similar to the rights protected in the United States under the Copyright Act of 1976. See 17 U.S.C. §§ 101-810 (1988). In contrast to

Specifically, French law gives the artist four significant moral rights: disclosure, retraction, integrity, and attribution.²² The right of disclosure is the right of the author to decide when and if a work is to be divulged to the public.²³ The right of retraction is the right of the author to withdraw from the public a work which is no longer faithful to her thought.²⁴ The right of integrity allows an artist to preserve her work from any alteration or destruction.²⁵ Finally, the right of attribution is the right of the

property rights, moral rights include "the right to one's identity, to a name, to one's reputation, one's occupation, or profession, to the integrity of one's person, and to privacy." Merryman, *supra* note 18, at 1025.

²² See Damich, *supra* note 5, at 1735.

²³ *Id.* at 1735 n.15. The right of disclosure recognizes that "[o]nly the author can decide whether his work corresponds to his original conception, at what moment it is completed, and whether it is worthy of him." Sarraute, *supra* note 5, at 467.

A leading French case explores the right of disclosure. See Judgment of March 19, 1947, Cour d'appel, Paris, G.P. 1949.20, discussed in Sarraute, *supra* note 5, at 469-70. The painter Rouault contracted with the art dealer Vollard to turn over to Vollard his entire body of work. *Id.* at 469. The dealer stored 806 unfinished canvases at his gallery, where Rouault could work "in a room to which he had a key." *Id.* After the dealer's death his heirs claimed ownership of the canvasses. *Id.* "Rouault maintained that they were unfinished and that he alone could decide on their final delivery." *Id.* The Paris Court of Appeal ruled in the artist's favor, declaring the right of disclosure to be an "inalienable right." *Id.* The court concluded that "until final delivery the painter remains master of his work, and may perfect it, modify it, or even leave it unfinished" *Id.*

²⁴ Damich, *supra* note 5, at 1735 n.15. Sarraute notes that the right of retraction is of "little efficacy." Sarraute, *supra* note 5, at 477. Because the right of retraction has little application in the context of murals, an extended discussion of this moral right is beyond the scope of this Comment.

²⁵ DaSilva, *supra* note 20, at 31; see also Damich, *supra* note 5, at 1735 n.15 (stating that "[t]he right of integrity is the right of the author to protect the integrity of his work even after transfer of all property rights in it"); Sarraute, *supra* note 5, at 16 (observing that an artist has "the right to insist that [the artwork's] integrity not be violated by measures which could alter or destroy it"). The right of integrity "is considered by virtually all scholars to be the most essential part of *droit moral*." DaSilva, *supra*, at 30-31 (footnote omitted). The right of integrity protects the artist's personal artistic integrity as well as the physical integrity of the artwork itself. See Comment, *An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus*, 9 PAC. L.J. 855, 859 (1978) (asserting that an "author has a right . . . to collect for damage to his personal integrity caused by the violations of the artistic integrity of his work").

A recent case illustrates French recognition of the right of integrity.

author to be recognized as the creator of the work.²⁶

These judicially created rights were codified in *Loi du 11 Mars 1957 Sur La Propriété Littéraire et Artistique* (Law of 1957),²⁷ which

✓ Bernard-Rousseau v. Société des Galeries Lafayette, Judgment of Mar. 13, 1973, Trib. gr. inst. Paris, 3 Ch. (unpublished), *discussed in* DaSilva, *supra*, at 32 (citing 1 J. MERRYMAN AND A. ELSÉN, LAW, ETHICS AND THE VISUAL ARTS 4-25 (1979)). In 1973 the granddaughter of artist Henri Rousseau sought an injunction against the use of her grandfather's paintings as "window displays" by a Paris department store. *Id.* The French court found that the department store's use of Rousseau's paintings "damaged the deceased artist's reputation and violated his moral right." *Id.*

²⁶ Damich, *supra* note 5, at 1735 n.15. A decision by the Paris Court of Appeal affirmed France's protection of the moral right of attribution. *See* Vollard v. Rouault, Judgment of March 19, 1947, Cour d'appel, Paris, G.P. 1949.20, *discussed in* Sarraute, *supra* note 5, at 478-79; *see also supra* note 24. One issue in the case involved the validity of a contract between the painter and the art dealer. *Id.* at 478. The court declared that "[u]nder this contract, the dealer agreed to pay the painter a monthly allowance in return for part of his production; in return the artist was required to sign with a certain pseudonym all the canvases reserved for the dealer, and to place no signature on the rest." *Id.* The terms of the contract provided that the parties' agreement would be in effect for ten years. *Id.* at 479. Only the art dealer retained the power to terminate the contract (upon ninety days notice). *Id.* The court found that the contract violated the right of attribution by forcing the artist to use a pseudonym on some paintings and by prohibiting the artist from signing the others. *Id.* at 478-79.

²⁷ *Loi du 11 Mars 1957 Sur La Propriété Littéraire et Artistique*, translated in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1976) [hereafter Law of 1957]. The Law of 1957 codifies the French civil law concerning the moral right:

The author of an intellectual work shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work, effective against all persons. This right includes attributes of an intellectual and *moral* nature as well as attributes of an economic nature, as determined by this law.

Id. art. 1 (emphasis added). One provision details the types of works that the Law of 1957 protects: "[t]he provisions of this law shall protect the right of authors of all intellectual works, regardless of their kind, form of expression, merit or purpose." *Id.* art. 2. Another provision addresses the expansive nature of the artist's moral right:

The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable and imprescriptible. It may be transmitted *mortis causa* to the heirs of the author. The exercise of this right may be conferred on a third person by testamentary provisions.

Id. art. 6. For discussion of a representative case, see Merryman, *supra* note 18, at 1035 (discussing French case, Judgment of May 30, 1962, Cour

provides artists with a cause of action against an individual who violates any of these personal rights. In addition, this Law's liberal standing provisions insure that the artist's moral rights are protected, even after an artist's death.²⁸ The French practice of protecting artists' moral rights was incorporated in the Berne Convention, the modern world's oldest and most comprehensive international copyright treaty.²⁹ While the United States is a

d'appel, Paris, D. Jur. 570). In that case, artist Bernard Buffet, who had painted six panels on a refrigerator, brought suit to enjoin the separate sale of one of the panels. *Id.* The French court granted the injunction, reasoning that "an object of art expresses the artist's personality" and "the law should protect an artist's integrity and reputation." *Id.*

²⁸ After her death, the artist's descendants, spouse, other heirs, and general legatees may act to protect the artist's rights. See Law of 1957, *supra* note 27, art. 19. And if the mural should fall into the public domain, the National Literary Fund protects the work. See Sarraute, *supra* note 5, at 484. Created in 1946, the National Literary Fund is a public institution in France similar to the National Endowment for the Arts in the United States. The National Literary Fund is under the control of the Ministry of Arts and Letters and is charged with "protecting the integrity" of works which "have fallen into the public domain" after the artist's death. *Id.* In contrast to French law, federal law in the United States does not protect works in the public domain. See *Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989) (holding that topics in the public domain are not eligible for legal protection); *Ventura County v. Blackburn*, 362 F.2d 515 (9th Cir. 1966) (holding law cannot protect material in public domain). The public domain is "the realm embracing property rights belonging to the community at large, subject to appropriation by anyone." WEBSTER'S THIRD NEW INT'L DICTIONARY 1836 (unabr. ed. 1986). For discussion of the public domain, see generally Nemschoff and Eagle, *Back to the Future: Exploiting Vintage Films in the Public Domain*, 10 L.A. LAW. 34 (May 1987); Note, *A "Handy Man's" Guide to Copyright Infringement: Standing, Public Domain and Registration*, 8 LOY. ENT. L.J. 169 (1988).

²⁹ See Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C.L. REV. 363, 363 n.2 (1990). Article 6bis of the Berne Convention incorporates the moral right doctrine. Subsection (1) provides that:

Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim ownership 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.

Berne Copyright Union, Paris Act, *reprinted in* WORLD INTELLECTUAL PROPERTY ORGANIZATION GUIDE TO THE BERNE CONVENTION 41 (1978). Article 6bis does not address the personal right to disclosure because the drafters regarded the right as too controversial to include in the treaty. See Steven-

party to this Convention, it has failed to recognize or protect artists' moral rights.³⁰

II. ARTISTS' RIGHTS IN THE UNITED STATES

In the United States, the federal Copyright Act of 1976 protects artists' interests in their works.³¹ The Copyright Act, however, protects only pecuniary property rights.³² For example, the Copyright Act gives artists who copyright³³ their work the exclu-

son, *Moral Right and the Common Law: A Proposal*, 6 COPYRIGHT L. SYMP. 89, 108 (1955).

Original members signed the Berne Convention on September 9, 1886 in Berne, Switzerland. See Kwall, *supra* note 6, at 10 n.38. Presently, 77 countries have ratified the Berne Convention. See Comment, *supra*, at 363 n.2. Among the world's developed nations, only the Soviet Union and China have failed to adopt the Berne Convention. See Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. L.J. 27, 28 n.6 (1989).

³⁰ On October 6, 1989, the United States Congress enacted legislation allowing the United States to join the Berne Convention. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). Although the Berne Convention provides for moral rights, Congress expressly rejected either recognizing or protecting moral rights in its Implementation Act. Senator Leahy stated: "I am glad that my colleagues in the Senate and the House agreed that the only way the United States could join Berne this Congress was to leave the moral rights debate for another day." 134 CONG. REC. S14,552 (daily ed. Oct. 5, 1988). Senator Hatch added: "U.S. implementing legislation should be neutral on the issue of moral rights. . . . [T]o maintain th[e] status quo on moral rights . . . Berne has no impact on: specifically, the rights of paternity [i.e., attribution] or integrity." *Id.* at S14,558. In implementing the legislation, Congress made the following declaration: "The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law." *Id.* at S14,549.

³¹ 17 U.S.C. §§ 101-810 (1988). For discussions of the Copyright Act, see generally M. NIMMER, CASES AND MATERIALS ON COPYRIGHT (1979); N. BOORSTYN, COPYRIGHT LAW (1981); Comment, *Copyright—Compulsory Licensing, Similar Use and Piracy*, 10 SUFFOLK L. REV. 1275 (1976).

³² See Kwall, *supra* note 6, at 2 (arguing property rights are pecuniary in nature and federal copyright laws protect these economic interests). Kwall asserts that the Copyright Act of 1976 protects "pecuniary rights" and the "inherent economic value" of a copyright. *Id.* (emphasis in original); cf. Rosen, *supra* note 20, at 158 (observing that "the United States recognized only economic rights in its Constitution, predicated its copyright protection on the belief that this incentive would cause artists to continue to create, thus benefitting the public").

³³ A copyright is an "intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of

sive right to reproduce the copyrighted work,³⁴ to prepare derivative works,³⁵ and to distribute copies of the copyrighted work.³⁶ Unlike the French *droit moral* system, however, United States federal copyright law does not protect moral rights.³⁷

Nevertheless, the United States Constitution suggests that Congress has the authority to enact legislation that would recognize and protect moral rights.³⁸ To supplement existing law, Congress recently considered legislation to recognize moral rights at the federal level.³⁹ The proposed legislation would have speci-

multiplying copies of the same and publishing and selling them." BLACK'S LAW DICTIONARY 304 (5th ed. 1979) (emphasis added).

³⁴ 17 U.S.C. § 106(1) (1988).

³⁵ *Id.* § 106(2). A "derivative work" is "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, *art reproduction*, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." *Id.* § 101 (emphasis added).

³⁶ *Id.* § 106(3).

³⁷ See Kwall, *supra* note 6, at 2. Kwall observes that "noticeably absent" from the Act are "protections for the *personal* rights of creators." *Id.* (emphasis in original); see also *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (observing that "American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors"); *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (applying Copyright Act and holding that artist could not compel defendant-church to remove paint covering his mural, nor could he recover damages, because artist sold all property rights in mural to the church).

³⁸ Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" U.S. CONST. art. I, § 8, cl. 8. The ability of federal law to protect moral rights arguably fits within the Congressional power to promote "useful Arts." See Kwall, *supra* note 6, at 70. Kwall states that "Congress has the power to protect moral rights so long as it concurrently fosters the constitutional goal of promoting the useful Arts. Two important rationales for protecting moral rights, the encouragement of creativity and the preservation of our cultural heritage, both promote the useful Arts." *Id.*; see also Diamond, *supra* note 4, at 275 (noting amendment to "so-called copyright clause of the Constitution" could arguably accommodate and protect moral rights).

³⁹ For a discussion of bills recently introduced in Congress, see Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U.L. REV. 1011, 1021 (1988). For a discussion of the development of moral rights and protections at the federal level, see Comment, "Tilted" Justice: *Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*, 77 CALIF. L. REV. 1431 (1989).

cally protected visual artists' moral rights.⁴⁰ Congress, however, failed to enact these bills into law.⁴¹

While Congress has failed to protect artists' moral rights, several individual states have moved to protect moral rights.⁴² Cali-

⁴⁰ See H.R. 2690, 101st Cong., 2d Sess. (1989); S. 1198, 101st Cong., 2d Sess. (1989). In pertinent part, H.R. 2690 provided:

Rights of Attribution and Integrity.—Chapter 1 of title 17, United States Code, is amended by inserting after section 106 the following new section:

“§ 106A. Rights of certain authors to attribution and integrity.

(a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and
(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work as described in paragraph (3); and

(3) subject to the limitations set forth in section 113(d), shall have the right to prevent any destruction, distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and which is the result of an intentional or negligent act or omission with respect to that work, and any such destruction, distortion, mutilation, or modification of that work is a violation of that right.

(b) Scope and Exercise of Rights.—Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.”

Id. § 106A. The Senate bill contained substantially the same language. See S. 1198, 101st Cong., 2d Sess. (1989). Interestingly, both bills would have directed the Register of Copyrights “to establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building . . . may record their identities and addresses with the Copyright Office.” H.R. 2690, 101st Cong., 2d Sess. (1989).

⁴¹ See 1 Cong. Index (CCH) 20,507 (Aug. 31, 1990); 2 Cong. Index (CCH) 34,511 (Aug. 31, 1990).

⁴² Besides California, eight states — Massachusetts, Connecticut, Pennsylvania, Louisiana, New York, New Jersey, Rhode Island, and Maine

ifornia was the first state to pass legislation protecting moral

— have passed some form of moral rights legislation. See Beyer, *supra* note 39, at 1021 n.23; Davis, *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317 (1989). This legislation is consistent with the individual state's power to supplement rights that federal law neither prohibits nor fully protects. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). "State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed." *Id.* at 491.

Although a detailed analysis of the development of moral rights outside California is beyond the scope of this Comment, a brief discussion is appropriate. Massachusetts recognizes the moral rights of integrity and attribution. Davis, *supra*, at 329-31. Massachusetts defines art more broadly than does California: a work of fine art is "any original work of visual or graphic art of any media." MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West Supp. 1990). Although there is no limiting provision concerning "commercial use," the Massachusetts statute contains a "removal from building" exception. *Id.* § 85S(h)(1). For a discussion of what constitutes a "removal from building" exception, see *infra* notes 67-68 and accompanying text.

Connecticut recognizes the moral rights of integrity and attribution. Davis, *supra*, at 331-33. Connecticut's definition of fine art is more expansive than California's definition: works of fine art include "any drawing; painting; sculpture; mosaic; photograph; work of calligraphy [or] work of graphic art." CONN. GEN. STAT. ANN. § 284(1)(2)(B) (West Supp. 1990). The Connecticut statute protects commissioned works unless the artist waives her rights in the contract. *Id.* § 284(1)(2)(A). The Connecticut statute also contains a "removal from building" provision. *Id.* § 284(6).

Pennsylvania protects an artist's moral rights of integrity and attribution. Davis, *supra*, at 333-36. Within its definition of fine art, the Pennsylvania statute includes original works "of recognized quality . . . using any medium." PA. STAT. ANN. tit. 73 § 2102 (Purdon Supp. 1990). Like California's Act, artwork "created under contract for advertising or other commercial use" receives no protection. *Id.* § 2107(3). Pennsylvania also has a "removal from building" provision. *Id.* § 2108(a). Assuming the artist has a written agreement, the Pennsylvania statute nevertheless exempts building owners from compliance with the statute in "emergency situations" when there is "no opportunity for the owner of the building to provide due notice to the artist." *Id.* § 2108(d).

Louisiana protects both an artist's right to integrity and her right to attribution. Davis, *supra*, at 336-39. The Louisiana statute defines fine art as "any original work of visual or graphic art of recognized quality." LA. REV. STAT. ANN. § 51:2152(7) (West 1987). If an artist creates a work under contract for commercial use, she may protect her rights with an express

rights.⁴³

written instrument. *Id.* § 51:2155D. Like the California Act, the Louisiana statute contains a "removal from building" provision. *Id.* § 51:2155F(1).

New York's statute recognizes and protects the rights of integrity and attribution. Davis, *supra*, at 339-41. New York defines fine art as a "painting, sculpture, drawing, or work of graphic art." N.Y. ARTS & CULT. AFF. LAW § 11.01.9 (McKinney Supp. 1990). The New York statute does not protect work "prepared under contract for advertising or trade use unless the contract so provides." *Id.* § 14.03.3(d). Unlike the California Act, the New York statute does not contain a "removal from building" provision. Davis, *supra*, at 340.

The New Jersey statute protects an artist's rights to integrity and attribution. *Id.* at 341-43. New Jersey defines fine art as "any original work of visual or graphic art in any medium." N.J. STAT. ANN. § 2A:24A-3e (West 1987). The New Jersey statute will not protect work "prepared under contract for advertising or trade use unless the contract so provides." *Id.* § 2A:24A-7. The New Jersey statute does not contain a "removal from building" provision. Davis, *supra*, at 341.

Rhode Island's statute protects both integrity and attribution rights. *Id.* at 343-45. Rhode Island broadly defines fine art as "any original work of visual or graphic art." R.I. GEN. LAWS § 5-62-2(e) (1987). The Rhode Island statute excludes "work prepared under contract for advertising or trade use unless the contract so provides." *Id.* § 5-62-5(d). Unlike the California Act, Rhode Island's statute does not contain a "removal from building" provision. Davis, *supra*, at 343.

The Maine statute recognizes and protects an artist's moral rights to integrity and attribution. *Id.* at 345-47. Maine defines fine art to include "any original work of visual or graphic art." ME. REV. STAT. ANN. tit. 27 § 303(1)(D) (1988). The Maine statute excludes artwork "prepared under contract for advertising or trade use, unless the contract so provides." *Id.* § 303(4). Unlike the California Act, Maine's statute does not include a "removal from building" provision. Davis, *supra*, at 345.

⁴³ See Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675, 685 (1982) (stating that California "once again took the lead in art law in the United States" with the passage of the California Art Preservation Act).

In addition to the California Art Preservation Act, discussed *infra* notes 44-68 and accompanying text, the California Legislature passed the Resale Royalties Act. CAL. CIV. CODE § 986 (West Supp. 1990). The Resale Royalties Act became effective on January 1, 1977. *Id.* The Resale Royalties Act grants the artist a five percent "royalty" on the gross proceeds realized from the sale of her artwork. *Id.* § 986(a). The Resale Royalties Act applies both to an initial sale, when the artist maintains her original property interest in the work, and to subsequent resales, in which the artist no longer retains the initial property right. *Id.* The Resale Royalties Act is significant because the legislature recognized an artist's continuing interest in her artwork after she transfers title to the work.

Moreover, the Resale Royalties Act recently withstood a Constitutional challenge. In *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980), an art dealer sold two paintings which required him to pay

III. THE CALIFORNIA ART PRESERVATION ACT

In order to protect artists' moral rights and preserve the integrity of cultural and artistic creations,⁴⁴ the California legislature passed the California Art Preservation Act.⁴⁵ The California Act protects works of "fine art."⁴⁶ While French law and the Berne

royalties under the Act. The dealer brought suit challenging the Act's constitutionality, alleging that it violated the Contracts Clause of the United States Constitution and the right to due process. *Id.* at 975. In upholding the constitutionality of the Act, the court found that not "all impairments of contracts [are] improper." *Id.* at 979. Further, the court found no violation of due process: "We view the California Act, whatever its merits as a legislative matter, as economic regulation to promote artistic endeavors generally." *Id.*

⁴⁴ See CAL. CIV. CODE § 987(a) (West Supp. 1990). The Act provides:

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 any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

Id. § 987(a).

⁴⁵ CAL. CIV. CODE § 987 (West Supp. 1990). The California Art Preservation Act became effective on January 1, 1980. *Id.* § 987(j). See generally Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873 (1981); Levy, *Artists' Moral Rights*, 11 L.A. LAW. MAR. 1988, at 11; Note, *The California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.*, 14 U.C. DAVIS L. REV. 975 (1981).

⁴⁶ "'Fine art' means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality" CAL. CIV. CODE § 987(b)(2) (West Supp. 1990). Although the Act does not explicitly protect murals, they arguably qualify for protection under the Act. See *id.* § 987(h)(2) (implicitly recognizing murals as fine art in subsection (h)(2) which applies to "a work of fine art which is a *part of the building*" (emphasis added)). Murals also arguably fit within the definition of "fine art." See GREENBURG, MEGAMURALS & SUPERGRAPHICS: BIG ART 3 (1977) (describing murals as "fine art"); MARLING, WALL-TO-WALL AMERICA: A CULTURAL HISTORY OF POST-OFFICE MURALS IN THE GREAT DEPRESSION 24 (1982) (describing murals as "abstract art," "fine art," and "avant-garde painting"); Brandt, *Conference Report: London Symposium on the Conservation of Wall-Paintings*, 129 BURLINGTON MAG. 753 (1987) (describing murals as "fine art"); Greengard, *Art to Drive By*, LOS ANGELES, Feb. 1990, at 23 (quoting muralist Kent Twitchell as stating that murals are "fine art"). But see CLARK, CALIFORNIA MURALS 8 (1979) (stating that murals are not fine art because many muralists "had felt alienated from museums and galleries, where they

Convention provide more sweeping protections,⁴⁷ the Act does provide protection for two significant moral rights: the right of integrity and the right of attribution.

The California Art Preservation Act's most important provision recognizes an artist's right of integrity.⁴⁸ This provision prohibits anyone but the artist from intentionally altering, mutilating, or destroying her artwork.⁴⁹ In addition, the Act charges a high degree of care to those who frame, conserve, or restore a fine work of art.⁵⁰ Accordingly, a restorer working on a mural may be liable for any damage resulting from gross negligence.⁵¹ Thus, the Act recognizes the artist's moral right of integrity by prohibiting both intentional and grossly negligent acts that result in injury to a mural.⁵²

experienced frustration when their art was rejected according to the arbitrary standards made by elitist galleries and their critics in New York").

⁴⁷ Unlike French law, the Act does not recognize the artist's moral rights of disclosure and retraction. *See supra* notes 23-24 and accompanying text. There are similarities to French law, however. For example, the California Act's generous standing provision allows an artist's heir, beneficiary, devisee, or personal representative to exercise the artist's moral rights for 50 years after the artist's death. *See* CAL. CIV. CODE § 987(g)(1) (West Supp. 1990).

⁴⁸ *See* Karlen, *supra* note 43, at 690 (discussing right to integrity as "principal concern of the Act"). The Act states that "artists . . . have an interest in protecting their works of fine art against any alteration or destruction." CAL. CIV. CODE § 987(a) (West Supp. 1990).

⁴⁹ CAL. CIV. CODE § 987(c)(1) (West Supp. 1990) (stating that "[n]o 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").

⁵⁰ Specifically, the Act provides, in part:

In addition to the prohibitions contained in paragraph (1) [of subsection (c)], 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.

Id. § 987(c)(2).

⁵¹ The Act 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.*

⁵² Muralist Tom Van Sant filed suit against several corporations for destroying his mural in the Crocker Citizens Plaza Building in Los Angeles. *L.A. Murals: Destruction and Protection*, ARTWEEK, Feb. 7, 1987, at 3. Remodelers destroyed the 120-foot mural when they drove floor beams through the mural and attached another wall over the mural. *Id.* The

In addition to recognizing the right of integrity, the California Art Preservation Act acknowledges the artist's moral right of attribution.⁵³ Under this provision of the Act, a muralist can demand that her name be attached to her mural.⁵⁴ Further, the muralist has the right to disassociate her name from a project.⁵⁵ The Act's recognition of a right of attribution thus allows an artist to protect her reputation.⁵⁶ This provision may also permit an artist to protect the economic interests that flow from her reputation.⁵⁷

The California Act provides two remedies for an artist whose moral rights have been violated. The artist may sue for either injunctive relief⁵⁸ or actual damages.⁵⁹ In addition, a court may

muralist sued under the California Art Preservation Act, but the case settled before trial. *Id.*

⁵³ "The artist shall retain at all times the right to claim authorship" CAL. CIV. CODE § 987(d) (West Supp. 1990). The California Art Preservation Act recognizes the right of attribution in the absence of a contract. *Compare id. with* Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947) (denying moral right of attribution to artist without express contract) and Note, *supra* note 45, at 988 (discussing right of attribution and noting that "[h]eretofore in America, the artist has been denied this [attribution] right absent a contract[ual] provision").

⁵⁴ CAL. CIV. CODE § 987(d) (West Supp. 1990).

⁵⁵ *Id.* ("The artist shall retain at all times the right . . . , for a just and valid reason, to disclaim authorship of his or her work of fine art").

⁵⁶ See Damich, *supra* note 5, at 1743; Gantz, *supra* note 45, at 886 (commenting on the "injustices" of displaying artwork without "attributing authorship to the artist").

⁵⁷ See Karlen, *supra* note 43, at 686 (stating that attribution rights "are often of equal or greater importance than copyright"). Proper recognition for her work is connected with the economic consequences of a muralist's reputation. *Id.* (declaring that "authors of visual works . . . depend on name recognition for future commissions"). It is important to emphasize that reputation also involves non-pecuniary interests. "Not only do [attribution] rights have an economic importance for artists but also an overriding emotional importance. After all, the right to credit at least can secure the public recognition [that] so many artists seek." *Id.*

⁵⁸ CAL. CIV. CODE § 987(e)(1) (West Supp. 1990).

⁵⁹ *Id.* at § 987(e)(2). Actual damages may, however, present problems of proof. See Gantz, *supra* note 45, at 873 (contending that "[p]roving actual injury [to the artist] and converting that legal conclusion into a monetary amount . . . may be problematic"); Karlen, *supra* note 43, at 712-13. For example, "where the work is damaged but salvageable the measure of damages may only be the cost of repair." *Id.* Karlen questions, however, whether this is a reliable basis for determining actual damages. *Id.* at 713. In addition, since time-consuming litigation might allow a work to become irreversibly damaged, the artist may "have the burden of paying for repair first and hoping for compensation later." *Id.*

award reasonable attorneys' fees,⁶⁰ expert witness fees,⁶¹ and punitive damages.⁶² The injured artist does not, however, recover the punitive award.⁶³ Instead, the court will utilize its discretion in selecting a California fine arts charity or educational organization to receive the punitive damages award.⁶⁴

Although the California Act protects a muralist's moral right of integrity, the Act has two significant limits on this protection: the "commercial use" and "removal from building" provisions. Under the "commercial use" provision of the Act, if an artist creates a mural for use in advertising by the ultimate purchaser, the Act will not protect her moral rights to the work.⁶⁵ Thus, the purchaser may destroy the mural with impunity, even if the work is used only incidentally as advertising.⁶⁶ Under the "removal from

⁶⁰ CAL. CIV. CODE § 987(e)(4) (West Supp. 1990).

⁶¹ *Id.*

⁶² *Id.* § 987(e)(3).

⁶³ *Id.*

⁶⁴ *Id.* The exact language of the statute provides: "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 any punitive damages." *Id.* Presumably, this punitive award subsection will prevent an artist from pursuing a cause of action solely for the potential financial windfall. See Note, *supra* note 45, at 993 (asserting that "[d]enying the artist punitive damages is intended to remove the incentive for law suits instigated primarily for financial gain"). But see Damich, *supra* note 5, at 1751 (arguing that any recovery may be a "windfall" as the destruction of an artist's particular work "actually may benefit the artist by increasing the value of remaining works").

⁶⁵ The Act specifically denies protection to art "prepared under contract for commercial use by its purchaser." CAL. CIV. CODE § 987(b)(2) (West Supp. 1990). "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) (emphasis added). One commentator offers a rationale for the "commercial use" provision. See Karlen, *supra* note 43, at 704. The legislature "may have felt that in the commercial setting, the owner has more of an interest in the work made for hire and that such works naturally tend to be disposable or susceptible to alteration or damage." *Id.*

⁶⁶ See Karlen, *supra* note 43, at 703 (describing this provision as "baffling"). Karlen notes that this provision "operates against the modern trend to grant similar protections to works used incidentally in commerce and works created solely for contemplation by aesthetes." *Id.* (questioning, rhetorically, "If a sculpture is commissioned for installation in a storefront or other business premises, may there be *carte blanche* destruction?"). Ironically, even federal copyright law takes a less draconian approach to fine

building" provision, a muralist's moral rights to her work are deemed waived unless they are preserved by an express written instrument signed by the building owner.⁶⁷ This provision, too, is prejudicial to many muralists because they are charged with knowledge of this obscure statutory provision and because they are often not in a position to bargain at arm's length with building owners for their rights.⁶⁸

The introductory hypothetical exemplifies how detrimental these provisions are to a muralist's moral rights. As a work of fine art, the mural painted on the wall of the savings and loan would

art. *See id.* (observing that under federal law "there is no reason, as far as copyright is concerned, to distinguish between museum pieces and works embodied in commercial articles").

⁶⁷ CAL. CIV. CODE § 987(h)(1) (West Supp. 1990). The full text of this provision provides:

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

Id. (emphasis added). This "removal from building" provision of the Act is the legislature's compromise between building owners' traditional property rights and artists' emerging moral rights. *Compare id.* § 987(a) (declaring that artists "have an interest in protecting their works of fine art against any alteration or destruction") *with id.* § 987(h)(1) (requiring that owner of building must sign express written instrument to preserve artist's rights). Ironically, although the Act will not protect a muralist's moral rights without an express written instrument, the Act recognizes that murals are "fine art." *Id.*

The Act also has special provisions dealing with works of fine art which are part of a building but which can be removed without substantial harm to the works. *See id.* § 987(h)(2)-(3). Because murals, by definition, are integral with the structure they adorn, these provisions are generally inapposite. *See supra* note 1.

⁶⁸ *See* Karlen, *supra* note 43, at 694. Karlen argues that:

[T]he visual artist has the greatest need for moral rights. He not only lacks the protection of strong guilds and of well-established trade customs which prohibit the mutilation of his creations, but also, as the creator of unique originals, he is more vulnerable to losing a work forever.

Id. (footnote omitted). *See also* DaSilva, *supra* note 20, at 56. (stating that "[i]n the United States . . . artists frequently suffer from an inferior bargaining position . . . and only the most well-known artists are able to procure by contract those rights which the law has not yet seen fit to protect").

be entitled to the Act's protection.⁶⁹ The realtor's plans to paint over the mural would thus violate the muralist's moral right of integrity.⁷⁰ The muralist would only be able to assert a claim to protect her right of integrity, however, if she had originally obtained an express written agreement with the building owner preserving her rights.⁷¹ And even then, the muralist would still have no recourse against the building owner if the mural was purchased as advertising for the savings and loan, which the realtor might easily claim.⁷² Thus, although California has taken a large step toward recognizing an artist's moral rights to her artwork, the Act fails to adequately protect a muralist's moral rights. Yet murals are especially deserving of the Act's protection. They are decorative, didactic creations that have played an important role in promoting and preserving California's unique cultural heritage.⁷³ The California legislature should preserve our artistic and cultural heritage by recognizing and protecting a muralist's moral rights of integrity and attribution without prejudicial provisions.

IV. PROPOSALS FOR IMPROVED ARTIST PROTECTION

Federal legislation⁷⁴ or amendment of the California Art Preservation Act could more fully protect a muralist's moral rights. Because Congress has been unwilling to create moral rights for artists,⁷⁵ amendment of the California Act is the best recourse.

⁶⁹ See *supra* note 46 and accompanying text.

⁷⁰ See *supra* notes 48-52 and accompanying text.

⁷¹ See *supra* note 67 and accompanying text.

⁷² See *supra* notes 65-66 and accompanying text.

⁷³ See *supra* note 17 and accompanying text.

⁷⁴ Congress could protect artists' rights by expanding the existing federal Copyright Act to include moral rights, or by passing completely new legislation. Federal legislation would provide an important advantage by preempting state laws and thus creating uniform national moral rights legislation. See U.S. CONST. art. IV, cl. 2 (the Supremacy Clause); Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990); Note, *That Old Due Process Magic: Growth Control and the Federal Constitution*, 88 MICH. L. REV. 1245 (1990).

⁷⁵ In the summer of 1989, moral rights legislation, the Visual Artists Rights Act of 1989, was introduced in both houses of Congress. The proposed legislation would have specifically impacted the moral rights of integrity and attribution. See 135 CONG. REC. S6,813 (daily ed. June 16, 1989). Senator Kasten asserted:

The California Act currently protects integrity and attribution rights, yet limits these rights with provisions prejudicial to a muralist.⁷⁶ For example, even if a mural qualifies as fine art, the Act does not protect the muralist's moral rights if the mural is created for use in advertising by the purchaser.⁷⁷ This provision, in effect, allows a purchaser to alter or destroy a mural when the work is used only incidentally as advertising.⁷⁸ This Comment thus proposes to narrow the Act's definition of "commercial use":

(7) "Commercial use" means fine art created under a work-for-hire arrangement exclusively for use in advertising, magazines, newspapers, or other print and electronic media.⁷⁹

Narrowing the provision to apply only to works prepared *exclusively* for commercial use would protect the moral rights of artists, such as muralists, whose work is important to the community, even though it may be used as advertising. Yet this provision would still allow for the commercial exploitation of art that is not

Today there is no guarantee that the owner of a fine work of art will protect the integrity of that art. We have all heard the horror stories about . . . murals painted over . . . We have to commit ourselves to the fundamental premise that even when an artist has sold his work he has the moral and legal right to see the integrity of that work preserved.

Id. In the Senate, Senator Kennedy (D-Mass.) introduced the bill. 135 CONG. REC. S6,811 (daily ed. June 16, 1989). Senator Kennedy stated:

I believe that the Federal Government has a responsibility to provide leadership in the arts and to ensure a lively climate in America that will enable creative men and women to pursue careers and livelihoods in the arts. . . . Congress can no longer overlook its responsibility to safeguard the Nation's artistic heritage.

Id. In the House of Representatives, Representative Kastenmeier (D-Wis.) introduced the bill. 135 CONG. REC. E2199 (daily ed. June 20, 1989). Congressman Kastenmeier asserted that "the visual arts covered in this bill meet a special societal need, and . . . [their] protection and preservation serve an important public interest." *Id.* After hearings on July 20, 1989 and August 3, 1989, Congress failed to enact this legislation. *See supra* note 41 and accompanying text.

⁷⁶ Compare *supra* notes 20-30 and accompanying text (discussing French *droit moral* system) with *supra* notes 43-68 and accompanying text (analyzing California Art Preservation Act).

⁷⁷ CAL. CIV. CODE § 987(b)(2) (West Supp. 1990); *see supra* note 65 and accompanying text.

⁷⁸ CAL. CIV. CODE § 987(b)(2) (West Supp. 1990).

⁷⁹ *Id.* § 987(b)(7).

as deserving of protection.⁸⁰ With this change the Act would strike a more equitable balance between a muralist's moral rights and advertisers' commercial interests.

The second provision of the Act that is detrimental to muralists' moral rights is the "removal from building" provision.⁸¹ This provision waives an artist's moral rights to her mural unless she expressly reserves them in a written instrument signed by the owner of the structure on which the mural is created.⁸² This provision charges the muralist with the knowledge of a relatively obscure statutory provision; her moral rights to the artwork are denied if she fails to protect these rights.⁸³ This Comment thus proposes to replace the current "removal from building" provision⁸⁴ with the following provision:

(h)(1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work, the rights and duties under this provision are preserved until the building is demolished, unless expressly waived by a properly recorded written instrument, signed by the artist and the owner of the building, that contains a legal definition of the property.

The proposed provision would protect moral rights unless *the muralist* expressly waives them. In effect, building owners would be charged with the knowledge of this statute and a corresponding burden of securing a muralist's waiver. This burden is not unreasonable as building owners often have greater resources and generally are in a superior bargaining position.⁸⁵ While this provision would expand muralists' moral rights, it would not ultimately hinder a building owner's ability to dispose of her building. Therefore, this amendment strikes a more equitable balance between a muralist's moral rights and a building owner's property rights.⁸⁶

⁸⁰ See Karlen, *supra* note 43, at 704.

⁸¹ See *supra* notes 67-68 and accompanying text.

⁸² See *supra* note 67 and accompanying text.

⁸³ See *supra* note 67 and accompanying text.

⁸⁴ CAL. CIV. CODE § 987(h)(1) (West Supp. 1990).

⁸⁵ See *supra* note 69.

⁸⁶ In addition to the two main amendments proposed by this Comment, the Act could be improved in two further respects. First, the California legislature could broaden the current definition of "fine art" to specifically include murals. For example, the Act might define fine art as "an original painting, mural, sculpture, drawing, or original work of art in glass." In the alternative, California might follow the examples set by Massachusetts and

CONCLUSION

The French believe that an artist retains moral rights to her work after transfer of title because art is an expression of the artist's personality.⁸⁷ To recognize and protect these rights, French courts developed the *droit moral* system that protects artists' rights to disclosure, retraction, integrity, and attribution.⁸⁸ The United States, however, has not adopted the French system at the federal level.⁸⁹ While the United States Copyright Act protects artists, its protection primarily vindicates traditional pecuniary interests rather than moral rights.⁹⁰

In contrast to the federal Copyright Act, the California Art Preservation Act protects two important moral rights: the right of integrity and the right of attribution.⁹¹ The Act's protections are limited, however, by two provisions that are especially detrimental to muralists' moral rights: the "commercial use" and "removal from building" provisions.⁹² Yet muralists are especially deserving of the Act's protection. Their decorative, didactic creations enhance our lives while preserving California's unique

Pennsylvania, *supra* note 42, in broadly defining fine art: "'Fine art' includes any original work of visual or graphic art in any medium."

A second improvement centers around establishing a preference for awarding injunctive relief. Currently, the Act provides for both injunctive relief and actual damages. *See supra* notes 58-59 and accompanying text. However, an award of damages might not adequately remedy a violation of an artist's moral rights. *See* Karlen, *supra* note 43, at 711-14. With a judgment of actual damages, a muralist could not force a building owner to restore a mutilated or damaged mural. Instead, the building owner could refuse restoration, contending that money damages provide the muralist adequate relief. An improved Act would favor the granting of injunctions by providing that:

In adjudicating a moral rights cause of action under this Act, the court shall consider as its primary goal the award of injunctive relief. The award of monetary damages is of secondary importance in a moral rights claim.

In this respect, a court would advance the interests of the muralist by granting restoration of the artwork, rather than merely providing the injured artist with a pecuniary award.

⁸⁷ *See supra* note 20.

⁸⁸ *See supra* notes 20-30 and accompanying text.

⁸⁹ *See supra* notes 31-41 and accompanying text.

⁹⁰ *See supra* notes 31-41 and accompanying text.

⁹¹ *See supra* notes 43-57 and accompanying text.

⁹² *See supra* notes 65-68 and accompanying text.

cultural heritage.⁹³ This Comment proposes two amendments to the California Art Preservation Act. The first provision would expand the Act's protection of murals in a "commercial use" setting⁹⁴, while the second would preserve moral rights in a "removal from building" situation.⁹⁵ With these improvements, the California Art Preservation Act will continue to vindicate traditional property interests, while recognizing muralists' importance to our culture by fully protecting their moral rights of integrity and attribution.

Robert Ernest Craven, Jr.

⁹³ See *supra* note 17 and accompanying text.

⁹⁴ See *supra* notes 79-80 and accompanying text.

⁹⁵ See *supra* notes 84-86 and accompanying text.

