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Abstract

This Article will review the doctrine of moral right, which acknowledges a continuing relationship between an author and his work, in Europe and the United States law that has been applied in similar fact situations. It will then assess both the California and New York statutes that grant rights similar to those of moral right, but only to visual and graphic artworks. Finally, it will analyze the recent New York statute and compare it with both the California legislation and the European doctrine.

NEW YORK ARTISTS' AUTHORSHIP RIGHTS ACT INCORPORATES EUROPEAN MORAL RIGHT DOCTRINE

Douglas Watson Lubic *

INTRODUCTION

A Calder stabile displayed in the Pittsburgh airport is repainted in the county colors.[1] Members of a congregation become offended by the emphasis on Christ's body in a mural they had commissioned for their church and have it painted over.[2] The administrator of a famous sculptor's estate strips some of the sculptor's later polychrome sculptures so that they resemble his earlier and more popular unpainted works.[3] The work of award-winning book illustrators is revamped into a placemat design.[4] In each of these situations, a United States artist is left with no practical recourse to reverse or redress the destruction or alteration of his works because United States law generally provides that an artist's relationship with his work ceases once he sells the work.

In Europe, a distinction is made between the pecuniary rights of an author in his work, or copyright, and his personal rights in the work, or moral right.[5] The moral right doctrine

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1. Rose, *Calder's* Pittsburgh: *A Violated and Immobile Mobile*, Artnews, Jan. 1978, at 39.

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

3. Krauss, *Changing the Work of David Smith*, Art in America, Sept.-Oct. 1974, at 30; *see* Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1039-40 (1976).

4. Letter from Susan M. Dooha, Executive Director of the Graphic Artists Guild, New York Chapter, to New York Governor Mario Cuomo, at 2 (June 10, 1983) (advocating signature of the Artists' Authorship Rights Act). "Leo and Diane Dillon, 2-time Caldecott Award winners, found that Dell used artwork from a book they had illustrated, re-drawing it for use on a place mat." *Id.*

5. The term "moral right" is a translation of the French term "*droit moral.*" Given the confusing connotations of the term in English and the personal nature of the rights involved, the German term "*Urheberpersönlichkeitsrecht*," translating as "creators' personality right," is more descriptive and its use would be more appropriate.

acknowledges a continuing relationship between an author and his work. The doctrine also provides him with theoretically perpetual and inalienable rights concerning that relationship that are separate from ownership of the work or the copyright. As expressed in the Berne Convention for the Protection of Literary and Artistic Works[6] (Berne Convention), an international copyright agreement which requires signatory nations to provide for minimal moral right coverage, the most important rights are paternity, or the right to be associated or dissociated with one's work, and integrity, the right to preserve one's work from damage or alteration.[7] These rights serve not only to protect the author's honor and reputation, but to further society's interest in the preservation of its culture.

In the United States, moral right is not recognized as such. In its place, a patchwork of legal theories provides relief that is incomplete and uncertain for authors whose works have been mutilated or misattributed. In response to this situation, the California and New York Legislatures have enacted statutes that grant rights similar to those of moral right, but only to visual and graphic artworks.

This Article will review the doctrine of moral right in Europe[8] and the United States law that has been applied in similar fact situations.[9] It will then assess both the California and New York legislation.[10] Finally, it will analyze the recent New York statute and compare it with both the California legislation and the European doctrine.[11]

I. *THE DOCTRINE OF MORAL RIGHT*

In common law nations through the beginning of the twentieth century, an author[12] had special protection for his

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S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 575 (1935); Marcus, *The Moral Right of the Artist in Germany*, 25 COPYRIGHT L. SYMP. (ASCAP) 93, 93 (1975). This Article nevertheless will comply with longstanding English usage and will apply the term "moral right."

6. *Latest revision* July 24, 1971, 331 U.N.T.S. 218 [hereinafter cited as Berne Convention].

7. *Id.* art. 6*bis*(1).

8. *See infra* notes 26-95 and accompanying text.

9. *See infra* notes 96-135 and accompanying text.

10. *See infra* notes 136-75 and accompanying text.

11. *See infra* notes 176-227 and accompanying text.

12. As used in this article, "author" is a broad term encompassing creators of all

works only in copyright, which was granted by statute.[13] Copyright affords protection only for the author's pecuniary interest in his work by granting him a limited monopoly over the work's economic exploitation.[14] The copyright itself is a property right, is readily alienable, and may be exercised by anyone who possesses it.[15] Copyright does not acknowledge the special aspects of artistic creation. It treats the author in the same manner as patent law treats the inventor, by failing to acknowledge the expression of the author's personality in his work and the continuing relationship between the author and his work that necessarily persists even after the work or its copyright have been alienated.[16] For any causes of action against the owners of the copyright or the work, the author must necessarily rely on the recourse provided by contract or at common law.[17]

In civil law nations,[18] the doctrine of moral right acknowledges the continuing relationship between the author and his work. It protects the author's personality by protecting his works[19] and is of different duration and alienability than copyright.[20] The touchstone of a claim under the moral right doc-

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works, including sculptors, painters, poets, and songwriters as well as writers. Authors in the common sense of the word, that is authors of written works, will be specially denoted when required. This is the terminology used in the Berne Convention, *supra* note 6. *See generally id.*

13. *See generally* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1-37 (1967).

14. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968). Of course, the author has recourse to any other causes of action the law provides to any other person. *See infra* notes 96-135 and accompanying text.

15. *See* Copyright Act, 17 U.S.C. § 201(d)(1) (1982).

16. A work's status as an expression of the author's personality does not change with the identity of its owner. After its creation, a work continues to represent a stage in the artist's development and becomes a part of the *oeuvre* by which the public judges the merit of the artist (and consequently sets the price of his work).

17. *See infra* notes 96-135 and accompanying text.

18. As used in this article, "civil law nations" refers to the continental European countries, and the nations whose law is derived from their codes, excluding the socialist nations.

19. Moral right also acknowledges society's interest in the preservation and development of its culture. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 578 (1940). This is one of the prime legislative purposes of the California law. *See infra* notes 138-39 and accompanying text.

20. *See infra* notes 74-79 and accompanying text.

trine is damage to an author's honor and reputation.[21] Unless this damage is present, an author will obtain no relief.[22] As formulated by the courts and legislatures of civil law nations,[23] particularly those of France,[24] the doctrine of moral right encompasses a "bundle of rights"[25] protecting the author.

A. *The "Bundle of Rights"*

The most basic right that an author possesses is the right to create or not to create.[26] This right is universally acknowledged[27] and is an underlying conceptual basis for both moral right and copyright. A corollary of the right to create is the right of disclosure, which is the right to determine the time at which a work shall be published,[28] or made available to the public.[29] Inasmuch as the author alone may create his work, he alone may determine when, if ever, it is complete and ready to be sold, reproduced, or otherwise consumed.[30] He may even have the right to modify a work after it has been sold. In a leading French case on the right of publication,[31] an artist

21. *See* Stevenson, *Moral Right and the Common Law: A Proposal*, 6 COPYRIGHT L. SYMP. (ASCAP) 89, 112 (1955).

22. *See id.*

23. Although the stereotypical view sees civil law courts as passive appliers of legislation, the reality is somewhat more like the judicial activism of common law countries. In France, the courts developed moral right throughout the nineteenth and twentieth centuries, and continue to do so today. It was only in 1957 that the doctrine was codified by the legislature. Sarraute, *supra* note 14, at 466; *see* S. LADAS, *supra* note 5, at 1022.

24. It has been suggested that the French development of the moral right followed the global preeminence of French art in the eighteenth and nineteenth centuries. Merryman, *supra* note 3, at 1042.

25. *See* S. LADAS, *supra* note 5, at 575. What rights are in the "bundle" may vary by jurisdiction. *See infra* notes 63-67. The rights are not completely discrete; in a given situation several of them may provide causes of action. Indeed, the rights have been expressed as "phases" of a single right. S. LADAS, *supra* note 5, at 1023.

26. S. LADAS, *supra* note 5, at 594.

27. *Id.* at 594-95. Respect for the author's right to create or not to create is not only universal in nations recognizing a moral right, but is evident in the refusal of common law nations to command specific performance of contracts mandating artistic creation.

28. In this Article, "publication" is used not in the strict sense of reproducing a book or article in print, but means the release of a work by an author for consumption in whatever manner appropriate for the work. "Publication" indicates that the author considers the work complete and that the process of creation is over.

29. Marcus, *supra* note 5, at 94; Sarraute, *supra* note 14, at 467.

30. Marcus, *supra* note 5, at 94; Sarraute, *supra* note 14, at 467.

31. Carco et autres v. Camoin et syndicat de la proprieté artistique, Judgment of

slashed some of his paintings with which he was dissatisfied and discarded them. An enterprising art dealer found the paintings, restored them, and sold them as the work of the artist. Although the artist's copyright apparently had not been violated,[32] the court found that the artist's moral right of publication prevented the restoration and sale of the canvasses he had rejected.[33] In another leading French case,[34] an artist contracted to paint a portrait. Prior to delivery of the work, the artist had a dispute with the person who had commissioned the portrait, declared himself dissatisfied with the work, painted over the face of the portrait, and refused to deliver it. Notwithstanding the suspect motivation of the artist's assertion of his moral right, the court allowed the artist to keep the painting but made him pay damages.[35] The right of publication is also manifested in decisions requiring a publisher to publish within a reasonable time a work he has accepted.[36] Some nations grant the literary author the additional right to withdraw his work through rescission of a publication contract,[37] or to modify the work[38] after it has been published. There are severe limitations on the exercise of these rights, which are rarely, if ever, asserted.[39]

The right of paternity is the right to have authorship recognized or concealed by having the author's name associated or not associated with his works.[40] The rights or interests of

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Mar. 6, 1931, Cour d'appel, Paris, 1931 Recueil Periodique et Critique [D.P.] II 88. The case is discussed in Sarraute, *supra* note 14, at 468-69.

32. There is no mention in the case of unauthorized duplication of the works. They had been abandoned by the artist, who had not reserved his copyright when he "transferred" the works. *See* Sarraute, *supra* note 14, at 468-69.

33. The court ordered the restored works to be destroyed. This decision has been criticized as extreme, as the artist's honor and reputation could arguably have been protected by the depletion of his signature from the works. *See id.* at 469.

34. Eden v. Whistler, Judgment of Mar. 14, 1900, Cass. civ., 1900 D.P. I 497. The case involves many factors and is discussed in Merryman, *supra* note 3, at 1024.

35. *See* Merryman, *supra* note 3, at 1024.

36. S. LADAS, *supra* note 5, at 596.

37. In many countries this right is statutory. *See* S. LADAS, *supra* note 5, at 599. In France, the right is a creation of the legislature and is infrequently if ever applied. *See* Sarraute, *supra* note 14, at 466. In Germany, the right of withdrawal exists for both written and visual works, although in a more limited form for the latter. Marcus, *supra* note 5, at 111.

38. S. LADAS, *supra* note 5, at 597.

39. *Id.*

40. *Id.* at 576. "The right to paternity is simply the right of the creator of a work

other people will rarely counterbalance the right of paternity, so the author's right is nearly supreme.[41] There are three circumstances in which the right of paternity is commonly applied.[42] The first occurs when a third party fails to identify the author as such and leaves the work anonymous[43] even if he has consented to earlier pseudonymous publication.[44] The author may insist that he be correctly identified. The impact of this right is greatly cushioned by the courts' willingness to imply a waiver of the right by the author particularly with respect to newspaper or compendium writing.[45] The right is not only positive, but negative in that the author may demand that his real name not be attached to one of his anonymous or pseudonymous works.[46] The second circumstance occurs when a third party's name is attributed to the author's work. This is plagiarism which may be a violation of copyright as well as of moral right.[47] The final circumstance occurs when the author's name is attributed to a work of a third party.[48] The right of paternity frequently conflicts with contracts requiring an author's production to be anonymous. European courts limit the right in this situation.[49]

The right to integrity ensures the author that no alteration, whether by addition or omission, will be made to his work without his consent.[50] The author is injured when the public takes the altered work to be his own and judges him accordingly. When plainly stated, the right to integrity seems extreme. For example, in the publishing and film industries edit-

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to present himself before the public as such, to require others so to present him, and to prevent others from attributing works to him which he has not devised." Roeder, *supra* note 19, at 561-62.

41. S. LADAS, *supra* note 5, at 586.

42. *Id.* at 585.

43. *Id.*

44. *Id.*

45. *See* Roeder, *supra* note 19, at 564. In Germany, the courts will determine whether waiver has occurred by looking to the customs and practices of the trade or market involved. Marcus, *supra* note 5, at 100; *see* Roeder, *supra* note 19, at 564.

46. S. LADAS, *supra* note 5, at 585; Roeder, *supra* note 19, at 562. The author's desires control in this situation. S. LADAS, *supra* note 5, at 585.

47. S. LADAS, *supra* note 5, at 585-86.

48. *Id.* at 586.

49. *See* 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, 684-85 (1971).

50. S. LADAS, *supra* note 5, at 586-87. The changes must of course damage the author's honor and reputation to be actionable. *Id.* at 586.

ing is a standard practice.[51] Reasonable limits are therefore imposed by the courts on the right to integrity in these areas.[52] In the case of the visual arts, small changes are likely to have a greater effect and less justification, and are therefore less likely to be tolerated by the courts. In a well-known French case,[53] a modern artist painted a series of panels that together decorated a refrigerator. When one of the panels was offered at auction without the other panels, the artist was able to prevent the separate sale of the panel because it violated his right in the integrity of his work.[54] In a seminal German case,[55] an artist had decorated the defendant's stairwell with frescoes of nude sirens.[56] The defendant later modified the frescoes by painting clothes on the sirens. The court found that the artist's moral right had been violated and ordered the overpainted clothes removed.[57]

Whether the right to integrity prevents the complete destruction of an artwork is open to discussion.[58] While modified or altered work may misrepresent an author or damage his reputation, the absence of the work by itself arguably should have no effect on the author.[59] On the other hand, destruction

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51. Opposition from the film and publishing industries has been the primary reason moral right has made so little headway in the United States. *See id.* at 862; Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYMP. (ASCAP) 31, 43, 46-47 (1983).

52. For a review of the French law in this area, see generally Amarnick, *supra* note 51, at 47-48; Sarraute, *supra* note 14, at 481; Stevenson, *supra* note 21, at 112. For an overview of German law in this area, see Marcus, *supra* note 5, at 107. The courts only recognize a consent to reasonable alteration of a work and not to any extreme or unreasonable alterations. Merryman, *supra* note 3, at 1045. This approach reflects a balancing of author's rights with commercial reality.

53. Buffet v. Fersing, Judgment of May 30, 1962, Cour d'appel, Paris, 1962 Recueil Dalloz *Jurisprudence* [D. Jur.] 570. The case is discussed in Merryman, *supra* note 3, at 1023.

54. Merryman, *supra* note 3, at 1023 n.1.

55. Judgement of June 8, 1913, 79 Reichsgericht in Zivilsachen [RGZ] 397. This case is popularly known as *Felseneiland mit Sirenen*, "Rocky Island with Sirens," after the topic of the frescoes. It is discussed in Marcus, *supra* note 5, at 104-05.

56. In dictum, the *Felseneiland mit Sirenen* court observed that if the frescoes had been obscene, the public interest in morality might well have dictated their modification. Marcus, *supra* note 5, at 104. This judicial attitude is not now as readily apparent as it once was. *See* Marvin, *supra* note 49, at 688.

57. Marcus, *supra* note 5, at 104.

58. French law prohibits the destruction of an author's manuscript by a publisher. *See* Merryman, *supra* note 3, at 1035 n.37.

59. The means of the act of destruction may nullify this argument. In a French case, Sudre v. Comune de Baixas, Judgment of Apr. 3, 1936, Conseil d'etat, 1936

may be said to deprive the author of other rights in the "bundle"[60] and intuitively seems unacceptable. The European courts have not squarely faced the issue,[61] but in cases involving the decoration of buildings they have looked to the competing interests of the works' owners.[62]

In addition to the major rights listed above, there occur in some nations miscellaneous rights that deserve mention. In Germany, an author is guaranteed a right of access to his work for the purpose of making reproductions or adaptations of it.[63] In France, moral right will be used to justify a prohibition of excessive or abusive criticism.[64] This use correlates to United States defamation and invasion of privacy law,[65] and illustrates the personal nature of moral right. Similarly, other acts that might damage the author's honor or reputation may be forbidden.[66]

B. *Remedies and Duration*

Moral right without the European analogues of equitable relief would be a hollow doctrine. The very nature of the damage done to the author causes money damages to be speculative at best and incalculable or inappropriate at worst.[67] The

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D.P. III 57, the court found that a sculptor's right of integrity had been violated notwithstanding the destruction of the work. His sculpture had been improperly maintained and was subsequently broken up and used to fill potholes. The case is discussed in Merryman, *supra* note 3, at 1034.

60. Merryman, *supra* note 3, at 1035.

61. *Id.*

62. In a French case, Lacasse et Welcome v. Abbe Quenard, Judgment of Apr. 27, 1934, Cour d' appel, Paris, 1934 Recueil Dalloz Hebdomadaire de Jurisprudence 385, an artist's frescoes were obliterated and the court found that the property right of the owner of the building outweighed the moral right of the artist. Merryman, *supra* note 3, at 1034. This case suggests that rather than moral right being absolute, it must be balanced against competing interests. *Cf.* Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949). Although the German court in *Felseneiland mit Sirenen*, 79 RGZ 397, found a violation of the artist's moral right, it stated in dictum that it would be acceptable for the owner to completely destroy the work. The dictum was heavily criticized and seems to have been overriden by subsequent statutes. Marcus, *supra* note 5, at 105; *see infra* note 59 (discussing the right to access which would be defeated by destruction of the work).

63. Marcus, *supra* note 5, at 110-11. This is distinct from a right of modification.

64. *See* Marvin, *supra* note 49, at 693.

65. *See infra* notes 109-22 and accompanying text.

66. These acts are forbidden by the Berne Convention, *supra* note 6, art. 6*bis; see infra* note 91 and accompanying text.

67. In 1940, a United States author observed that "[t]he injury suffered by the

courts consequently rely on injunctions to prevent modification or alteration of a work or to forbid public display of the altered work. Courts have also ordered the restoration of a work,[68] and even its destruction.[69] Courts may award money damages in addition to injunctive or mandatory relief. One other form of available relief is particularly appropriate for damage to literary or theatrical works requiring interpretation. This is a specialized "labelling remedy,"[70] which involves a specific acknowledgement, on display or publication, that the work has been altered and does not fairly represent the author.[71] This is less extreme for the author than an absolute prohibition on the association of his name with the work as it enables him to reject only selected parts of an otherwise acceptable work. This remedy is particularly appropriate where a work is adapted[72] or depends on its context for its meaning,[73] and where the basic moral right doctrine would produce a

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creator will not be measurable in dollars and cents, although it may well be irreparable. The violation of the moral right is very often continuous and the remedy at law of no value whatsoever." Roeder, *supra* note 19, at 574. Time has since revealed that difficulty in calculating damages is no bar to awarding them.

68. *See Felseneiland mit Sirenen*, 79 RGZ 397.

69. *See* Camoin v. Carco, Judgment of Nov. 15, 1927, Trib. pr. inst., Paris, 1928 D.P. II 89; *see supra* note 31 and accompanying text.

70. One author champions the labelling remedy and discusses it at great length in an effort to make moral right more palatable to wary American lawyers. Amarnick, *supra* note 51, at 52-56.

71. *See, e.g.*, Leger v. Réunion des Théâtres Lyriques Nationaux, Judgment of Oct. 15, 1954, Cour de Paris, (discussed in Marvin, *supra* note 49, at 695). In that case, the producers of an opera deleted a scene for which the plaintiff had designed the set and costumes. The court ordered that programs and posters for the opera convey a message to that effect.

72. In a situation described in Amarnick, *supra* note 51, at 46-47, the authors of the work from which the movie *Wonder Bar* was adapated forced the film's producers to pay a large sum in exchange for the authors' promise not to exercise their moral right, and forbid distribution of the film in countries adhering to the Berne Convention, *supra* note 6. The movie had already been released in the United States. If the movie producers had consulted European law they would presumably have extracted the authors' consent to adapt the work.

73. In the 1940's and 1950's, a group of Soviet composers brought suit in France and the United States against the producers of an anti-Soviet movie, *The Iron Curtain*, to redress the use of their music in that context. Société Le Chant du Mond v. Sociétés Fox Europe et Fox Américaine Twentieth Century, Judgment of Feb. 19, 1952, Cour d'appel, Paris (discussed in Merryman, *supra* note 3, at 1039). In Shostakovich v. Twentieth Century Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), *aff'd* 275 A.D. 692, 87 N.Y.S.2d 430 (1949), the court found no moral right and hence no violation. *See* Amarnick, *supra* note 51, at 53-54; Merryman, *supra* note 3, at 1039. Presumably the moral right would address other contextual distor-

harsh result. On the other hand, the remedy is less appropriate if the altered part cannot be easily separated from the intact parts of the work. In that case, the danger that the author will be judged by the work is much greater.

The duration of a moral right depends on the theoretical basis of the rights. There are two major schools of thought on this topic. Germany adheres to the monist theory, which holds that moral right and copyright are part of a unified whole that encompasses rights of different qualities.[74] Because moral right and copyright are manifestations of the same right, it follows that they should have the same duration. In Germany, the moral right therefore expires with the copyright.[75] France, as well as most civil law nations, adheres to a dualist approach, which views the moral right and copyright as mutually independent rights arising from a work.[76] Consequently, the two rights may have different durations. The nature of the interest protected dictates that moral right should be perpetual in duration.[77] There are, of course, tremendous practical difficulties involved in a perpetual moral right, such as who is to exercise it[78] and to what ends.[79]

The moral right may be bequeathed or passed to heirs by inheritance, just as may the copyright. Again the differences

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tions, such as the arrangement of other works accompanying a work in a gallery, or the environment of a multimedia work. *See* Amarnick, *supra* note 51, at 55-56.

74. Marcus, *supra* note 5, at 95. German scholars tend to view the French approach as functionally very close to monism. *Id.* Nevertheless the two schools prescribe different durations for moral right. This is the principal practical difference between the two theories. S. LADAS, *supra* note 5, at 578.

75. *See* Marcus, *supra* note 5, at 115. The term extends for the life of the author plus seventy years. *Id.* Nevertheless, more general principles of German law support the proposition that "a person who has appropriated the work of a dead author that has fallen into the public domain, and presented it under his own name, could be sued by other authors or by authors professional organizations . . . ." Michaélidès-Nouaros, *Protection of the Author's Moral Interests After His Death as a Cultural Postulate*, 1979 COPYRIGHT 35, 39; *see infra* notes 80-88 and accompanying text.

76. S. LADAS, *supra* note 5, at 578. Nevertheless, moral right has a dominant position over the copyright. Marcus, *supra* note 5, at 95.

77. *See* Sarraute, *supra* note 14, at 483. This is primarily the author's honor and reputation. On this basis alone, the moral right arguably should expire on the author's death. Marcus, *supra* note 5, at 115. When the social interest in the preservation of culture is considered, however, the moral right unquestionably should be perpetual. *Id.*

78. *See infra* notes 80-88 and accompanying text.

79. The interests of the heirs of an author may prescribe alteration of a work. *See* Merryman, *supra* note 3, at 1040-41 (discussing the works of David Smith).

between monism and dualism are relevant.[80] Monist nations view moral right as passing absolutely to the new owner, who may exercise it without restriction as if he were the author.[81] While this system is simple and predictable[82] it does not acknowledge the shift in the balance of social and individual interests that occurs when an author dies.

> [M]oral rights *post mortem*, while retaining their main characteristics (inalienability, unattachability, etc.) and while remaining within the sphere of private law, undergo a change in nature. . . . They cease to be sovereign rights of absolute and individualistic character, changing into relative, altruistic rights, the respect of which is dictated by the interests of culture, and the abuse of which must be controlled by the courts.[83]

To account for this shift, the dualist nations employ more complex systems. In these systems, the rights of the "bundle" may survive to varying degrees,[84] or the holder of the moral right may be required to exercise it according to the best interests of the author,[85] or the court or authors' associations may

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80. *See* Michaélidès-Nouaros, *supra* note 75, at 35-36. Not all rights in the "bundle" survive to the same extent. *See infra* note 84.

81. Michaélidès-Nouaros, *supra* note 75, at 35.

82. *Id.* at 36.

83. *Id.* The author's bias is evident in that while the quoted language is presented as conclusions based on analysis of the relevant laws, it clearly reflects the French dualist approach.

84. In France, the right of publication may be exercised by the author's executors during their lives, and by others chosen according to a statutory scheme thereafter. The right may only be exercised with respect to works whose publication was not specifically forbidden by the author. The right of integrity may be freely bequeathed, and survives unchanged, as does the right of paternity. Michaélidès-Nouaros, *supra* note 75, at 37. The right of withdrawal perishes with the author. *See id.; see also* Sarraute, *supra* note 14, at 483 (discussing duration of moral right).

85. *See* Michaélidès-Nouaros, *supra* note 75, at 38. Such a limit prevents abuse of the right of disclosure by heirs in France. *Id.* French courts will hold against heirs who seek to exercise their moral right for their own benefit and not according to the dead author's wishes. Sarraute, *supra* note 14, at 483. In Germany and Italy, an executor may be removed for a violation of his duties. One commentator sees a need for additional legislation in this area:

> [H]eirs have the status of legal representatives and a function similar to that of an executor; therefore the civil courts should be given the right, *de lege ferenda*, to declare the disqualification of heirs for that function where, as a result of error or inability, they have shown themselves unworthy of performing the tasks entrusted to them by the law.

Michaélidès-Nouaros, *supra* note 75, at 38.

share in the exercise of the moral right.[86] Once the author's work passes into the public domain and there are no heirs or holders of the moral right, only associations will be able to protect the moral right. The extent to which authors' associations, whether private or state-created, may exercise the moral right of deceased authors is questionable.[87] Concerns over state regulation of culture loom large[88] but the alternative of no protection of works in the public domain is more unpalatable. Consequently, commentators favor the exercise of the moral right by authors' associations.

II. *THE BERNE CONVENTION*

The Berne Convention is an international copyright union to which many of the nations of the world adhere.[89] The United States is a conspicuous exception. Article 6*bis* of the Convention provides for recognition of moral right by member states.[90] The Convention embodies a minimal level of moral right protection, as it preserves only the paternity and integrity rights and includes a general prohibition against other acts prejudicial to the author's honor or reputation.[91] Although the Convention requires the moral right to be preserved at

86. Michaélidès-Nouaros, *supra* note 75, at 37. In France, the courts oversee the exercise of the right of disclosure. *Id.*

87. The French National Literary Fund was created by statute in 1946 to protect the integrity of literary works in the public domain. Sarraute, *supra* note 14, at 484. Nevertheless, the Fund was unable to sue for the confiscation of a distorted novel because heirs of the author were still alive and had the first right to sue. *Id.* The concerns of society and the perpetuity of moral right demand, in the opinions of the commentators, that such an exercise of moral right be possible. S. LADAS, *supra* note 5, at 602; Merryman, *supra* note 3, at 1041-43; Sarraute, *supra* note 14, at 483.

88. This is a special fear in Germany because of Nazi efforts in this area. Marcus, *supra* note 5, at 115-16.

89. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 499 (1967). "Since [1886] most of the significant nations of the world have acceded to the Convention . . . ." *Id.*

90. Berne Convention, *supra* note 6, art. 6*bis*. Article 6*bis* was first incorporated into the Berne Convention through the Rome Act of 1928, and was most recently modified by the Stockholm Act of 1967.

91. Berne Convention, *supra* note 6, art. 6*bis*(1). This article provides that:

> Independently of the author's copyright, and even after the transfer of said copyright, the author shall have the right . . . to claim authorship of the work and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work which would be prejudicial to his honour or reputation.

Id.

least as long as the author's copyright, it defers to those states whose preexisting legislation provides a different duration for moral right.[92] Article 6*bis* fails to specify the contents of the rights it names, however, and its final clause allows member states to legislate the means for redress.[93] Consequently, either strong or weak protections may fit within the broad article 6*bis* language so long as they at least recognize the listed rights.[94] There is not even a requirement that the moral rights be inalienable.[95]

III. *PROTECTIONS COMPARABLE TO MORAL RIGHT IN UNITED STATES LAW*

There has been a great debate on the issue of whether United States federal and state noncopyright statutes and common law currently provide protection equivalent to moral right,[96] and whether the United States would thereby be able

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92. *Id.* art. 6*bis*(2). This article provides that:

> In so far as the legislation of the countries . . . permits, 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 copyright, and shall be exercisable by the persons or institutions authorized by the said legislation. The determination of the conditions under which the rights mentioned in this paragraph shall be exercised shall be governed by the legislation of the countries of the Union.

Id. Thus the duration requirements of both the monist and dualist countries are accommodated.

93. *Id.* art. 6*bis*; *see* Nimmer, *supra* note 89, at 552. Article 6*bis*(3) states that "[t]he 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 Convention, *supra* note 6, art. 6*bis*(3).

94. Nimmer, *supra* note 89, at 522. "A [Berne Copyright] Union member may not simply ignore the provisions of article 6*bis*, but whether those provisions are to be liberally or narrowly construed is a matter for individual national determination." *Id.*

95. *Id.* at 524. The legislative materials of article 6*bis* and of its modifications leave the matter of alienability up to the legislatures of member nations. *Id.*

96. Some commentators support the proposition that United States law sufficiently approximates moral right to allow accession to the Berne Convention. *See, e.g., id.* at 518-19; STRAUSS, THE MORAL RIGHT OF THE AUTHOR, STUDY NO. 4, in COPYRIGHT OFFICE, LIB. OF CONG., STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS TRADEMARKS AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, U.S. SEN., 86TH CONG., 1ST SESS. (Comm. Print 1960); Treece, *American Law Analogues of the Author's "Moral Right"* 16 AM. J. COMP. L. 487 (1968). Others disagree. *See, e.g.*, Merryman, *supra* note 3, at 1049.

to ratify the Berne Convention without further legislation.[97] Even though the 1976 Copyright Act[98] does not provide moral rights for authors, it does not preempt state legislation or common law in the area.[99] After some encouraging language in opinions at the start of the twentieth century,[100] United States courts have rejected moral right when squarely confronted with the issue.[101] Nevertheless, there are already a number of

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97. Of course, this issue embraces more than the moral right issue alone. *See generally* S. Ladas, *supra* note 5, at 862-76.

98. 17 U.S.C. § 101 (1982).

99. *Id.* § 301 (1982). This section provides, in pertinent part:

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—
>
> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 . . . or . . .
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.
>
> (d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

Section 106 provides no moral right protections. *Id.* § 106. *But see* Nimmer, *supra* note 89, at 518 n.107.

100. *See, e.g.*, Clemens v. Press Publishing Co., 67 Misc. 183, 183-84 122 N.Y.S. 206, 207-08 (N.Y. Sup. Ct. 1910).

> 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. . . . If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work, but to have it published in the manner in which he wrote it. *The purchaser cannot garble it or put it out under another name than the author's; nor can he omit altogether the name of the author*, unless his contract with the latter permits him so to do.
>
> The position of the author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name, or to perform before the public, *necessarily affects his reputation and standing, and thus impairs or increases his future earning capacity.*

Id. (emphasis added). Note the ultimate concern is not honor and reputation, but pecuniary gain. For a further discussion of this case, see *infra* note 102 and accompanying text.

101. *See* Miller v. Commissioner, 299 F.2d 706, 709 n.5 (2d Cir. 1962), *cert. denied*, 370 U.S. 923 (1962); Granz v. Harris, 198 F.2d 585, 589 (2d Cir. 1952); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 576, 89 N.Y.S.2d 813, 819 (N.Y. Sup. Ct. 1949); Meliodon v. School District of Philadelphia, 328 Pa. 457, 460, 195 A. 905, 906 (1938).

In *Crimi*, a congregation commissioned a fresco of Christ for their church. The contract with the artist assigned all copyright to the church and provided that the frsco would be part of the church building. Eight years after its completion, the congregation painted over the fresco without giving notice to the artist. The artist sued, seeking either the removal of the obliterating paint, the removal of the entire fresco

common law tort and contract doctrines that provide relief in situations where moral right is implicated.

Breach of contract may be used to remedy paternity[102] and integrity[103] problems in United States courts, but it involves certain difficulties. Relief is only available where a direct contractual relationship exists between the author and the poten-

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at his expense, or damages. 194 Misc. at 572, 89 N.Y.S.2d at 815. He asserted that the obligation: 1) violated custom and usage incorporated in the original contract; 2) violated the artist's continuing right of integrity in the work; and 3) was against public policy. *Id.* In its discussion of moral right, the court noted both *Lacasse*, Judgment of Apr. 27, 1934, Cour d'Appel, Paris, 1934 Recueil Dalloz Hebdomadaire de Jurisprudence 385, and Vargas v. Esquire Inc., 164 F.2d 522 (7th Cir. 1947). The court ultimately found that the artist had no continuing right in the work, and should have reserved the rights he desired by contract. *Crimi*, 194 Misc. at 574-75, 89 N.Y.S.2d at 819.

In *Meliodon*, a sculptor hired by the School District to create sculpture for the Board of Education building brought suit when his works were altered so that he felt ridiculed and caused him to lose contracts for the decoration of other buildings. 328 Pa. at 458, 195 A. at 905. The sculptor sought damages and the destruction of the altered works. The court did not directly discuss the issue of moral right, but mismissed the complaint, holding that since the claim was in the nature of tort, the school district as a governmental agency was immune from liability. *Id.* at 458-59, 195 A. at 906.

102. In Clemens v. Press Publishing Co., 67 Misc. 183, 122 N.Y.S. 206 (N.Y. Sup. Ct. 1910), *appeal denied sub nom* Taylor v. Crawford, 124 N.Y.S. 1131 (N.Y. Sup. Ct. 1910) plaintiff, a writer, sold a story to defendant who printed galley proofs of it with plaintiff's name shown as author. Defendant later decided to publish the story without plaintiff's name, and when plaintiff insisted that the story be attributed to him, defendant refused to pay the contract price. The trial court dismissed the complaint. The Appellate Term, finding that the contract was complete, reversed and ordered a new trial. Judge Gavegan opined that "[t]itle to the manuscript having passed . . . plaintiff [could not] compel or prevent its publication, with or without his name." 67 Misc. at 185, 122 N.Y.S. at 207 (Gavegan, J., concurring). The frequently cited language comes from Judge Seabury's opinion. *See supra* note 100. The remaining justice dissented.

103. In Granz v. Harris, 198 F.2d 585 (2d Cir. 1952), plaintiff, a well-known promoter, made master recordings of one of his concerts and sold them to defendant for reproduction. The sale contract provided that any records produced were to be identified as plaintiff's production. When defendant sold edited versions of the recordings and attributed them to plaintiff, plaintiff filed suit and lost. On appeal, the circuit court reversed, finding defendant had breached the sales contract. *Id.* "This contractual duty [to identify plaintiff as producer] carries by implication . . . the duty not to sell records which make the required legend a false representation." *Id.* at 588. In his concurrence, Judge Frank acknowledged plaintiff's effort to invoke the doctrine of moral right, discussed the possibility of its acceptance in the United States, and concluded "[w]ithout rejecting the doctrine of 'moral right' . . . we should not rest decision on that doctrine where, as here, it is not necessary to do so." *Id.* at 591 (Frank, J., concurring); *see also* De Bekker v. Frederick A. Stokes Co., 168 A.D. 452, 153 N.Y.S. 1066 (1915) (protecting the integrity of a work); *infra* note 107.

tial defendant.[104] Thus, an artist whose work may pass through many hands would have no recourse against a distant owner. This problem can be resolved by inclusion of appropriate language into sales contracts.[105] This protection would not be readily available to new or unknown authors because of their very limited bargaining power with purchasers.[106] In asserting their moral rights through contract law, authors must therefore rely on the mercy of the courts which can only encourage ad hoc results. There are also many cases in which narrowly drawn contracts are construed in favor of the purchaser or publisher.[107] In sum, breach of contract can provide

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104. Those in privity may sue on a contract. J. CALAMARI & J. PERILLO, CONTRACTS § 17-1 (2nd ed. 1977). Where a licensing agreement has been breached, the copyright statute provides a remedy. *See* Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976); Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 263-64 (1978).

105. Ensuring recourse against distant owners is possible but because it necessarily relies on the actions of others, it is very difficult to achieve.

The provision of moral rights which are enforceable against subsequent purchasers of a work would be based on a covenant by the initial purchaser that he will make any sale of the work contingent upon the subsequent purchaser's acceptance of the relevant covenants. Such a provision could be enforceable against the initial purchaser alone. If the initial purchaser were to breach it, the author would be denied the equitable remedies which are the major attraction of moral right, although he would have a claim for damages.

Given the sparse legal basis for asserting moral rights in most common law jurisdictions, contractual language must explicitly describe the rights and duties the author desires. To set the context for a court's interpretation of an agreement incorporating moral rights, the drafter should include extensive recitations as to the parties understanding of the continuing and vital relationship between the work and its creator. These recitations are important in justifying the application of equitable remedies.

106. By virtue of their continuous presence in the market, publishers and purchasers can draw on their experience to draft onerous "boilerplate" contracts. Where purchasers and publishers are few, powerful, or have captured large portions of the market, they may force authors to accept adhesion contracts. *See* J. CALAMARI & J. PERILLO, *supra* note 104, § 1-3.

107. In the reknowned case of Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947), the plaintiff, an artist, produced drawings of women which were published by defendant magazine and identified by plaintiff's pseudonym as "Vargas Girls." The contract between the parties provided that defendant had all right in the drawings and the names by which they were identified. When defendant renamed the drawings "Esquire Girls" and ceased to identify them as plaintiff's work, plaintiff brought suit for breach of contract and unfair competition. The court also refused to accept plaintiffs moral right argument. *Id.* at 526.

In De Bekker v. Frederick A. Stokes Co., 168 A.D. 452, 153 N.Y.S. 1066 (1915), the plaintiff, a writer, entered into a sales contract with defendant which provided that plaintiff's encyclopedia of music was to be published under defendant's name.

the same results as moral right but only to those authors who are able to protect themselves by means of their sufficient bargaining power.[108]

An author injured by excessive or abusive criticism may proceed on a theory of defamation. However, as with breach of contract, there are numerous ways in which defamation cannot provide the protection afforded by moral right. Injunctive relief is generally not available for defamation,[109] and the resultant damage to an author's career, especially if his career is nascent, can be incompensable. The action is available only to living authors,[110] which makes its protection less durable than that of copyright and a far cry from the perpetual protection provided in some nations.[111] The author must also have a reputation to serve as a yardstick for damages,[112] a requirement which places heavy burdens on unknown authors who are least able to bear them. Finally, the higher standard of proof that public figures must meet,[113] coupled with the use of the relevant community to define the action,[114] limits the availability of defamation to well-known authors. One commentator has observed that an author seeking to enforce his moral rights by means of libel would nearly always qualify as a public figure.[115] In sum, because of the unavailability of injunctive relief and the problems of proof involved, defamation provides a weak device to enforce moral rights.

The right to privacy has also been used to protect moral

When the book was published under the name of a third party with additions not of the plaintiff's making, plaintiff brought suit for breach of contract. The court reversed the trial court's findings for defendant on the grounds that the damages were excessive, and ordered a new trial. *Id.* at 456, 153 N.Y.S. at 1068. The court observed that the plaintiff was entitled under the contract to have the work published without additions under the defendant's name, thus denying plaintiff's argument that conditions implying the use of plaintiff's name should be implied into the contract. *Id.* at 455, 153 N.Y.S. at 1068.

108. *See generally* Diamond, *supra* note 104, at 261-63.

109. W. PROSSER & W. KEETON, THE LAW OF TORTS 772-73 (5th ed. 1984).

110. *Id.* at 778.

111. *See supra* notes 74-77 and accompanying text.

112. *See* W. PROSSER & W. KEETON, *supra* note 109, at 843.

113. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See generally* W. PROSSER & W. KEETON, *supra* note 109, at 805-07.

114. *See* W. PROSSER & W. KEETON, *supra* note 109, at 777-78.

115. Diamond, *supra* note 104, at 265. The author cites cases showing examples of the broad range of literary figures that have been considered public for the purposes of defamation.

right interests. It overlaps defamation extensively,[116] and suffers from similar shortcomings. At common law, only a living author may sue for a breach of his privacy,[117] and he may do so to protect himself, not his work, from "an assault upon his own feelings."[118] The most relevant branches of the doctrine are "false light," in which the plaintiff is placed in a false light in the public eye,[119] and attribution, in which the defendant appropriates the plaintiff's name or likeness for his own benefit.[120] A number of states have enacted statutes that articulate the right to privacy.[121] Privacy is best able to redress violations of an author's paternity right when an author's name is associated with the work of another person, but it is not able to require that an author's name be associated with his work. Privacy has also been used to vindicate breaches of the right to integrity,[122] but because the focus of privacy is on the author, protection of the work is not a goal in itself, and may not necessarily result.

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116. W. PROSSER & W. KEETON, *supra* note 109, at 864.

117. W. PROSSER, THE LAW OF TORTS 815 (4th ed. 1971). Several states provide by statute for privacy actions on the behalf of deceased persons. *Id.*; *see infra* note 121. It is of course conceivable that family members would suffer from a breach of a deceased author's privacy, in which case they would have causes of action in their own rights. W. PROSSER, *supra*, at 814-15.

118. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890); Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539, 1549 (1972).

119. W. PROSSER & W. KEETON, *supra* note 109, at 863. The seminal case in this area, Lord Byron v. Johnston, 35 Eng. Rep. 851 (1816), involved the paternity right. Lord Byron succeeded in enjoining the publication and circulation of an inferior poem falsely attributed to him. *Id.* at 852.

120. W. PROSSER & W. KEETON, *supra* note 109, at 851. Another branch of privacy is the "public disclosure of private facts." *See id.* at 856. In Ellis v. Hurst, 66 Misc. 235, 121 N.Y.S. 438 (N.Y. Sup. Ct. 1910), an author successfully enjoined publication under his own name of a work originally published pseudonymously. *Id.* at 237, 121 N.Y.S. at 440. The case was decided under the New York privacy statute. *Id.* at 236, 121 N.Y.S. at 439.

121. *See, e.g.*, CAL. CIV. CODE § 3344 (West Supp. 1984); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976). The New York law, dating from 1909, forbids the use of the name or picture of a living person for advertising or trade purposes without permission. N.Y. CIV. RIGHTS LAW §§ 50-51. The trade purposes limitation ostensibly would prevent recovery for the destruction of the mural in *Crimi*, 194 Misc. 570, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949); *see supra* note 101. CAL. CIV. CODE § 3344, is substantially the same except that injunctive relief is not specifically provided.

122. In Neyland v. Home Pattern Co., 65 F.2d 363 (2d Cir. 1933), the court reversed a judgment against an artist, whose painting of a ship was crudely reproduced by defendant and marketed as a sewing pattern for cushions, and ordered a new trial. The court based its decision on the New York privacy statute, N.Y. CIV.

Unfair competition has also been used to redress violations of a moral right, but as with defamation and privacy, it does not focus on protecting the work except as a means to some other end. In unfair competition, the focus is on protecting the author from being deprived of his market,[123] or on protecting the public from being misled or deceived.[124] Courts have granted relief for breaches of paternity and integrity rights by means of unfair competition as defined in the common law,[125] or state[126] or federal[127] statutes. The closest a court has come to embracing moral right as a doctrine was in *Gilliam v. American Broadcasting Companies*,[128] in which the Sec-

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RIGHTS LAW § 51, and not on the artist's proffered argument of "infringement of his artistic property." 65 F.2d at 364.

In Gieseking v. Urania Records, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (N.Y. Sup. Ct. 1956), a reknowned pianist brought suit under N.Y. CIV. RIGHTS LAW §§ 50, 51 against a defendant who had made unauthorized inferior reproductions of plaintiff's performances. Plaintiff also made a claim on grounds of unfair competition because defendant had made unauthorized reproductions of tapes of performances not made for that purpose. In refusing to dismiss the case, the court observed that "[a] performer has a property right in his performance that it shall not be used . . . in a manner which does not fairly represent his service." 17 Misc. 2d at 1035, 155 N.Y.S.2d at 172.

123. Roeder, *supra* note 19, at 568.

124. Diamond, *supra* note 104, at 266.

125. In Prouty v. National Broadcasting Co., 26 F. Supp. 265 (D. Mass. 1939), plaintiff, author of the novel "Stella Dallas," brought suit against defendant because its creation and broadcasting of radio episodes based on the novel were of inferior artistic and commercial quality. The action was not brought under the Copyright Act. In denying the defendant's motion to dismiss the court observed that even though the parties were not direct competitors, the facts alleged could well fit within the doctrine of unfair competition. *Id.* at 266. "It is the injury to the author and a fraud upon the reading public that constitute the real offense alleged." *Id.* The holding in Granz v. Harris, 198 F.2d 585 (2d Cir. 1952), was based on unfair competition as well as on contract. *See supra* note 103.

126. In Bonner v. Westbound Records, Inc., 49 Ill. App. 3d 543, 364 N.E.2d 570 (1977), plaintiffs, The Ohio Players, sought and received an injunction against the distribution of an album attributed to plaintiffs which contained songs written, performed, or added to by others. The case was decided under Illinois' enactment of the Uniform Deceptive Trade Practices Act. *Id.* at 547, 364 N.E.2d 575.

127. The relevant federal statute is § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1976). For cases applying the Lanham Act, see Diamond, *supra* note 104, at 267. There is some question as to whether the Lanham Act is a federal unfair competition law. *See* Harms, Inc. v. Tops Music Enterprises, Inc., of California, 160 F. Supp. 77 (S.D. Cal. 1958). *But see* Gilliam v. American Broadcasting Co., 538 F.2d 14, 24 (2d Cir. 1976).

128. 538 F.2d 14 (2d Cir. 1976). Plaintiffs, the "Monty Python" group, unsuccessfully sought to enjoin defendant's broadcast of heavily edited (27% cut) Monty Python programs. On appeal, the three-judge panel noted that defendant's right to

ond Circuit Court of Appeals expanded section 43(a) of the Lanham Trademark Act[129] to incorporate the doctrine of moral right. Given the past explicit rejection of moral right in the Second Circuit[130] and the alternative theory of liability based on copyright infringement,[131] courts have been reluctant to follow the moral right language of the decision.[132] The Lanham Act alone, however, has been used extensively to provide relief.[133] Nevertheless, the Lanham Act and unfair competi-

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broadcast the shows ultimately flowed from the plaintiffs' licensing arrangement with the British Broadcasting Corporation, which permitted only minor modification of plaintiff's work without plaintiff's oversight and consent. *Id.* at 17. Because defendant could not have received the right to edit the shows heavily without plaintiff's consent, the court reversed and granted the preliminary injunction. *Id.* at 26.

The court provided an additional and ostensibly independent line of reasoning in support of its holding. "[A]ppellants [Monty Python] will succeed on the theory that . . . the cuts made constituted an actionable mutilation of Monty Python's work. This cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of droit moral, or moral right . . . ." *Id.* at 23-24. The court discussed moral right in general and the United States law in the area, and concluded that "an allegation that a defendant has presented to the public a 'garbled,' . . . distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act, 15 U.S.C. § 1125(a), and should be recognized as stating a cause of action under that statute." *Id.* at 24-25 (quoting Granz v. Harris, 198 F.2d at 591 (Frank, J., concurring)). In his concurrence, Judge Gurfein agreed with the views expressed on the plaintiff's Lanham Act complaint but observed that the Act "is not a substitute for *droit moral*. . . . [T]he Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like." *Id.* at 27 (Gurfein, J., concurring). This aspect of the majority's opinion has been similarly criticized elsewhere. *See* Diamond, *supra* note 104, at 268-69.

129. 15 U.S.C. § 1125(a) (1976). Section 43(2) of the Lanham Act reads in pertinent part:

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

Id.

130. *See* Miller v. Commissioner, 299 F.2d 706 (2d Cir. 1962); Granz v. Harris, 198 F.2d 585 (2d Cir. 1952); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949).

131. *See supra* note 128.

132. This aspect of the decision has only been followed once in the federal courts. In Follett v. New American Library, Inc., 497 F. Supp. 304 (S.D.N.Y. 1980), the court cited *Gilliam* for its use of the Lanham Act to prevent the presentation of an author's work in distorted form, and enjoined distribution of a book that identified as primary author a popular novelist who had merely edited the work. *Id.* at 313.

133. *See* Comment, *Monty Python and the Lanham Act: In Search of the Moral Right*, 30 RUTGERS L. REV. 452, 474-76 (1977).

tion in general seem to be poor substitutes for the doctrine of moral right.

Intellectually their thrust is different as they only protect economic interests of the author and public.[134] Unknown artists are vulnerable even under these approaches, as they have little or no present market for their works, or have little public recognition. The absence of decisions relying on *Gilliam*'s expansion of the Lanham Act indicates that there will probably be little future growth in this direction.

In conclusion, United States law provides some remedy for breach of moral right, but the available devices differ widely in their applicability, duration, and remedy.[135] None of the available remedies acknowledge protection of works of authorship as a goal in itself, but rather see it only as a means to some other end. The remedies, consequently, may not always provide adequate results. Further, the unknown author has little redress under any of the theories, not in the least because of the costs and the risks of pursuing litigation in such ambiguous areas of the law. Even if the remedies are conceded to be adequate, codification would add consistency and predictability that would better serve the objectives of moral right than the current patchwork of remedies.

A. *The California Art Preservation Act*

The California Legislature moved to address the shortcomings of United States protection of artists' moral rights by passing the California Art Preservation Act[136] (CAPA) in 1979.[137] In CAPA, the legislature specifically recognized the close connection between an artist's work and his personality, and the principle that damage to a work can result in damage to an artist.[138] Both of these principles are basic to moral

134. *See supra* notes 96-135 and accompanying text.

135. *See supra* notes 123-29 and accompanying text.

136. CAL. CIV. CODE § 987 (West Supp. 1984). The California Art Preservation Act (CAPA) applies only to works of fine art, and not to literary works. *Id.* § 987(b)(2). The term "artist" refers to authors of works of fine art. *Id.* § 987(b)(1); *see infra* notes 140-46 and accompanying text.

137. Although California is not the only state to have made efforts in this area, *see* Note, *The Americanization of Droit Moral in the California Art Preservation Act*, 15 N.Y.U.J. INT'L L. & POL. 901, 910 n.34 (1983), it and New York are the only ones to date that have passed any legislation.

138. CAL. CIV. CODE § 987(a). This recognition was expressed as follows:

right. The legislature also recognized "a public interest in preserving the integrity of cultural and artistic creations."[139] CAPA is hardly an enactment of moral right, however, and provides more limited protection to an artist and his work than he would enjoy in Europe.[140] The most dramatic limitation of CAPA's scope is its applicability to "fine art" alone.[141] As defined in the Act, " '[f]ine art' means an original painting, sculpture, or drawing, or an original work of art in glass, *of recognized quality*, but shall not include work prepared under contract for commercial use by its purchaser."[142] Literary, musical, and cinematic works, as well as crafts, original prints and lithographs, are completely excluded. The same is true for less traditional forms of art that arguably do not fit within the listed categories.[143] The requirement of "recognized quality" also militates against innovative or unpopular works of art, because

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> 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.

Id.

139. *Id.* For an exhaustive discussion of the general recognition of this interest in the United States, see Note, *supra* note 137, at 912 n.50.

140. Note, *supra* note 137, at 909-10, 947-48; *see* Merryman, *supra* note 3, at 1042-43. It is felt that the public interest evident in CAPA, *see supra* note 138, requires a synthesis of moral right and United States law rather than a mere addition of the two. Note, *supra* note 137, at 909-10.

141. CAL. CIV. CODE § 987(a).

142. *Id.* § 987(b)(2) (emphasis added). This limitation was imposed by political necessity. *See* Note, *supra* note 137, at 923. The pressures to which the lawmakers were subject are evident in the addition in 1982 of the language referring to works in glass, and of similar language in § 997, which provides that "[i]n this state, for any purpose, porcelain painting and stained glass artistry shall be considered a fine art and not a craft." CAL. CIV. CODE § 997.

143. Examples of these are conceptual art, in which the process of creation and the aging of the work are considered the art, *see* Note, *Artworks and American Law: The California Art Preservation Act*, 61 B.U.L. REV. 1201, 1220 n.111 (1981), or landscape art such as the Lake Placid Summer Olympics "ground sculpture," *see* N.Y. Times, May 16, 1980, at C24, col. 2.

The exclusion of limited edition prints and other works that are not unique indicates that the social interest in the integrity of culture is paramount. That interest is served by the intact survival of a single individual of a serial work. In contrast, the artist's interest is disserved by the damage of a single individual.

In any event, the specificity of the list in CAL. CIV. CODE 987(b)(2) and the subsequent additions to it, *see id.*, will suggest to the courts that the California Legislature intended the categories to be exclusive and the statute narrowly construed.

"recognized quality" is determined by the trier of fact and not by a panel of experts.[144] The exclusion of works for commercial use is consistent with the treatment of "works for hire" under the Copyright Act of 1976,[145] although CAPA limits the exclusion to works for use in advertising, print, and electronic media.[146] A final limitation on the scope of CAPA is the special provision for works of fine art that are integral parts of buildings and are not easily removed therefrom.[147] In the case of a work that cannot be removed from its site intact, CAPA provides that the artist's rights are deemed waived unless they are specifically reserved.[148] This is an exception to the general rule that an artist may only waive his rights under CAPA in

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144. CAL. CIV. CODE § 987(f). "In determining whether a work of fine art 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 or marketing of fine art." *Id.* This limitation seems to be a practical necessity, given the diversity of opinions as to the merit of works in borderline areas. The process avoids the twin evils of overly explicit judgment by the legislature and the delegation of the definition of absolute qualitative standards of culture to an independent government body. *See supra* text accompanying note 88. Nevertheless, the process is imprecise at best, and courts would doubtless welcome a list of criteria to consider. *See* Note, *supra* note 137, at 926. Under moral right, no qualitative standards are formally considered.

145. 17 U.S.C. § 201(b) (1982). This Act provides that the copyright of works made for hire resides in the employer. *Id.*

146. CAL. CIV. CODE § 987(b)(7) (added by amendment, 1982). CAPA applies only to "commercial use" and such use is defined as meaning "fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media." *Id.* Thus it would seem that the plaintiff in Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947), would have fared no better under CAPA than he did in fact. *See supra* note 107. On the other hand, the artist in Meliodon v. School District of Philadelphia, 328 Pa. 457, 195 A. 905 (1938), might well have prevailed. *See supra* note 101.

147. CAL. CIV. CODE § 987(h)(1). The limitation is expressed as follows:

> 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.

Id. The recordation referred to is presumably in the title records. If the building owner gives 90 days' notice and the artist fails to remove the work, no action may be brought under CAPA. *Id.* § 987(h)(2).

148. *Id.* § 987(h)(1). In *Crimi*, 194 Misc. at 570, 89 N.Y.S.2d at 813, the artist offered to remove his mural at his own expense. Thus even if he had waived his rights under CAPA, it would seem that the mural was removable and thus was not within § 987(h)(1). Relief would therefore have been available.

writing.[149] In Europe, moral right is technically unwaivable, but reasonable allowances in the courts accommodate both the artist's right in his work and the owner's right in his property,[150] as does CAPA.

CAPA protects both integrity and paternity with a full range of remedies,[151] but the rights themselves are somewhat more limited than they are in Europe. The integrity subsection of CAPA forbids intentional mutilation or destruction of a work of fine art.[152] CAPA differs from moral right in the requirement of intent and makes proof of the artist's case very difficult. A gross negligence standard, however, applies to those who undertake to prepare a work for display, or who conserve or restore it.[153] The paternity right is limited to the right to claim, or to disclaim for "just and valid reason" authorship of a work.[154] The "just and valid reason" standard for a disclaimer of authorship is similar to the "recognized quality" standard discussed above and may be criticized on similar grounds.[155] The statute is silent as to the content of the standard; the courts must define the concept.[156] The pa-

149. CAL. CIV. CODE § 987(g)(3).

150. *See supra* note 52 and accompanying text.

151. CAL. CIV. CODE § 987(e). The artist may sue for injunctive relief, actual and punitive damages, attorneys' and expert witnesses' fees, and any other relief the court is inclined to grant. *Id.* This presumably includes the "labelling remedy." *See supra* notes 70-73 and accompanying text. Punitive damages go to the government or to charity. CAL. CIV. CODE § 987(e)(3).

152. CAL. CIV. CODE § 987(c)(1). This provision states that: "No person, except an artist who owns and possesses a work of fine art which the artist has created, shall *intentionally* commit, or authorize the *intentional* commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art." *Id.* (emphasis added).

153. *Id.* § 987(c)(2). This standard is expressed as follows:

> 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.

Id.

154. *Id.* § 987(d). "The artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art." *Id.*

155. *See supra* note 144 and accompanying text.

156. Note, *supra* note 137, at 916 n.64. There are numerous problems attendant on application of this standard by the courts. *See id.*

ternity right of CAPA is not much different from that available in Europe,[157] given the former's more limited scope[158] and duration.[159]

CAPA provides that the rights it creates will endure until the fiftieth anniversary of the artist's death.[160] There is, however, a three year statute of limitations.[161] This "life plus fifty" duration is identical to that provided by the Copyright Act of 1976[162] and conforms to the requirements of article 6*bis* of the Berne Convention.[163] The rights may be bequeathed[164] but apparently may only be waived and not transferred inter vivos.[165] On these points, CAPA is in accordance with moral right.

A 1982 amendment to CAPA provides that not-for-profit artistic organizations may exercise the integrity right in a limited fashion.[166] Given that the artist may be indifferent, unable to act, or unaware of the impending danger to his work, and given society's interest in the integrity of its culture,[167] it fol-

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157. *See supra* notes 40-49 and accompanying text. In situations where the artist's name is attached to the work of another or vice-versa, defamation and unfair competition actions provide some relief.

Although one commentator feels that the artist's sole remedy under CAPA in cases of breach of the paternity right would be to disclaim authorship of the work, Note, *supra* note 137, at 915, it is readily apparent that the full range of remedies provided in § 987(e), *see supra* note 151 and accompanying text, is available. Without them, § 987(d) would provide a hollow right capable of little meaningful exercise.

158. *See supra* notes 142-48 and accompanying text.

159. *See infra* note 160 and accompanying text.

160. CAL. CIV. CODE § 987(g)(1). "The rights and duties created under this section: (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." *Id.*

161. *Id.* § 987(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." *Id.* There is some question as to when "discovery" occurs. See Note, *supra* note 137, at 933 n.141 for a discussion of the problems involved.

162. 17 U.S.C. § 302(a) (1982).

163. Berne Convention, *supra* note 6, art 6*bis; see supra* notes 91-92 and accompanying text.

164. CAL. CIV. CODE § 987(g)(1). The provision implies that the artist may choose who is to exercise the rights after his death. *See id.*

165. *Id.* § 987(g)(3). This section provides for written waiver of the rights. *Id.* Transfer of the rights is not mentioned in CAPA.

166. *Id.* § 989.

167. *Id.* § 989(a). "The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations." *Id.*

lows that agencies other than the artist should be able to protect the integrity of artworks.[168] Artworks falling within the ambit of the amendment are those of fine art protected by CAPA that are also "of substantial public interest."[169] As with "recognized quality," this standard is to be determined by the trier of fact.[170] A qualified artistic organization[171] may exercise only the CAPA integrity right and may sue only for injunctive relief.[172] As with the artist's integrity right, special provisions apply where the artwork is part of a building.[173]

Although CAPA has yet to be challenged in the courts,[174]

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168. The same conclusion was reached by the French parliament. *See supra* note 87 and accompanying text. A waiver of rights under § 987(g)(3) will bind the organization with respect to works that are part of real property. CAL. CIV. CODE § 989(e)(1).

169. CAL. CIV. CODE § 989(b)(1). "As used in this section: (1) 'Fine art' means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest." *Id.*

170. *Id.* § 989(d). "In determining whether a work of fine art is of recognized quality and of substantial public interest the trier of fact shall rely on the opinions of those described in subdivision (f) of Section 987." *Id.*

171. CAPA defines a qualified artistic organization as:

> [A] public or private not-for-profit entity or association, in existence at least three years at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists.

Id. § 989(b)(2). Included in this category are the California Arts Council and Artists' Equity. Note, *supra* note 137, at 933 n.140.

172. CAL. CIV. CODE § 989(c). "An organization acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by subdivision (c) of Section 987." *Id.* The court may also award attorney's fees and expert witness' fees to prevailing parties. *Id.* § 989(f).

173. *Id.* § 989(e). The restrictions are more extensive than those in § 987(h). No action may be brought unless there is a minimal showing that the work can be removed without substantial damage and the plaintiff is prepared to pay for removal. *Id.* § 989(e). The action must commence within 30 days of filing. *Id.* The owner may also give 30 days' notice to the artist to remove the work, or 30 days' concurrent notice by publication directed at any organizations which may remove the work if the artist does not. *Id.* If neither the artist nor any organizations act to remove the work, the rights under CAPA no longer apply. *Id.*

It is not clear that any difference is intended by the use of "building" in § 987(h) and the use of "real property" in § 989.

174. In the one reported case construing CAPA, Jacobs Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 205 Cal. Rptr. 620 (Cal. Ct. App. 1984), the Court of Appeal, Second District held that architectural drawings were prepared in a commercial context and thus were not "fine art" within the definition and scope of CAPA. *Id.* at 644, 205 Cal. Rptr. at 624. The paucity of cases construing CAPA since its enactment may indicate that 1) the statute is so well constructed that it discourages all challenges; 2) the problems it is designed to address are in fact rare occurrences; or

it should withstand constitutional challenges.[175] CAPA thus stands as a limited though laudable step towards greater protection of artists and artworks. Its endorsement of the policies underlying moral right helps to fill the void of moral right protection in the United States.

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

On August 8, 1983, the New York State Legislature enacted the Artist's Authorship Rights Act[176] (AARA) as an attempt to redress the deleterious effects suffered by artists whose work is mutilated or altered.[177] Nevertheless, the law only protects the paternity right.[178] AARA applies only to

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3) the statute acts as an incentive for cooperation between artists and art owners, and potential lawsuits are resolved by negotiation.

175. *See* Note, *supra* note 143, at 1231-40. It is concluded that CAPA will withstand a fifth amendment "takings clause" challenge or a supremacy clause challenge. *Id.*

176. N.Y. ART & CULTURAL AFF. LAW § 14.51 (McKinney 1984).

177. The legislative findings and purpose of the statute were expressed as follows:

> The legislature finds that New York state is the home of many artists of international repute and that the physical state of a work of fine art is of enduring and crucial importance to the artist and the artist's reputation.
>
> The legislature further finds that there have been cases where works of art may have been altered, defaced, mutilated or modified thereby destroying the integrity of the artwork and sustaining a loss to the artist and the artist's reputation.
>
> The legislature therefore finds that there are circumstances when an artist has the legal right to object to the alteration, defacement, mutilation or other modification of his or her work which may be prejudicial to his or her career and reputation and that further the artist should have the legal right to claim or disclaim authorship for [sic] a work of art.

Artists Authorship Rights Act, ch. 994, § 1, 1983 N.Y. Laws 1933-34.

178. N.Y. ART & CULTURAL AFF. LAW § 14.55. The history of AARA reflects pressures imposed on the legislature to narrow the coverage of the law. The original bill, A.7157, 1981-1982 Reg. Sess., was introduced in the Assembly in 1981. It was similar to CAPA in all respects, except that it would permit the complete destruction of a work of art. *Id.* It specifically acknowledged the state's interest in the integrity of artworks, a feature omitted from the 1982 bill, A.9477, 1982-1983 Reg. Sess., which was otherwise very similar. The 1983 bill, A.5052, 1983-1984 Reg. Sess., ch. 994, 1983 N.Y. Laws 1933, omitted many elements of CAPA. The 1983 bill's sponsor, Assemblyman Richard N. Gottfried, wrote to Governor Mario Cuomo's office that:

> Early versions of the bill sought to give the artist the right to prevent destruction or alteration of his or her art work in the hands of subsequent owners. It became clear that the practical, political, legal and constitutional obstacles to such legislation were large and complex. Thus, the bill now before the Governor in no way interferes with an owner's right to destroy or alter a work of art at will. Instead, it focuses on protecting the name and

"works of fine art,"[179] defined by a nonexclusive list of media including limited editions of photographs or sculptures, but excluding motion pictures, literary works, and other nonvisual or nongraphic works.[180]

AARA also specifies that "works prepared under contract for advertising or trade use" are not protected in the absence of a contractual provision reserving the artists' rights.[181] It forbids the knowing display[182] in a public place, of mutilated or altered works without the artist's consent where the work is reasonably likely to be regarded as the artist's and damage to his reputation is a reasonably likely result.[183] Subsequent display of a work damaged by the passage of time, maintenance or protective work, or conservation[184] is not a violation of AARA unless the maintenance allowing the work to deteriorate was

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right of authorship of the artist. The thrust of the bill is simply this: an artist will not be able to stop an owner from altering a work of art, but at least the artist will then be able to keep his or her name from being wrongly associated with it.

Letter from Assemblyman Richard N. Gottfried to Hon. Alice Daniel, Counsel to Governor Mario Cuomo (July 5, 1983).

179. N.Y. ART & CULTURAL AFF. LAW § 14.53.

180. *Id.* § 14.51(5). A "work of fine art" is defined as:

> any original work of visual or graphic art of any medium which includes, but is not limited to, the following: painting; drawing; print; photographic print or sculpture of a limited edition of not more than three hundred copies; provided however, that "work of fine art" shall not include sequential imagery such as that in motion pictures.

Id.

181. *Id.* § 14.57(4).

182. *Id.* § 14.57(5). The provision limits the scope of the article to "fine art knowingly displayed in a place accessible to the public, published or reproduced . . . ." *Id.* Thus a mutilated work displayed in the home of a recluse would not violate the act. For the nonreclusive art collector, applicability of AARA will hinge on the courts' construction of place accessible to the public.

183. *Id.* § 14.53. This section provides that:

> Except as limited by section 14.57 of this article, no person other than the artist or a person acting with the artist's consent shall knowingly *display* in a place accessible to the public or publish a work of fine art of that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom.

Id. (emphasis added).

184. "Conservation" is defined as meaning "acts taken to correct deterioration and alteration and acts taken to prevent, stop or retard deterioration . . . ." *Id.* § 14.51(2).

grossly negligent[185] or the conservation was negligent.[186] Because the offense forbidden by AARA is the display of a work and not its alteration or mutilation alone,[187] AARA does not protect the integrity right but only the paternity right. This is more explicit in the provision concerning the artist's right to claim authorship of a work, or for just and valid reason, to disclaim authorship of a work.[188] This right is not waivable or transferable,[189] but the artist may consent to otherwise forbidden display of his works.[190]

Although AARA does not specifically provide a duration for the rights it creates, the Act's reference only to "the artist" and not to his heirs or executors strongly suggests that the rights expire with the artist's life.[191] There is also no provision for pre or post mortem enforcement of the rights by third par-

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185. *Id.* § 14.57(1). The gross negligence standard is expressed as follows:

> Alteration, defacement, mutilation or modification of a work of fine art resulting from the passage of time or the inherent nature of the materials will not by itself create a violation of section 14.53 of this article or a right to disclaim authorship under subdivision one of section 14.55 of this article; provided such alteration, defacement, mutilation or modification was not the result of gross negligence in maintaining or protecting the work of fine art.

Id.

186. *Id.* § 14.57(3). "Conservation shall not constitute an alteration, defacement, mutilation or modification within the meaning of this article, unless the conservation work can be shown to be negligent." *Id.* The "conservation" and "maintenance" provisions may be distinguished by the more active nature of the former and the passivity of the latter, which does not alter the work except through retarding, rather than attempting to reverse the ravages of time.

187. *Id.* § 14.53.

188. *Id.* § 14.55(1). The provision reads as follows:

> Except as limited by section 14.57 of this article, the artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art. The right to claim authorship shall include the right of the artist to have his or her name appear on or in connection with the work of fine art as the artist. . . . Just and valid reason for disclaiming authorship shall include that the work of fine art has been altered, defaced, mutilated or modified other than by the artist, without the artist's consent, and damage to the artist's reputation is reasonably likely to result or has resulted therefrom.

Id.

189. *Id.* § 14.55(1). "[T]he artist shall retain at all times the right to claim authorship . . . ." *Id.* There is no mention in AARA that persons other than the artist may exercise this or other rights.

190. *Id.* § 14.53(1). The section provides that "no person other than the artist or a person acting with the artist's consent shall knowingly display . . . ." *Id.*

191. *See id.* §§ 14.51(1), 14.53, 14.55(1), 14.59(1).

ties or organizations. AARA claims are subject to a statute of limitations of three years from the offending act, or one year after its constructive discovery.[192] An aggrieved artist may sue for injunctive or legal relief.[193] Presumably costs, attorney's and expert witness' fees, and punitive damages are excluded.[194]

A recent case in New York raised AARA as an issue.[195] A well-known artist contracted with the owner of a building in Manhattan[196] for permission to prepare a mural on the building's rear exterior wall by periodically sandblasting the wall in various patterns. New tenants started extensive renovations of the building and objected to the work when it was still incomplete. In the spring of 1983, the new tenants refused to allow the artist to continue work. The artist obtained a preliminary injunction to prevent defendants from interfering with the completion and integrity of the art work. The court based only part of its decision on AARA. The court noted that defendants, in denying the artist access to the wall, violated the "spirit and letter" of AARA because of the public display of the work in an unfinished form to the detriment of the artist's reputation.[197]

IV. *ANALYSIS*

There are a number of similarities and differences among AARA, CAPA, and European law. AARA's purpose focuses on the artist's reputation,[198] while CAPA and the doctrine of

192. *Id.* § 14.59(2). "No action may be maintained to enforce any liability under this article unless brought within three years of the act complained of or one year after the constructive discovery of such act, whichever is longer." *Id.*

193. *Id.* § 14.59(1). "An artist aggrieved under section 14.53 or section 14.55 of this article shall have a cause of action for legal and injunctive relief." *Id.*

194. Earlier versions of AARA specifically included these remedies. *See supra* note 178.

195. Newmann v. Delmar Realty Co., No. 2955-84 slip op. (N.Y. Sup. Ct. Apr. 26, 1984). The facts of the case, as discussed textually *infra*, have been gleaned from *Manhattan Wall Spurs a Test Case Over Art*, N.Y. Times, Mar. 3, 1984, at 1, col. 4; Telephone interview with Richard Altman, Counsel for Plaintiff (Apr. 9, 1985).

196. The building at issue is the Palladium, a theater between East 13th and 14th Streets in New York City. The wall at issue faces 13th Street.

197. Newmann v. Delmar Realty Co., No. 2955-84, slip op. at 9 (N.Y. Sup. Ct. Apr. 26, 1984).

198. The statement of AARA's legislative purpose does not mention any interests but the artist's. *See supra* note 178.

moral right in Europe also acknowledge social interests in the integrity or correct attribution of artworks.[199] In its scope, AARA is broader than CAPA but not nearly as broad as moral right. The definition of "fine art" in AARA[200] avoids the judgmental problems entailed by the subjective limitation of "recognized quality" imposed by CAPA[201] and also comes closer to the universal scope of moral right.[202] The exclusion of nonvisual and cinematic works from both United States laws reflects pressure from the great industries that process and produce these works. Similar pressures resulted in the exclusion by both CAPA[203] and AARA[204] of work prepared under contract for advertising and trade.[205]

AARA explicitly protects only the paternity right,[206] in contrast to CAPA's protection of both paternity and integrity.[207] This limited protection is linked to New York's failure to assert a state interest in the condition of artworks. The "just and valid reason" limitation to the right in both AARA[208] and CAPA[209] represents an acknowledgment of the high monetary value of art which may be severely reduced by an artist's disclaimer of authorship. CAPA may be construed to imply that mutilation or alteration constitutes a "just and valid reason" for disclaimer.[210] Yet the elucidation of other "just and valid reasons" is left to the courts. AARA's language makes it clear that the display of mutilated works, and not the mutilation, is

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199. *See supra* note 138 and accompanying text (discussing CAPA); *supra* note 87 and accompanying text (discussing moral right).

200. *See supra* notes 179-80 and accompanying text. A "recognized quality" standard was included in the 1981 bill, A.7157, *see supra* note 183, but did not appear in the 1982 bill, A.9477, *see id.* This omission makes litigation much simpler. The "recognized quality" standard functions as a regulating mechanism to keep trivial or frivolous cases out of court. It is possible that New York substituted an omission of the integrity right for this standard in order to cut down on the volume of cases.

201. *See supra* note 142-44 and accompanying text.

202. Moral right applies to all works of whatever form or medium and without regard to subjective quality. *See generally* S. LADAS, *supra* note 5, at 585-94.

203. *See supra* notes 145-55 and accompanying text.

204. *See supra* notes 181-83 and accompanying text.

205. Under moral right, the courts also acknowledge these pressures. *See supra* note 52 and accompanying text.

206. *See supra* note 178 and accompanying text.

207. *See supra* notes 151-59 and accompanying text.

208. N.Y. ART & CULTURAL AFF. LAW § 14.55.

209. CAL. CIV. CODE § 987(d).

210. *Id.* § 987(c)-(d).

the offending activity.[211]

The interaction of AARA's prohibition of the display of mutilated works and its disclaimer provisions is unclear. Where an artist has disclaimed an unmutilated work for just and valid reason, he may clearly require that his name no longer appear in connection with the work.[212] If the work's authorship is not readily identifiable it may be displayed publicly, as no damage to the artist's reputation could result.[213] If the work could reasonably be regarded as the artist's work even in the absence of his name, it could still be displayed as long as it is not specifically identified as the artist's work.[214] The statute does not indicate whether labelling the work with the artist's disclaimer is required. Such a label should logically be required to protect the rights of the artist who would otherwise continue to be associated with the work even though he has disclaimed it.[215]

If the labelling remedy were to exist, its applicability would be limited to situations where a "just and valid reason" for disclaimer is present. Where a work has been both mutilated and disclaimed, labelling may identify the disclaiming artist and inadvertently damage his reputation. In this situation, it is not clear if a mutilated work labelled as disclaimed could be displayed. Because a disclaimer label may imperfectly disassociate the artist from his work, the work therefore should not be displayed.

AARA's prohibition of display and its affirmation of the right to disclaim authorship apply only where "damage to the artist's reputation is reasonably likely to result" from the alteration or mutilation of the work.[216] With the exception of the right to claim authorship, AARA suffers from the same shortcomings as defamation; namely, for a remedy to exist an artist must have a reputation to protect.[217] Although a work of an unknown artist could be mutilated and displayed with impu-

211. N.Y. ART & CULTURAL AFF. LAW § 14.53.

212. *Id.* § 14.55.

213. *Id.* § 14.53.

214. *Id.* Section 14.53 only forbids public display if the work is altered, defaced, mutilated or modified. *Id.* It is silent to display of disclaimed works.

215. It is unclear, however, that labelling would provide an adequate remedy, as works labelled would continue to be identified with the artist.

216. *Id.* §§ 14.53, 14.55(1).

217. *See supra* note 112 and accompanying text.

nity, such actions would create a circular trap. If the artist asserts his right of paternity, he will be prospectively damaged by the association of his name with a mutilated work; but if he does not assert his right, he remains unknown. Thus, the artist is afforded no protection until he gains notoriety. Reputation is not required under either moral right or CAPA. CAPA, however, requires the protected art to be "of recognized quality."[218] This is, in practical effect, a limitation of similar severity.

Like CAPA, AARA provides a more relaxed standard for conservators of artworks. Under AARA, damage resulting from conservation efforts must be due to negligence,[219] and damage from maintenance must be due to gross negligence.[220] This is a stricter standard than that of CAPA[221] and allays the fears of art owners that they will inadvertently render their works undisplayable.

The statute of limitations provided by AARA is generous.[222] Although its term is identical to that of CAPA,[223] the relevant offense from which the clock runs is the display of a work, not its mutilation. Only when the display is complete does the statute begin to run. Each subsequent display is a new event that violates the act. Although it is not clear what effect this might have on damages, the artist whose work is displayed for a long period has additional time in which to discover the offense.

A major flaw of AARA is its apparent limitation of the paternity right to the artist's lifetime.[224] It makes clear the close similarity between AARA and defamation where the cause of action also expires with the one whose reputation it vindicates. Like the nontransferability of AARA's rights[225] and the inability of other organizations to exercise them for or instead of the artist,[226] this duration flows from the legislature's limited pur-

218. CAL. CIV. CODE § 987(b)(2); *see supra* notes 142-44 and accompanying text.
219. N.Y. ART & CULTURAL AFF. LAW § 14.57(3).
220. *Id.* § 14.57(1).
221. *See* CAL. CIV. CODE § 987(c)(2).
222. N.Y. ART & CULTURAL AFF. LAW § 14.59(2).
223. CAL. CIV. CODE § 987(i).
224. *See supra* note 191 and accompanying text.
225. *See supra* note 189 and accompanying text.
226. *See supra* note 192 and accompanying text.

pose in enacting AARA.[227] AARA falls short of the liberal requirements of article 6*bis* of the Berne Convention[228] because it does not recognize the integrity right at all.

CONCLUSION

The New York law for the protection of artists' rights is a weak shadow of the protection available in California, let alone in Europe. It protects only the paternity rights, and is similar in a number of ways to the relief available under defamation. It creates rights that endure only as long as the artist is alive and is directed exclusively to protecting his reputation. Although the New York Legislature is to be lauded for its enactment three years after the introduction of the first bill suggesting it and for the breadth of its definition of art, it is far less efficacious than the California law at protecting artists in almost every other respect. It provides an incomplete model for initial legislation in other states and does not provide recognition of moral right adequate to allow the United States to ratify the Berne Convention and enjoy its reciprocal benefits. A nationwide enactment of laws based on the New York law, however, would at least acknowledge the concept of moral right.

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227. *See supra* note 178 and accompanying text. The limited absent characteristics may be most effectively justified in terms of society's interest in the preservation of its culture. This interest is a legislative justification for CAPA but not for AARA.

228. Berne Convention, *supra* note 6, art. 6*bis*; *see supra* notes 89-95 and accompanying text.